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(33) *Cameron and others* v. *Young*, [1908] A.C. 176; 77 L.J.P.C. 68; 98 L.T. 592, H.L.; 12 Digest (Repl.) 52, *285*.

(34) *White and wife* v. *Steadman*, [1913] 3 K.B. 340; 82 L.J.K.B. 846; 109 L.T. 249; 29 T.L.R. 563; 8 Digest (Repl.) 75, *497*.

Appeal from an interlocutor of the Second Division of the Court of Session in Scotland.

On Aug. 26, 1928, the appellant, a shop assistant, drank a bottle of ginger-beer manufactured by the respondent, which a friend had ordered on her behalf from a retailer in a shop at Paisley and given to her. She stated that the shopkeeper, who supplied the ginger-beer, opened the bottle, which she said was sealed with a metal cap and was made of dark opaque glass, and poured some of its contents into a tumbler which contained some ice cream, and that she drank some of the contents of the tumbler, that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler, when a snail which had been in the bottle floated out in a state of decomposition. As a result, the appellant alleged, she had contracted a serious illness, and she claimed from the respondents damages for negligence. She alleged that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the article, that he neglected such duty, and that he was, consequently, liable for any damage caused by such neglect. The case then came before the Lord Ordinary, who rejected the plea in law of the respondent and allowed the parties a proof of their averments, but on a reclaiming note the Second Division (the Lord Justice Clerk, Lord Ormidale and Lord Anderson; Lord Hunter dissenting) recalled the interlocutor of the Lord Ordinary and dismissed the action. The plaintiff appealed.

George Morton, K.C., and *W. R. Milligan* (both of the Scottish Bar) for the appellant.

The Attorney-General for Scotland (*Normand, K.C.*), *J. L. Clyde* (of the Scottish Bar) and *T. Elder Jones* for the respondent.

The House took time for consideration.

May 26. **LORD BUCKMASTER** (read by Lord Tomlin).—The facts of this case are simple. On Aug. 26, 1928, the appellant drank a bottle of ginger-beer, manufactured by the respondent, which a friend had bought from a retailer and given to her. The bottle contained the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed. As a result she alleged, and at this stage her allegations must be accepted as true, that she suffered from shock and severe gastro-enteritis. She, accordingly, instituted the proceedings against the manufacturer which have given rise to this appeal. The foundation of her case is that the respondent, as the manufacturer of an article intended for consumption and contained in a receptacle which prevented inspection, owed a duty to her as consumer of the article to take care that there was no noxious element in the goods, that he neglected such duty, and that he is, consequently, liable for any damage caused by such neglect. After certain amendments which are now immaterial, the case came before the Lord Ordinary, who rejected the respondent's plea in law and allowed a proof. His interlocutor was revoked by the Second Division of the Court of Session, from whose judgment this appeal has been brought.

Before examining the merits two comments are desirable: (i) that the appellant's case rests solely on the ground of a tort based, not on fraud, but on negligence; and (ii) that throughout the appeal the case has been argued on the basis, undisputed by the Second Division and never questioned by counsel for the appellant or by any of your Lordships, that the English law and the Scots law on the subject are identical. It is, therefore, upon the English law alone that I have considered the matter, and, in my opinion, it is on the English law alone that in the circumstances we ought to proceed.

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, yet themselves they cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

The common law must be sought in law books by writers of authority and in the judgments of judges entrusted with its administration. The law books give no assistance because the works of living authors, however deservedly eminent, cannot be used as authorities, though the opinions they express may demand attention, and the ancient books do not assist. I turn, therefore, to the decided cases to see if they can be construed so as to support the appellant's case. One of the earliest is *Langridge* v. *Levy* (1). It is a case often quoted and variously explained. There a man sold a gun, which he knew was dangerous, for the use of the purchaser's son. The gun exploded in the son's hands and he was held to have a right of action in tort against the gunmaker. How far it is from the present case can be seen from the judgment of Baron Parke, who, in delivering the judgment of the court, used these words:

> "We should pause before we make a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby";

and in *Longmeid* v. *Holliday* (2) the same eminent judge points out that the earlier case was based on a fraudulent mis-statement, and he expressly repudiates the view that it has any wider application. *Langridge* v. *Levy* (1), therefore, can be dismissed from consideration with the comment that it is rather surprising that it has so often been cited for a proposition which it cannot support.

Winterbottom v. *Wright* (3) is, on the other hand, an authority that is closely applicable. Owing to negligence in the construction of a carriage it broke down, and a stranger to the manufacture and sale sought to recover damages for injuries which he alleged were due to negligence in the work, and it was held that he had no cause of action. This case seems to me to show that the manufacturer of any article is not liable to a third party injured by negligent construction, for there can be nothing in the character of a coach to place it in a special category. It may be noted also that in this case ALDERSON, B., said:

> "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."

Longmeid v. *Holliday* (2) was the case of a defective lamp sold to a man whose wife was injured by its explosion. The vendor of the lamp, against whom the action was brought, was not the manufacturer, so that the case is not parallel to the present, but the statement of PARKE, B., in his judgment covers the case of the manufacturer, for he said:

> "It would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that, if a machine not in its nature dangerous . . . but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

It is true that he uses the words "lent or given" and omits the word "sold," but, if the duty be entirely independent of contract and is a duty owed to a third person, it seems to me the same whether the article be originally given or sold. The fact in the present case that the ginger-beer originally left the premises of the manufacturer on a purchase, as was probably the case, cannot add to his duty, if such existed, to take care in its preparation. It has been suggested that the statement of PARKE, B., does not cover the case of negligent construction. But the omission to exercise reasonable care in the discovery of the defect in the manufacture of an article where the duty of examination exists is just as negligent as the negligent construction itself.

The general principle of these cases is stated by LORD SUMNER (then HAMILTON, J.) in *Blacker* v. *Lake and Elliot, Ltd.* (4) (in these terms 106 L.T. at p. 536):

> "The breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not of itself give any cause of action to B. when he is injured by reason of the article proving to be defective."

From this general rule there are two well-known exceptions:

(i) in the case of an article dangerous in itself, and (ii) where the article, not in itself dangerous, is in fact dangerous on account of some defect or for any other reason, and this is known to the manufacturer. Until *George* v. *Skivington* (5) I know of no further modification of the general rule.

As to (i), in the case of things dangerous in themselves, there is, in the words of LORD DUNEDIN,

> "a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity":

Dominion Natural Gas Co., Ltd. v. *Collins* (6) ([1909] A.C. at p. 646). And as to (ii), this depends on the fact that the knowledge of the danger creates the obligation to warn, and its concealment is in the nature of fraud.

In the present case no one can suggest that the ginger-beer was an article dangerous in itself, and the words of LORD DUNEDIN show that the duty attaches only to such articles, for I read the words "a peculiar duty" as meaning a duty peculiar to the special class of subject mentioned.

Of the remaining cases *George* v. *Skivington* (5) is the one nearest to the present, and without that case and the statement of CLEASBY, B., in *Francis* v. *Cockrell* (7) (L.R. 5 Q.B. at p. 515), and the dicta of BRETT, M.R., in *Heaven* v. *Pender* (8) (11 Q.B.D. at pp. 509 et seq.), the appellant would be destitute of authority. *George* v. *Skivington* (5) related to the sale of a noxious hairwash, and a claim made by a person who had suffered from its use, based on its having been negligently compounded, was allowed. It is remarkable that *Langridge* v. *Levy* (1) was used in support of the claim and influenced the judgment of all the parties to the decision. Both KELLY, C.B., and PIGOTT, B., stressed the fact that the article had been purchased to the knowledge of the defendant for the use of the plaintiff, as in *Langridge* v. *Levy* (1), and CLEASBY, B., who, realising that *Langridge* v. *Levy* (1) was decided on the ground of fraud, said:

> "Substitute the word 'negligence' for 'fraud,'' and the analogy between *Langridge* v. *Levy* (1) and this case is complete."

It is unnecessary to point out too emphatically that such a substitution cannot possibly be made. No action based on fraud can be supported by mere proof of negligence. I do not propose to follow the fortunes of *George* v. *Skivington* (5); few cases can have lived so dangerously and lived so long. LORD SUMNER, in *Blacker* v. *Lake and Elliot, Ltd.* (4), closely examines its history, and I agree with his analysis. He said that he could not presume to say that it was wrong, but he declined to follow it on the ground, which is I think firm, that it was in conflict with *Winterbottom* v. *Wright* (3).

In *Francis* v. *Cockrell* (7) the plaintiff had been injured by the fall of a racecourse stand, on a seat for which he had paid. The defendant was part proprietor of the stand and acted as receiver of the money. The stand had been negligently erected by a contractor, though the defendant was not aware of the defect. The plaintiff succeeded.

The case has no bearing upon the present, but in the course of his judgment Cleasby, B., made the following observations (L.R. 5 Q.B. at p. 515):

> "The point that Mr. Matthews referred to last was raised in the case of *George* v. *Skivington* (5), where there was an injury to one person, the wife, and a contract of sale with another person, the husband. The wife was considered to have a good cause of action, and I would adopt the view which the Lord Chief Baron took in that case. He said there was a duty in the vendor to use ordinary care in compounding the article sold, and that this extended to the person for whose use he knew it was purchased, and, this duty having been violated, and he having failed to use reasonable care, was liable in an action at the suit of the third person."

It is difficult to appreciate what is the importance of the fact that the vendor knew who was the person for whom the article was purchased unless it be that the case was treated as one of fraud, and that without this element of knowledge it could not be brought within the principle of *Langridge* v. *Levy* (1). Indeed, this is the only view of the matter which adequately explains the references in the judgments in *George* v. *Skivington* (5) to *Langridge* v. *Levy* (1) and the observations of Cleasby, B., upon *George* v. *Skivington* (5).

The dicta of Brett, M.R., in *Heaven* v. *Pender* (8) are rightly relied on by the appellant. The material passage is as follows (11 Q.B.D. at p. 509):

> "The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. , . . Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods or machinery, or the like, for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises, to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to observe that it seems difficult to import the implied obligation into the contract except in cases in which, if there were no contract between the parties, the law would, according to the rule above stated, imply the duty."

A "The recognised cases" to which the Master of the Rolls refers are not definitely quoted, but they appear to refer to cases of collision and carriage, and the cases of visitation to premises on which there is some hidden danger, cases far removed from the doctrine he enunciates. None the less, this passage has been used as a tabula in naufragio for many litigants, struggling in the seas of adverse authority. It cannot, however, be divorced from the fact that the case had nothing whatever to do with the question of manufacture and sale. B An unsound staging had been erected on premises to which there had been an invitation to the plaintiffs to enter, and the case really depended on the duty of the owner of the premises to persons so invited. None the less, it is clear that BRETT, M.R., considered the cases of manufactured articles, for he examined *Langridge* v. *Levy* (1), and he says that it does not negative the proposition that the case might have been supported on the ground of negligence.

C In the same case, however, COTTON, L.J., in whose judgment BOWEN, L.J., concurred, said that he was unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertained, inasmuch as there were many cases in which the principle was impliedly negatived. He then referred to *Langridge* v. *Levy* (1), and stated that it was based upon fraudulent misrepresentation and had been so treated by COLERIDGE, J., in *Blakemore* v. *Bristol and Exeter Rail. Co.* (9), and that in *Collis* v. *Selden* (10) WILLES, J., had said that the judgment in *Langridge* v. *Levy* (1) D was based on the fraud of the defendant. The lord justice then proceeded as follows:

> "This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis* v. *Selden* (10) and in *Longmeid* v. *Holliday* (2) (in each of which the plaintiff failed) are in my opinion at variance with the principle contended for. The case of *George* v. *Skivington* (5), and especially what is said by CLEASBY, B., in giving judgment in that case, seems to support the existence of the E general principle. But it is not in terms laid down that any such principle exists, and that case was decided by CLEASBY, B., on the ground that the negligence of the defendant, which was his own personal negligence, was equivalent, for the purposes of that action, to fraud, on which (as he said) the decision in *Langridge* v. *Levy* (1) was based. In declining to concur in laying down the principle enunciated by the F Master of the Rolls I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act."

G With the views expressed by COTTON, L.J., I agree.

In *Le Lievre and another* v. *Gould* (11) the mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees and there was no contractual relationship between him and them. H In consequence of the negligence of the surveyor the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the surveyor owed no duty to the mortgagees to exercise care in giving his certificates and they could not maintain an action against him by reason of his negligence. In this case LORD ESHER, M.R., seems to have qualified to some extent what he said in *Heaven* v. *Pender* (8) for he says this ([1893] 1 Q.B. at p. 497):

I

> "But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them. The case of *Heaven* v. *Pender* (8) has no bearing upon the present question. That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract

> between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

In the same case, at p. 504, A. L. SMITH, L.J., said:

> "The decision of *Heaven* v. *Pender* (8) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other. *Heaven* v. *Pender* (8) goes no further than this, though it is often cited to support all kinds of untenable propositions."

In *Earl* v. *Lubbock* (12) the plaintiff had been injured by a wheel coming off a van which he was driving for his employer and which it was the duty of the defendant under contract with such employer to keep in repair. The county court judge and the Divisional Court both held that even if negligence was proved the action would not lie. It was held by the Court of Appeal that the defendant was under no duty to the plaintiff and that there was no cause of action. In his judgment COLLINS, M.R., said that the case was concluded by the authority of *Winterbottom* v. *Wright* (3), and he pointed out that the dictum of LORD ESHER, M.R., in *Heaven* v. *Pender* (8) was not a decision of the court and that it was subsequently qualified and explained by LORD ESHER himself in *Le Lievre and another* v. *Gould* (11). STIRLING, L.J., said that in order to succeed in the action the plaintiff must bring his case within the proposition enunciated by COTTON, L.J., and agreed to by BOWEN, L.J., in *Heaven* v. *Pender* (8), while MATHEW, L.J., made the following observation ([1905] 1 K.B. at p. 259):

> "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and that it followed as a matter of law that anyone in their employment, or, indeed, anyone else who sustained an injury traceable to that negligence, had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on. No prudent man would contract to make or repair what the employer intended to permit others to use in the way of his trade."

In *Bates and another* v. *Batey & Co.* (13) the defendants, ginger-beer manufacturers, were held not liable to a consumer (who had purchased from a retailer one of their bottles) for injury occasioned by the bottle bursting as the result of a defect of which the defendants did not know, but which by the exercise of reasonable care they could have discovered. In reaching this conclusion HORRIDGE, J., stated that he thought the judgments of PARKE, B., in *Longmeid* v. *Holliday* (2), of COTTON and BOWEN, L.JJ., in *Heaven* v. *Pender* (8), of STIRLING, L.J., in *Earl* v. *Lubbock* (12), and of HAMILTON, J., in *Blacker* v. *Lake and Elliot* (4), made it clear that the plaintiff was not entitled to recover, and that he had not felt himself bound by *George* v. *Skivington* (5).

So far, therefore, as *George* v. *Skivington* (5) and the dicta in *Heaven* v. *Pender* (8) are concerned, it is, in my opinion, better that they should be buried so securely that their perturbed spirits shall no longer vex the law.

One further case mentioned in argument may be referred to, certainly not by way of authority, but to gain assistance by considering how similar cases are dealt with by eminent judges of the United States. That such cases can have no close application and no authority is clear, for, though the source of the law in the two countries may be the same, its current may well flow in different channels. The case referred to is that of *Thomas* v. *Winchester* (14). There a chemist issued poison in answer to a request for a harmless drug, and he was held responsible to a third party injured by his neglect. It appears to me that the decision might well rest on the principle that he in fact sold a drug dangerous in itself, none the less so because he was asked to sell something else, and on this view the case does not advance the matter.

In another case, *McPherson* v. *Buick Motor Co.* (15), where a manufacturer of a defective motor car was held liable for damages at the instance of a third party, the learned judge appears to base his judgment on the view that a motor car might reasonably be regarded as a dangerous article. In my view, therefore, the authorities are against the appellant's contention, and apart from authority it is difficult to see how any common law proposition can be formulated to support her claim.

The principle contended for must be this—that the manufacturer, or, indeed, the repairer, of any article, apart entirely from contract, owes a duty to any person by whom the article is lawfully used to see that it has been carefully constructed. All rights in contract must be excluded from consideration of this principle, for such rights undoubtedly exist in successive steps from the original manufacturer down to the ultimate purchaser, embraced in the general rule that an article is warranted as reasonably fit for the purpose for which it is sold. Nor can the doctrine be confined to cases where inspection is difficult or impossible to introduce. This conception is simply to misapply to tort doctrines applicable to sale and purchase.

The principle of tort lies completely outside the region where such considerations apply, and the duty, if it exists, must extend to every person who, in lawful circumstances, uses the article made. There can be no special duty attaching to the manufacture of food, apart from those implied by contract or imposed by statute. If such a duty exists it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon. Were such a principle known and recognised, it seems to me impossible, having regard to the numerous cases that must have arisen to persons injured by its disregard, that with the exception of *George* v. *Skivington* (5) no case directly involving the principle has ever succeeded in the courts, and were it well known and accepted much of the discussion of the earlier cases would have been waste of time.

In *Mullen* v. *Barr & Co.*, *McGowan* v. *Barr & Co.* (16), a case indistinguishable from the present, except upon the ground that a mouse is not a snail, and necessarily adopted by the Second Division in their judgment, LORD ANDERSON says this (1929 S.C. at p. 479):

> "In a case like the present, where the goods of the defenders are widely distributed throughout Scotland, it would seem little short of outrageous to make them responsible to members of the public for the condition of the contents of every bottle which issues from their works. It is obvious that, if such responsibility attached to the defenders, they might be called on to meet claims of damages which they could not possibly investigate or answer."

In agreeing, as I do, with the judgment of LORD ANDERSON, I desire to add that I find it hard to dissent from the emphatic nature of the language with which his judgment is clothed. I am of opinion that this appeal should be dismissed, and I beg to move your Lordships accordingly.

N.B

LORD ATKIN.—The sole question for determination in this case is legal: Do the averments made by the pursuer in her pleading, if true, disclose a cause of action? I need not re-state the particular facts. The question is whether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health. I do not think a more important problem has occupied your Lordships in your judicial capacity, important both because of its bearing on public health and because of the practical test which it applies to the system of law under which it arises. The case has to be determined in accordance with Scots law, but it has been a matter of agreement between the experienced counsel who argued this case, and it appears to be the basis of the judgments of the learned judges of the Court of Session, that for the purposes of determining this problem the law of Scotland and the law of England are the same. I speak with little authority on this point, but my own research, such as it is, satisfies me that the principles of the law of Scotland on such a question as the present are identical with those of English law, and I discuss the issue on that footing. The law of both countries appears to be that in order to support an action for damages for negligence the complainant has to show that he has been injured by the breach of a duty owed to him in the circumstances by the defendant to take reasonable care to avoid such injury. In the present case we are not concerned with the breach of the duty; if a duty exists, that would be a question of fact which is sufficiently averred and for the present purposes must be assumed. We are solely concerned with the question whether as a matter of law in the circumstances alleged the defender owed any duty to the pursuer to take care.

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger, and so on. In this way it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To exist a complete logical definition of the general principle is probably to go beyond the function of the judge, for, the more general the definition, the more likely it is to omit essentials or introduce non-essentials. The attempt was made by Lord Esher in *Heaven* v. *Pender* (8) in a definition to which I will later refer. As framed it was demonstrably too wide, though it appears to me, if properly limited, to be capable of affording a valuable practical guide.

At present I content myself with pointing out that in English law there must be and is some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. This appears to me to be the doctrine of *Heaven* v. *Pender* (8) as laid down by Lord Esher when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J., in *Le Lievre and another* v. *Gould* (11). Lord Esher, M.R., says ([1893] 1 Q.B. at p. 497):

> "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

So A. L. Smith, L.J., says ([1893] 1 Q.B. at p. 504):

> "The decision of *Heaven* v. *Pender* (8) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity

> to the person or property of another that, if due care was not taken damage might be done by the one to the other."

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. That this is the sense in which nearness or "proximity" was intended by Lord Esher is obvious from his own illustration in *Heaven* v. *Pender* (8) (11 Q.B.D. at p. 510) of the application of his doctrine to the sale of goods.

> "This [i.e., the rule he has just formulated] includes the case of goods, &c., supplied to be used immediately by a particular person or persons, or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used, or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property."

I draw particular attention to the fact that Lord Esher emphasises the necessity of goods having to be "used immediately" and "used at once before a reasonable opportunity of inspection." This is obviously to exclude the possibility of goods having their condition altered by lapse of time, and to call attention to the proximate relationship, which may be too remote where inspection even by the person using, certainly by an intermediate person, may reasonably be interposed. With this necessary qualification of proximate relationship, as explained in *Le Lievre and another* v. *Gould* (11), I think the judgment of Lord Esher expresses the law of England. Without the qualification, I think that the majority of the court in *Heaven* v. *Pender* (8) was justified in thinking that the principle was expressed in too general terms. There will, no doubt, arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently in the course of preparation he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that in the assumed state of the authorities not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circumstances alleged there would be no evidence of negligence against anyone other than the manufacturer, and except in the case of a consumer who was also a purchaser no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, when the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless

A proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where everyone, including the manufacturer, knows that the articles will be used by persons other than the actual ultimate purchaser—namely, by members of his family and his servants, and, in some cases, his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilised society and the ordinary claims which it B makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found, I think, on examination, that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases where the relations were much more remote where the duty has been held not to exist. There are also dicta in such cases which go further than was C necessary for the determination of the particular issues, which have caused the difficulty experienced by the courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England, at any rate, entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability D of English law be unduly restricted. For this reason it is very necessary, in considering reported cases in the law of torts, that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges.

In my opinion, several decided cases support the view that in such a case as the present the manufacturer owes a duty to the consumer to be careful. A direct authority is *George* v. *Skivington* (5). That was a decision on a demurrer to a declaration which E averred that the defendant professed to sell a hairwash made by himself and that the plaintiff, Joseph George, bought a bottle to be used by his wife, the plaintiff Emma George, as the defendant then knew, and that the defendant had so negligently conducted himself in preparing and selling the hairwash that it was unfit for use, whereby the female plaintiff was injured. KELLY, C.B., said that there was no question of warranty, but whether the chemist was liable in an action on the case for unskilfulness and F negligence in the manufacture of it:

> "Unquestionably there was such a duty towards the purchaser, and it extends, in my judgment, to the person for whose use the vendor knew the compound was purchased."

PIGOTT and CLEASBY, BB., put their judgments on the same ground.

G I venture to think that COTTON, L.J., in *Heaven* v. *Pender* (8) (11 Q.B.D. at p. 517), misinterprets CLEASBY, B.'s judgment in the reference to *Langridge* v. *Levy* (1). CLEASBY, B., appears to me to make it plain that, in his opinion, the duty to take reasonable care can be substituted for the duty which existed in *Langridge* v. *Levy* (1) not to defraud. It is worth noticing that *George* v. *Skivington* (5) was referred to by CLEASBY, B., himself sitting as a member of the Court of Exchequer Chamber in *Francis* v. *Cock-* H *rell* (7) (L.R. 5 Q.B. at p. 515) and was recognised by him as based on an ordinary duty to take care. It was also affirmed by BRETT, M.R., in *Cunnington* v. *Great Northern Rail. Co.* (17), decided on July 2, 1883, at a date between the argument and the judgment in *Heaven* v. *Pender* (8), though as in that case the court negatived any breach of duty the expression of opinion is not authoritative.

The existence of the duty contended for is also supported by *Hawkins* v. *Smith* (18), I where a dock labourer in the employ of the dock company was injured by a defective sack which had been hired by the consignees from the defendant, who knew the use to which it was to be put, and which had been provided by the consignees for the use of the dock company which had been employed by them to unload the ship on the dock company's premises. The Divisional Court (DAY, J., and LAWRANCE, J.) held the defendant liable for negligence. Similarly, in *Elliott* v. *Hall or Nailstone Colliery Co.* (19) the defendants, colliery owners, consigned coal to the plaintiff's employers, coal merchants, in a truck hired by the defendants from a wagon company. The plaintiff was injured in the course of unloading the coal by reason of the defective condition of the truck, and was held by a Divisional Court (Grove, J., and A. L. Smith, J.) entitled to recover on the ground of the defendants' breach of duty to see that the truck was not in a dangerous condition. It is to be noticed that in neither case was the defective chattel in the defendants' occupation, possession or control, or on their premises, while in the latter case it was not even their property. It is sometimes said that the liability in these cases depends upon an invitation by the defendant to the plaintiff to use his chattel. I do not find the decisions expressed to be based upon this ground, but rather upon the knowledge that the plaintiff, in the course of the contemplated use of the chattel, would use it, and the supposed invitation appears to me to be in many cases a fiction and merely a form of expressing the direct relation between supplier and user which gives rise to the duty to take care.

A very recent case, which has the authority of this House, is *Chapman* (*or Oliver*) v. *Saddler & Co.* (20). In that case a firm of stevedores employed to unload a cargo of maize in bags provided the rope slings by which the cargo was raised to the ship's deck by their own men using the ship's tackle and was then transported to the dock side by the shore porters, of whom the plaintiff was one. The porters relied on examination by the stevedores and had themselves no opportunity of examination. In these circumstances this House, reversing the decision of the First Division, held that there was a duty owed by the stevedore company to the porters to see that the slings were fit for use, and restored the judgment of the Lord Ordinary, Lord Morison, in favour of the pursuer. I find no trace of the doctrine of invitation in the opinions expressed in this House, of which mine was one: the decision was based upon the fact that the direct relations established, especially the circumstance that the injured porter had no opportunity of independent examination, gave rise to a duty to be careful.

I should not omit in this review of cases the decision in *Grote* v. *Chester and Holyhead Rail. Co.* (21). That was an action on the case in which it was alleged that the defendants had constructed a bridge over the Dee on their railway and had licensed the use of the bridge to the Shrewsbury and Chester Rail. Co. to carry passengers over it, and had so negligently constructed the bridge that the plaintiff, a passenger on the last-named railway, had been injured by the falling of the bridge. At the trial before Vaughan Williams, J., the judge had directed the jury that the plaintiff was entitled to recover if the bridge was not constructed with reasonable care and skill. On a motion for a new trial the Attorney-General, Sir John Jervis, contended that there was misdirection, for the defendants were liable only for negligence, and the jury might have understood that there was an absolute liability. The Court of Exchequer, after consulting the trial judge as to his direction, refused the rule. This case is said by Kelly, C.B., in *Francis* v. *Cockrell* (7), in the Exchequer Chamber (L.R. 5 Q.B. at p. 505), to have been decided upon an implied contract with every person lawfully using the bridge that it was reasonably fit for the purpose. I can find no trace of such a ground in the pleadings or in the argument or judgment. It is true that the defendants were the owners and occupiers of the bridge. The law as to the liability to invitees and licensees had not then been developed. The case is interesting because it is a simple action on the case for negligence, and the court upheld the duty to persons using the bridge to take reasonable care that the bridge was safe.

It now becomes necessary to consider the cases which have been referred to in the courts below as laying down the proposition that no duty to take care is owed to the consumer in such a case as this.

In *Dixon* v. *Bell* (22) the defendant had left a loaded gun at his lodgings and sent his servant, a mulatto girl aged about thirteen or fourteen, for the gun, asking the landlord to remove the priming and give it her. The landlord did remove the priming and gave the gun to the girl, who later levelled it at the plaintiff's small son, drew the trigger, and injured the boy. The action was in case for negligently entrusting the young servant with the gun. The jury at the trial before Lord Ellenborough had returned a verdict for the plaintiff. A motion by the Attorney-General, Sir William Garrow, for a new trial was dismissed by the court, Lord Ellenborough and Bayley, J., the former remarking that it was incumbent on the defendant, who by charging the gun had made it capable of doing mischief, to render it safe and innoxious.

In *Langridge* v. *Levy* (1) the action was in case and the declaration alleged that the defendant, by falsely and fraudulently warranting a gun to have been made by Nock and to be a good, safe, and secure gun, sold the gun to the plaintiff's father for the use of himself and his son, and that one of his sons, confiding in the warranty, used the gun, which burst and injured him. Plea: Not Guilty and no warranty as alleged. The report is not very satisfactory. No evidence is reported of any warranty or statement except that the gun was an elegant twist gun by Nock. The judge left to the jury whether the defendant had warranted the gun to be by Nock and to be safe, whether it was in fact unsafe, and whether the defendant warranted it to be safe knowing that it was not so. The jury returned a general verdict for the plaintiff. It appears to have been argued that the plaintiff could recover wherever there is a breach of duty imposed on the defendant by contract or otherwise and the plaintiff is injured by reason of its breach; by this is meant, apparently, that the duty need not be owed to the plaintiff, but that he can take advantage of the breach of a duty owed to a third party. This contention was negatived by the court, who held, however, that the plaintiff could recover if a representation known to be false was made to a third person with the intention that a chattel should be used by the plaintiff, even though it does not appear that the defendant intended the false representation to be communicated to him: see per PARKE, B. (2 M. & W. at p. 531). The same view was adopted by the Exchequer Chamber, the user by the plaintiff being treated by the court as one of the acts contemplated by the fraudulent defendant. It is unnecessary to consider whether the proposition can be supported in its widest form. It is sufficient to say that the case was based, as I think, in the pleading, and certainly in the judgment, on the ground of fraud, and it appears to add nothing of value positively or negatively to the present discussion.

Winterbottom v. *Wright* (3) was a case decided on a demurrer. The plaintiff had demurred to two of the pleas as to which there was no decision by the court, but on the hearing of the plaintiff's demurrer the court, in accordance with the practice of the day, were entitled to consider the whole record, including the declaration, and, owing to the conclusion that this declaration disclosed no cause of action, gave judgment for the defendant: see SUTTON'S PERSONAL ACTIONS AT COMMON LAW, p. 113. The advantage of the procedure is that we are in a position to know the precise issue at law which arose for determination. The declaration was in case and alleged that the defendant had contracted with the Postmaster-General to provide the mail coach to convey mails from Hartford to Holyhead and to keep the mails in safe condition, that Atkinson and others, with notice of the said contract, had contracted with the Postmaster-General to convey the road mail coach from Hartford to Holyhead, and that the plaintiff, relying on the said first contract, hired himself to Atkinson to drive the mail coach, but that the defendant so negligently conducted himself and so utterly disregarded his aforesaid contract that, the defendant having the means of knowing and well knowing all the aforesaid premises, the mail coach, being in a dangerous condition owing to certain latent defects and to no other cause, gave way, whereby the plaintiff was thrown from his seat and injured. It is to be observed that no negligence apart from breach of contract was alleged—in other words, no duty was alleged other than the duty arising out of the contract. It is not stated that the defendant knew or ought to have known of the latent defect. The argument of the defendant was that on the fact of the declaration the wrong arose merely out of the breach of a contract, and that only a party to the contract could sue. The Court of Exchequer adopted that view, as clearly appears from the judgments of ALDERSON and ROLFE, BB. There are dicta by LORD ABINGER which are too wide as to an action of negligence being confined to cases of breach of a public duty. The actual decision appears to have been manifestly right, no duty to the plaintiff arose out of the contract, and the duty of the defendant under the contract with the Postmaster-General to put the coach in good repair would not have involved such direct relations with the servant of the person whom the Postmaster-General employed to drive the coach as would give rise to a duty of care owed to such servant.

We now come to *Longmeid* v. *Holliday* (2), the dicta in which have had considerable effect in subsequent decisions. In that case the declaration in case alleged that the plaintiff, Frederick Longmeid, had bought from the defendant, the maker and seller of "the Holliday lamp," a lamp to be used by himself and his wife Eliza in the plaintiffs' shop; that the defendant induced the sale by the false and fraudulent warranty that the lamp was reasonably fit for the purpose; and that the plaintiff Eliza, confiding in the said warranty, lighted the lamp, which exploded, whereby she was injured. It is, perhaps, not an extravagant guess to suppose that the plaintiffs' pleader had read *Langridge* v. *Levy* (1). The jury found all the facts for the plaintiffs except the allegation of fraud; they were not satisfied that the defendant knew of the defects. The plaintiff Frederick had already recovered damages on the contract of sale for breach of the implied warranty of fitness. The declaration made no averment of negligence. Verdict was entered at the trial by MARTIN, B., for the plaintiff, but with liberty to the defendant to move to enter the verdict for him. A rule having been obtained, plaintiff's counsel sought to support the verdict on the ground that this was an action, not for a breach of duty arising solely from contract, but for an injury resulting from conduct amounting to fraud.

PARKE, B., who delivered the judgment of the court, held that, fraud having been negatived, the action could not be maintained on that ground. He then went on to discuss cases in which a third person not a party to a contract may sue for damages sustained if it is broken. After dealing with the negligence of a surgeon or of a carrier, or of a firm in breach of contract committing a nuisance on a highway, he deals with the case where anyone delivers to another without notice an instrument in its nature dangerous or under particular circumstances, as a loaded gun, and refers to *Dixon* v. *Bell* (22), though what this case has to do with contract it is difficult to see. He then goes on:

> "But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that, if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it."

It is worth noticing how guarded this dictum is. The case put is a machine, such as a carriage, not in its nature dangerous, which might become dangerous by a latent defect entirely unknown. Then there is the saving "although discoverable by the exercise of ordinary care," discoverable by whom it is not said; it may include the person to whom the innocent machine is "lent or given." Then the dictum is confined to machines "lent or given" (a later sentence makes it clear that a distinction is intended between these words and "delivered to the purchaser under the contract of sale"), and the manufacturer is introduced for the first time—"even by the person who manufactured it." I do not for a moment believe that PARKE, B., had in his mind such a case as a loaf negligently mixed by the baker with poison which poisoned a purchaser's family. He is, in my opinion, confining his remarks primarily to cases where a person is seeking to rely upon a duty of care which arises out of a contract with a third party, and has never even discussed the case of a manufacturer negligently causing an article to be dangerous and selling it in that condition whether with immediate or mediate effect upon the consumer. It is noteworthy that he refers only to "letting or giving" chattels, operations known to the law, where the special relations thereby created have a particular bearing on the existence or non-existence of a duty to take care.

Next in his chain of authority come *George* v. *Skivington* (5) and *Heaven* v. *Pender* (8), which I have already discussed. The next case is *Earl* v. *Lubbock* (12). The plaintiff sued in the county court for personal injuries due to the negligence of the defendant. The plaintiff was a driver in the employ of a firm who owned vans. The defendant, a master wheelwright, had contracted with the firm to keep their vans in good and substantial repair. The allegation of negligence was that the defendant's servant had negligently failed to inspect and repair a defective wheel, and had negligently repaired the wheel. The learned county court judge had held that the defendant owed no duty to the plaintiff, and the Divisional Court (LORD ALVERSTONE, C.J., WILLS and

A KENNEDY, JJ.) and the Court of Appeal agreed with him. COLLINS, M.R., said that the case was concluded by *Winterbottom* v. *Wright* (3). In other words, he must have treated the duty as alleged to arise only from a breach of contract, for, as has been pointed out, that was the only allegation in *Winterbottom* v. *Wright* (3), negligence, apart from contract, being neither averred nor proved. It is true that he cites with approval the dicta of LORD ABINGER in the case, but obviously I think his approval B must be limited to those dicta so far as they related to the particular facts before the Court of Appeal, and to cases where, as LORD ABINGER says, the law permits a contract to be turned into a tort. STIRLING, L.J., it is true, said that to succeed the plaintiff must bring his case within the proposition of the majority in *Heaven* v. *Pender* (8), that any one who, without due warning, supplies to others for use an instrument which to his knowledge is in such a condition as to cause danger is liable for injury. I venture C to think that the lord justice was mistakenly treating a proposition which applies one test of a duty as though it afforded the only criterion. MATHEW, L.J., appears to me to put the case on its proper footing when he says:

> "The argument of counsel for the plaintiff was that the defendant's servants had been negligent in the performance of the contract with the owners of the van, and D that it followed as a matter of law that anyone in their employment . . . had a cause of action against the defendant. It is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on."

I entirely agree. I have no doubt that in that case the plaintiff failed to show that the repairer owed any duty to him. The question of law in that case seems very different from that raised in the present case. *Blacker* v. *Lake and Elliot, Ltd.* (4) E approaches more nearly the facts of this case. I have read and re-read it, having unfeigned respect for the authority of the two learned judges, HAMILTON and LUSH, JJ., who decided it, and I am bound to say I have found difficulty in formulating the precise grounds upon which the judgment was given. The plaintiff had been injured by the bursting of a brazing lamp which he had bought from a shopkeeper, who had bought it from the manufacturer, the defendant. The plaintiff had used the lamp for twelve F months before the accident. The case was tried in the county court before that excellent lawyer, the late JUDGE SIR HOWLAND ROBERTS. That learned judge had directed the jury that the plaintiff could succeed if the defendants had put upon the market a lamp not fit for use in the sense that a person working it with reasonable care would incur a risk which a properly constructed lamp would not impose upon him. The jury found that the lamp was defective by reason of an improper system of making an G essential joint between the container and the vaporiser; that the defendants did not know that it was dangerous, but ought, as reasonable men, to have known it. HAMILTON, J., seems to have thought that there was no evidence of negligence in this respect. LUSH, J., expressly says so, and implies by the words "I also think" that HAMILTON, J., so thought. If so, the case resolves itself into a series of important dicta. HAMILTON, J., says (106 L.T. at p. 536) that it has been decided in authorities from H *Winterbottom* v. *Wright* (3) to *Earl* v. *Lubbock* (12) that the breach of the defendant's contract with A. to use care and skill in and about the manufacture or repair of an article does not itself give any cause of action to B. when injured by the article proving to be defective in breach of that contract. He then goes on to say: How is the case of the plaintiff any better when there is no contract proved of which there could be breach? I think, with respect, that this saying does not give sufficient weight to the I actual issues raised by the pleadings, on which alone the older cases are an authority. If the issue raised was an alleged duty created by contract, it would have been irrelevant to consider duties created without reference to contract, and contract cases cease to be authorities for duties alleged to exist beyond or without contract. Moreover, it is a mistake to describe the authorities as dealing with the breach of care or skill in the manufacture of goods, as contrasted with repair.

The only manufacturing case was *Longmeid* v. *Holliday* (2), where negligence was not alleged. HAMILTON, J., recognises that *George* v. *Skivington* (5) was a decision which, if it remained an authority, bound him. He says that, without presuming to say it was wrong, he cannot follow it because it is in conflict with *Winterbottom* v. *Wright* (3). I find this very difficult to understand, for *George* v. *Skivington* (5) was based upon a duty in the manufacturer to take care independently of contract, while *Winterbottom* v. *Wright* (3) was decided on a demurrer in a case where the alleged duty was based solely on breach of a contractual duty to keep in repair and no negligence was alleged. LUSH, J., says in terms that there are only three classes of cases in which a stranger to a contract can sue for injury by a defective chattel: one is fraud, the second is the case of articles dangerous or noxious in themselves where the duty is only to warn, the third is public nuisance. He does not bring the cases represented by *Elliott* v. *Hall* (19) (the defective coal wagon) within his classes at all. He says (106 L.T. at p. 541) that they belong to a totally different class

> "where the control of premises or the management of a dangerous thing upon premises creates a duty."

I have already pointed out that this distinction is unfounded in fact, for in *Elliott* v. *Hall* (19), as in *Hawkins* v. *Smith* (18) (the defective sack), the defendant exercised no control over the article and the accident did not occur on his premises. With all respect I think that the judgments in the case err by seeking to confine the law to rigid and exclusive categories, and by not giving sufficient attention to the general principle which governs the whole law of negligence in the duty owed to those who will be immediately injured by lack of care.

The last case I need refer to is *Bates and another* v. *Batey & Co.* (13), where manufacturers of ginger-beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger-beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking proper means to discover whether the bottle was defective or not. HORRIDGE, J., found that a bottle of ginger-beer was not dangerous in itself, but that this defective bottle was in fact dangerous, but, as the defendants did not know it was dangerous, they were not liable, though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger-beer who caused the defect in the bottle, but, on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing.

I do not find it necessary to discuss at length the cases dealing with duties where a thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by SCRUTTON, L.J., in *Hope & Son* v. *Anglo-American Oil Co.* (23) (12 Ll.L.R. at p. 187), a case which was ultimately decided on a question of fact:

> "Personally, I do not understand the difference between a thing dangerous in itself as poison and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf."

The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods, so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In *Dominion Natural Gas Co., Ltd. v. Collins* (6) the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs—were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin, in giving the judgment of the Judicial Committee, consisting of himself, Lord Macnaghten, Lord Collins, and Sir Arthur Wilson, after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded ([1909] A.C. at p. 646):

> "There may be, however, in the case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity."

This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved, but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists. I may add, though it obviously would make no difference in the creation of a duty, that the installation of an apparatus to be used for gas perhaps more closely resembles the manufacture of a gun than a dealing with a loaded gun. In both cases the actual work is innocuous; it is only when the gun is loaded or the apparatus charged with gas that the danger arises. I do not think it necessary to consider the obligation of a person who entrusts to a carrier goods which are dangerous or which he ought to know are dangerous. As far as the direct obligation of the consignor to the carrier is concerned, it has been put upon an implied warranty, *Brass* v. *Maitland* (24), but it is also a duty owed independently of contract—e.g., to the carrier's servant, *Farrant* v. *Barnes* (25).

So far as the cases afford an analogy they seem to support the proposition now asserted. I need only mention, to distinguish them, two cases in this House which are referred to in some of the cases which I have reviewed. The first is *Caledonian Rail. Co.* v. *Warwick* (26), in which the appellant company were held not liable for injuries caused by a defective brake on a coal wagon conveyed by the railway company to a point in the transit where their contract ended and where the wagons were taken over for haulage for the last part of the journey by a second railway company, on which part the accident happened. It was held that the first railway company were under no duty to the injured workman to examine the wagon for defects at the end of their contractual haulage. There was ample opportunity for inspection by the second railway company. The relations were not proximate. In the second, *Cavalier* v. *Pope* (27), the wife of the tenant of a house let unfurnished sought to recover from the landlord damages for personal injuries arising from the non-repair of the house, on the ground that the landlord had contracted with her husband to repair the house. It was held that the wife was not a party to the contract, and that the well-known absence of any duty in respect of the letting an unfurnished house prevented her from relying on any cause of action for negligence.

In the most recent case, *Bottomley and another* v. *Bannister and another* (28), an action under Lord Campbell's Act, the deceased man, the father of the plaintiff, had taken an unfurnished house from the defendants, who had installed a gas boiler with a special gas burner which, if properly regulated, required no flue. The father and his wife were killed by fumes from the apparatus. The case was determined on the ground that the apparatus was part of the realty and that the landlord did not know of the danger, but there is a discussion of the case on the supposition that it was a chattel. Greer, L.J., states with truth that it is not easy to reconcile all the authorities, and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract, by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care then in cases of proximate relationship, this case will, I trust, supply the deficiency.

It is always satisfaction to an English lawyer to be able to test his application of A
fundamental principles of the common law by the development of the same doctrines by the lawyers of the courts of the United States. In that country I find that the law appears to be well established in the sense which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of CARDOZO, J., in *McPherson* v. B
Buick Motor Co. (15), in the New York Court of Appeals, in which he states the principles of the law as I should desire to state them and reviews the authorities in States other than his own. Whether the principle which he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the relation between manufacturer and C
the user of the car from being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

If your Lordships accept the view that the appellant's pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence D
of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition that I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear E
that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

LORD TOMLIN.—I have had an opportunity of considering the opinion prepared by my noble and learned friend LORD BUCKMASTER, which I have already read. As the reasoning of that opinion and the conclusions reached therein accord in every respect F
with my own views, I propose to say only a few words.

First, I think that if the appellant is to succeed it must be upon the proposition that every manufacturer or repairer of any article is under a duty to everyone who may thereafter legitimately use the article to exercise due care in the manufacture or repair. It is logically impossible to stop short of this point. There can be no distinction between food and any other article. Moreover, the fact that an article of food is sent out in a G
sealed container can have no relevancy on the question of duty. It is only a factor which may render it easier to bring negligence home to the manufacturer.

Secondly, I desire to say that, in my opinion, the decision in *Winterbottom* v. *Wright* (3) is directly in point against the appellant. The examination of the report makes it, I think, plain (i) that negligence was alleged and was the basis of the claim, and (ii) that the wide proposition which I have indicated was that for which the plaintiff was contending. H
The declaration averred (inter alia) that the defendant "so improperly and negligently conducted himself" that the accident complained of happened. The plaintiff's counsel said: "Here the declaration alleges the accident to have happened through the defendant's negligence and want of care." The alarming consequences of accepting the validity of this proposition were pointed out by the defendant's counsel, who said: "For example, every one of the sufferers by such an accident as that which I
recently happened on the Versailles Railway might have his action against the manufacturer of the defective axle."

That the action, which was in case, embraced a cause of action in tort is I think implicit in its form and appears from the concluding sentence of LORD ABINGER'S judgment, which was in these terms:

> "By permitting this action, we should be working this injustice, that after the defendant had done everything to the satisfaction of his employer, and after all matters between them had been adjusted, and all accounts settled on the footing of

their contract, we should subject them to be ripped open by this action of tort being brought against him."

I will only add to what has been already said by my noble and learned LORD BUCKMASTER with regard to the decisions and dicta relied upon by the appellant, and the other relevant reported cases, that I am unable to explain how the cases of dangerous articles can have been treated as "exceptions" if the appellant's contention is well founded. Upon the view which I take of the matter the reported cases, some directly, others impliedly, negative the existence as part of the common law of England of any principle affording support to the appellant's claim, and therefore there is, in my opinion, no material from which it is legitimate for your Lordships' House to deduce such a principle.

LORD THANKERTON.—In this action the appellant claims reparation from the respondent in respect of illness and other injurious effects resulting from the presence of a decomposed snail in a bottle of ginger-beer, which is alleged to have been manufactured by the respondent, and which was partially consumed by her, it having been ordered by a friend on her behalf in a café in Paisley.

The action is based on negligence, and the only question in this appeal is whether, taking the appellant's averments pro veritate, they disclose a case relevant in law, so as to entitle her to have them remitted for proof. The Lord Ordinary allowed a proof, but, on a reclaiming note for the respondent, the Second Division of the Court of Session recalled the Lord Ordinary's interlocutor and dismissed the action, following their decision in the recent cases of *Mullen* v. *Barr & Co.* and *McGowan* v. *Barr & Co.* (16).

The appellant's case is that the bottle was sealed with a metal cap, and was made of dark opaque glass, which not only excluded access to the contents before consumption if the contents were to retain their aerated condition, but also excluded the possibility of visual examination of the contents from outside; and that on the side of the bottle there was pasted a label containing the name and address of the respondent, who was the manufacturer. She states that the shopkeeper who supplied the ginger-beer opened it and poured some of its contents into a tumbler, which contained some ice cream, and that she drank some of the contents of the tumbler; that her friend then lifted the bottle and was pouring the remainder of the contents into the tumbler when a snail, which had been, unknown to her, her friend, or the shopkeeper, in the bottle, and was in a state of decomposition, floated out of the bottle.

The duties which the appellant accuses the respondent of having neglected may be summarised as follows: (a) that the ginger-beer was manufactured by the respondent or his servants to be sold as an article of drink to members of the public (including the appellant), and that, accordingly, it was his duty to exercise the greatest care in order that snails should not get into the bottles, render the ginger-beer dangerous and harmful, and be sold with the ginger-beer; (b) a duty to provide a system of working his business which would not allow snails to get into the sealed bottles, and, in particular, would not allow the bottles when washed to stand in places to which snails had access; (c) a duty to provide an efficient system of inspection, which would prevent snails from getting into the sealed bottles; and (d) a duty to provide clear bottles, so as to facilitate the said system of inspection.

There can be no doubt, in my opinion, that equally in the law of Scotland and of England it lies upon the party claiming redress in such a case to show that there was some relation of duty between her and the defender which required the defender to exercise due and reasonable care for her safety. It is not at all necessary that there should be any direct contract between them, because the action is not based upon contract but upon negligence; but it is necessary for the pursuer in such an action to show there was a duty owed to her by the defender, because a man cannot be charged with negligence if he has no obligation to exercise diligence: *Kemp and Dougall* v. *Darngavil Coal Co.* (29), per LORD KINNEAR (1909 S.C. at p. 1319); see also *Clelland* v. *Robb* (30), per LORD PRESIDENT DUNEDIN and LORD KINNEAR (1911 S.C. at p. 256). The question in each case is whether the pursuer has established, or, in the stage of the present appeal, has relevantly averred, such facts as involve the existence of such a relation of duty.

We are not dealing here with a case of what is called an article per se dangerous or one which was known by the defender to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it. The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that neither the law of Scotland nor the law of England will hold that the manufacturer has any duty towards the consumer to exercise diligence. In such a case the remedy of the consumer, if any, will lie against the intervening party from whom he has procured the article. I am aware that the American courts, in the decisions referred to by my noble and learned friend Lord Macmillan, have taken a view more favourable to the consumer.

The special circumstances, from which the appellant claims that such a relationship of duty should be inferred, may, I think, be stated thus, namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her showing that the article has reached her intact, and that she has been injured by the harmful nature of the article owing to the failure of the manufacturer to take reasonable care in its preparation before its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer.

In my opinion, the existence of a legal duty in such circumstances is in conformity with the principles of both the law of Scotland and the law of England. The English cases demonstrate how impossible it is finally to catalogue, amid the ever-varying types of human relationships, those relationships in which a duty to exercise care arises apart from contract, and each of these cases relates to its own set of circumstances, out of which it was claimed that the duty had arisen. In none of these cases were the circumstances identical with the present case as regards that which I regard as the essential element in this case, namely, the manufacturer's own action in bringing himself into direct relationship with the party injured. I have had the privilege of considering the discussion of these authorities by my noble and learned friend Lord Atkin in the judgment which he has just delivered, and I so entirely agree with it that I cannot usefully add anything to it.

An interesting illustration of similar circumstances is to be found in *Gordon* v. *M'Hardy* (31), in which the pursuer sought to recover damages from a retail grocer on account of the death of his son by ptomaine poisoning, caused by eating tinned salmon purchased from the defender. The pursuer averred that the tin, when sold, was dented, but he did not suggest that the grocer had cut through the metal and allowed air to get in, or had otherwise caused injury to the contents. The action was held irrelevant, the Lord Justice Clerk remarking,

> "I do not see how the defender could have examined the tin of salmon which he is alleged to have sold without destroying the very condition which the manufacturer had established in order to preserve the contents, the tin not being intended to be opened until immediately before use."

Apparently in that case the manufacturers' label was off the tin when sold, and they had not been identified. I should be sorry to think that the meticulous care of the manufacturer to exclude interference or inspection by the grocer in that case should relieve the grocer of any responsibility to the consumer without any corresponding assumption of duty by the manufacturer.

I am of opinion that the contention of the appellant is sound and that she has relevantly averred a relationship of duty as between the respondent and herself, as also that her averments of the respondent's neglect of that duty are relevant.

The cases of *Mullen* and *McGowan* (16), which the learned judges of the Second Division followed in the present case, related to facts similar in every respect except that the foreign matter was a decomposed mouse. In these cases the same court—Lord Hunter dissenting—held that the manufacturer owed no duty to the consumer. The view of the majority was that the English authorities excluded the existence of such a duty, but Lord Ormidale (1929 S.C. at p. 471) would otherwise have been prepared to come to a contrary conclusion. Lord Hunter's opinion seems to be in conformity with the view which I have expressed above. My conclusion rests upon the facts averred in this case, and would apparently also have applied in the cases of *Mullen* and *McGowan* (16), in which, however, there had been a proof before answer, and there was also a question as to whether the pursuers had proved their averments. I am, therefore, of opinion that the appeal should be allowed and the case should be remitted for proof, as the pursuer did not ask for an issue.

LORD MACMILLAN.—The incident which in its legal bearings your Lordships are called upon to consider in this appeal was in itself of a trivial character, though the consequences to the appellant, as she describes them, were serious enough. It appears from the appellant's allegation that on an evening in August, 1928 she and a friend visited a café in Paisley, where her friend ordered for her some ice cream and a bottle of ginger-beer. These were supplied by the shopkeeper, who opened the ginger-beer bottle and poured some of the contents over the ice cream which was contained in a tumbler. The appellant drank part of the mixture and her friend then proceeded to pour the remaining contents of the bottle into the tumbler. As she was doing so a decomposed snail floated out with the ginger-beer. In consequence of her having drunk part of the contaminated contents of the bottle the appellant alleges that she contracted a serious illness. The bottle is stated to have been of dark opaque glass, so that the condition of the contents could not be ascertained by inspection, and to have been closed with a metal cap, while on the side was a label bearing the name of the respondent, who was the manufacturer of the ginger-beer, of which the shopkeeper was merely the retailer.

The allegations of negligence on which the appellant founds her action against the respondent may be shortly summarised. She says that the ginger-beer was manufactured by the respondent for sale as an article of drink to members of the public including herself: that the presence of a decomposing snail in ginger-beer renders the ginger-beer harmful and dangerous to those consuming it; and that it was the duty of the respondent to exercise his process of manufacture with sufficient care to prevent snails from getting into or remaining in the bottles which he filled with ginger-beer. The appellant attacks the respondent's system of conducting his business, alleging that he kept his bottles in premises to which snails had access, and that he failed to have his bottles properly inspected for the presence of foreign matter before he filled them. The respondent challenged the relevancy of the appellant's averments and, taking them pro veritate, as for this purpose he was bound to do, pleaded that they disclosed no ground of legal liability on his part to the appellant. The Lord Ordinary repelled the respondent's plea to the relevancy and allowed the parties a proof of their averments, but on a reclaiming note their Lordships of the Second Division (Lord Hunter dissenting, or, perhaps more accurately, protesting) dismissed the action, and in doing so followed their decision in the previous cases of *Mullen* v. *Barr & Co.* and *McGowan* v. *Barr & Co.* (16). The only difference in fact between those cases and the present case is that it was a mouse and not a snail which was found in the ginger-beer. The present appeal is, consequently, in effect against the decision in these previous cases, which I now proceed to examine.

The two cases, being to all intents and purposes identical, were heard and decided together. In *Mullen* v. *Barr & Co.* (16) the sheriff-substitute allowed a proof, but the sheriff on appeal dismissed the action as irrelevant. In *McGowan* v. *Barr & Co.* (16) the sheriff-substitute allowed a proof and the sheriff altered his interlocutor by allowing

A a proof before answer—that is to say, a proof under reservation of all objections to the relevancy of the action. On the cases coming before the Second Division on the appeals of the pursuer and the defenders respectively their Lordships ordered a proof before answer in each case and the evidence was taken before LORD HUNTER. It will be sufficient to refer to *Mullen's Case* (16), in which their Lordships gave their reasons for assoilzieing the defenders in both cases. The LORD JUSTICE CLERK held that negligence had not been proved, and, therefore, he did not pronounce upon the question of B relevancy. LORD ORMIDALE held that there was no relevant case against the defenders, but would have been prepared if necessary to hold that in any case negligence had not been established by the evidence. LORD HUNTER held that the case was relevant and that negligence had been proved. LORD ANDERSON held that the pursuer had no case in law against the defenders, but that, if this view was erroneous, negligence had not been proved. C

I desire to draw special attention to certain passages in the opinions of their Lordships. At 1929 S.C., p. 470, the learned LORD JUSTICE CLERK states that he prefers

> "to base my judgment on the proposition that the pursuer has failed to prove fault on the part of the defenders" [and feels] "absolved from expressing a concluded opinion on the thorny and difficult question of law whether, assuming fault to be proved on the part of the defenders, the pursuer has in law a right to sue them." D

In the present case his Lordship, after pointing out that he had formally reserved his opinion on the point in *Mullen* v. *Barr & Co.* (16), proceeds:

> "I think I indicated not obscurely the view which I entertained on a perusal of the English cases,"

E and to that view, in deference to the English cases which his Lordship has re-considered, he has given effect adversely to the present appellant. That the opinions of the majority of the judges of the Second Division in *Mullen's Case* (16) on the question of relevancy are founded entirely on their reading of the series of English cases cited to them is made clear by LORD ORMIDALE. After stating the questions in the case, the first being

> F "whether in the absence of any contractual relation between the pursuers and the defenders, the latter owed a duty to the pursuers, as the consumers of the beer, of taking precautions to see that nothing of a poisonous or deleterious nature was allowed to enter and remain in the bottles,"

his Lordship proceeds:

> G "I recognise the difficulty of determining the first of these questions with either confidence or satisfaction; and were it not for the unbroken and consistent current of decisions beginning with *Winterbottom* v. *Wright* (3) to which we were referred I should have been disposed to answer it in the affirmative. The evidence shows that the greatest care is taken by the manufacturers to ensure by tab and label that the ginger-beer should pass, as it were, from the hand of the maker to the hand of the ultimate user uninterfered with by the retail dealer—who has little interest in, and H no opportunity of, examining the contents of the containers. Accordingly, it would appear to be reasonable and equitable to hold that, in the circumstances and apart altogether from contract, there exists a relationship of duty as between the maker and the consumer of the beer. Such considerations, however, as I read the authorities, have been held to be irrelevant in analogous circumstances."

I LORD ORMIDALE thus finds himself constrained to reach a conclusion which appears to him to be contrary to reason and equity by his reading of what he describes as an "unbroken and consistent current of decisions beginning with *Winterbottom* v. *Wright* (3)." In view of the defence thus paid to English precedents, it is a singular fact that the case of *Winterbottom* v. *Wright* (3) is one in which no negligence in the sense of breach of a duty owed by the defendant to the plaintiff was alleged on the part of the plaintiff. The truth, as I hope to show, is that there is in the English reports no such "unbroken and consistent current of decisions" as would justify the aspersion that the law of England has committed itself irrevocably to what is neither reasonable nor equitable, A or require a Scottish judge in following them to do violence to his conscience. "In my opinion," said LORD ESHER in *Emmens* v. *Pottle* (32) (16 Q.B.D. at pp. 357–358),

> "any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust cannot be part of the common law of England."

B At your Lordships' Bar counsel for both parties to the present appeal, accepting, as I do also, the view that there is no distinction between the law of Scotland and the law of England in the legal principles applicable to the case, confined their arguments to the English authorities. The appellant endeavoured to establish that according to the law of England the pleadings disclose a good cause of action; the respondent endeavoured to show that on the English decisions the appellant had stated no admissible case. I C propose, therefore, to address myself at once to an examination of the relevant English precedents.

I observe in the first place that there is no decision of this House upon the point at issue, for I agree with LORD HUNTER that such cases as *Cavalier* v. *Pope* (27) and *Cameron and others* v. *Young* (33) which decided that

> "a stranger to a lease cannot found upon a landlord's failure to fulfil obligations D undertaken by him under contract with his lessee,"

are in a different chapter of the law. Nor can it by any means be said that the cases present "an unbroken and consistent current" of authority, for some flow one way and some the other.

It humbly appears to me that the diversity of view which is exhibited in such cases E as *George* v. *Skivington* (5) on the one hand, and *Blacker* v. *Lake and Elliot* (4) on the other hand—to take two extreme instances—is explained by the fact that in the discussion of the topic which now engages your Lordships' attention two rival principles of the law find a meeting place where each has contended for supremacy. On the one hand, there is the well-established principle that no one other than a party to a contract can complain of a breach of that contract. On the other hand, there is the equally F well-established doctrine that negligence, apart from contract, gives a right of action to the party injured by that negligence—and here I use the term negligence, of course, in its technical legal sense, implying a duty owed and neglected. The fact that there is a contractual relationship between the parties which may give rise to an action for breach of contract does not exclude the co-existence of a right of action founded on negligence as between the same parties independently of the contract though arising G out of the relationship in fact brought about by the contract. Of this the best illustration is the right of the injured railway passenger to sue the railway company either for breach of the contract of safe carriage or for negligence in carrying him. And there is no reason why the same set of facts should not give one person a right of action in contract and another person a right of action in tort. I may be permitted to adopt as my own the language of a very distinguished English writer on this subject.

> H "It appears, [says SIR FREDERICK POLLOCK (LAW OF TORTS (13th Edn.) 570)] that there has been (though, perhaps, there is no longer) a certain tendency to hold that facts which constitute a contract cannot have any other legal effect. The authorities formerly relied on for this proposition really proved something different and much more rational, namely, that if A. breaks his contract with B. (which may happen without any personal default in A. or A.'s servants), that is not I of itself sufficient to make A. liable to C., a stranger to the contract, for consequential damage. This, and only this, is the substance of the perfectly correct decisions of the Court of Exchequer in *Winterbottom* v. *Wright* (3) and *Longmeid* v. *Holliday* (2). In each case the defendant delivered, under a contract of sale or hiring, a chattel which was in fact unsafe to use, but in the one case it was not alleged, in the other was alleged but not proved, to have been so to his knowledge. In each case a stranger to the contract, using the chattel—a coach in the one case, a lamp in the other—in the ordinary way, came to harm through its dangerous condition, and was held not to have any cause of action against the

> purveyor. Not in contract, for there was no contract between these parties; not in tort, for no bad faith or negligence on the defendant's part was proved." A

Where, as in cases like the present, so much depends upon the avenue of approach to the question it is very easy to take the wrong turning. If you begin with the sale by the manufacturer to the retail dealer, then the consumer who purchases from the retailer is at once seen to be a stranger to the contract between the retailer and the B manufacturer and so disentitled to sue upon it. There is no contractual relation between the manufacturer and the consumer, and thus the plaintiff if he is to succeed is driven to try to bring himself within one or other of the exceptional cases where the strictness of the rule that none but a party to a contract can found on a breach of that contract has been mitigated in the public interest, as it has been in the case of a person who issues a chattel which is inherently dangerous or which he knows to be in a dangerous C condition. If, on the other hand, you disregard the fact that the circumstances of the case at one stage include the existence of a contract of sale between the manufacturer and the retailer and approach the question by asking whether there is evidence of carelessness on the part of the manufacturer and whether he owed a duty to be careful in a question with the party who has been injured in consequence of his want of care, the circumstance that the injured party was not a party to the incidental contract of D sale becomes irrelevant and his title to sue the manufacturer is unaffected by that circumstance. The appellant in the present instance asks that her case be approached as a case of delict, not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject-matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves or known E to be in a dangerous condition has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety. F

With these preliminary observations I turn to the series of English cases which is said to compose the consistent body of authority on which we are asked to non-suit the appellant. It will be found that in most of them the facts were very different from the facts of the present case and did not give rise to the special relationship and consequent duty which, in my opinion, is the deciding factor here. *Dixon* v. *Bell* (22) is the starting point. There a maidservant was sent to fetch a gun from a neighbour's house; on the G way back she pointed it at a child and the gun went off and injured the child. The owner of the gun was held liable for the injury to the child on the ground that he should have seen that the charge was drawn before he entrusted the gun to the maidservant.

> "It was incumbent on him who, by charging the gun, had made it capable of doing mischief to render it safe and innoxious."

This case, in my opinion, merely illustrates the high degree of care, amounting in effect H to insurance against risk, which the law exacts from those who take the responsibility of giving out such dangerous things as loaded firearms. The decision, if it has any relevance, is favourable to the appellant, who submits that human drink, rendered poisonous by careless preparation, may be as dangerous to life as any loaded firearm.

Langridge v. *Levy* (1) is another case of a gun, this time of defective make and known to the vendor to be defective. The purchaser's son was held entitled to sue for damages I in consequence of injuries sustained by him through the defective condition of the gun causing it to explode. The ground of the decision seems to have been that there was a false representation by the vendor that the gun was safe, and the representation appears to have been held to extend to the purchaser's son. The case is treated by commentators as turning on its special circumstances and as not deciding any principle of general application. As for *Winterbottom* v. *Wright* (3) and *Longmeid* v. *Holliday* (2) neither of these cases is really in point for the reason indicated in the passage from SIR FREDERICK POLLOCK's treatise which I have quoted above.

Then comes *George* v. *Skivington* (5), which is entirely in favour of the appellant's contention. There was a sale in that case by a chemist of some hairwash to a purchaser for the use of his wife, who suffered injury from using it by reason of its having been negligently compounded. As Kelly, C.B., points out, the action was not founded on any warranty implied in the contract of sale between the vendor and the purchaser, and the plaintiff, the purchaser's wife, was not seeking to sue on the contract, to which she was not a party. The question, as the Chief Baron stated it, was

> "whether the defendant, a chemist, compounding the article sold for a particular purpose, and knowing of the purpose for which it was bought, is liable in an action on the case for unskilfulness and negligence in the manufacture of it whereby the person who used it was injured."

And this question the court unanimously answered in the affirmative. I may mention in passing that Lord Atkinson in this House, speaking of that case and *Langridge* v. *Levy* (1), observed in *Cavalier* v. *Pope* (27) ([1906] A.C. at p. 433) that

> "in both these latter cases the defendant represented that the article sold was fit and proper for the purposes for which it was contemplated that it should be used, and the party injured was ignorant of its unfitness for these purposes."

It is true that *George* v. *Skivington* (5) has been the subject of some criticism and was said by Hamilton, J., as he then was, in *Blacker* v. *Lake and Elliot, Ltd.* (4), to have been in later cases as nearly disaffirmed as is possible without being expressly overruled. I am not sure that it has been so severely handled as that. At any rate, I do not think that it deserved to be, and, certainly, so far as I am aware, it has never been, disapproved in this House.

Heaven v. *Pender* (8) has probably been more quoted and discussed in this branch of the law than any other authority, because of the dicta of Brett, M.R., as he then was, on the general principles regulating liability to third parties. In his opinion,

> "it may safely be affirmed to be a true proposition [that] wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

The passage specially applicable to the present case is as follows:

> "Whenever one person supplies goods . . . for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognise at once that, unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises, to be enforced by an action for negligence."

Cotton, L.J., with whom Bowen, L.J., agreed, expressed himself as

> "unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived,"

but the decision of the Court of Appeal was unanimously in the plaintiff's favour. The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism, and their universality may require some qualification, but as enunciations of general legal doctrine, I am prepared, like Lord Hunter, to accept them as sound guides.

I now pass to the three modern cases of *Earl* v. *Lubbock* (12), *Blacker* v. *Lake and Elliot, Ltd.* (4), and *Bates and another* v. *Batey & Co., Ltd.* (13). The first of these cases related to a van which had recently been repaired by the defendant under contract with the owner of the van. A driver in the employment of the owner was injured in consequence of a defect in the van which was said to be due to the careless manner in which the repairer had done his work. It was held that the driver had no right of action against the repairer. The case turns upon the rule that a stranger to a contract cannot found an action of tort on a breach of that contract. It was pointed out that there was no evidence that the plaintiff had been invited by the defendant to use the van and the van owner was not complaining of the way in which the van had been repaired. The negligence, if negligence there was, was too remote, and the practical consequences of affirming liability in such a case were considered to be such as would render it difficult to carry on a trade at all.

> "No prudent man [says Mathew, L.J.] would contract to make or repair what the employer intended to permit others to use in the way of his trade."

The special facts in that case seem to me to differ widely from the circumstances of the present case, where the manufacturer has specifically in view the use and consumption of his products by the consumer and where the retailer is merely the vehicle of transmission of the products to the consumer and by the nature of the products is precluded from inspecting or interfering with them in any way.

Blacker v. *Lake and Elliot* (4) is of importance because of the survey of previous decisions which it contains. It related to a brazing lamp which, by exploding owing to a latent defect, injured a person other than the purchaser of it, and the vendor was held not liable to the party injured. There appears to have been some difference of opinion between Hamilton, J., and Lush, J., who heard the case in the Divisional Court, whether the lamp was an inherently dangerous thing. The case seems to have turned largely on the question whether, there being a contract for sale of the lamp between the vendor and the purchaser, the article was of such a dangerous character as to impose upon the vendor in a question with a third party any responsibility for its condition. This question was answered in the negative. So far as negligence was concerned, it may well have been regarded as too remote, for I find that Hamilton, J., used these words (106 L.T. at p. 537):

> "In the present case all that can be said is that the defendants did not know that their lamp was not perfectly safe and had no reason to believe that it was not so in the sense that no one had drawn their attention to the fact, but that had they been wiser men or more experienced engineers they would then have known what the plaintiff's experts say that they ought to have known."

I should doubt indeed if that is really a finding of negligence at all. The case on its facts is very far from the present one, and if any principle of general application can be derived from it adverse to the appellant's contention I should not be disposed to approve of such principle. I may add that in *White and wife* v. *Steadman* (34) ([1913] 3 K.B. at p. 348) I find that Lush, J., who was a party to the decision in *Blacker* v. *Lake and Elliot, Ltd.* (4), expressed the view that

> "a person who has the means of knowledge and only does not know that the animal or chattel which he supplies is dangerous because he does not take ordinary care to avail himself of his opportunity of knowledge is in precisely the same position as the person who knows."

As for *Bates* v. *Batey & Co., Ltd.* (13), where a ginger-beer bottle burst owing to a defect in it which, though unknown to the manufacturer of the ginger-beer, could have been discovered by him by the exercise of reasonable care, Horridge, J., there held that the plaintiff who bought the bottle of ginger-beer from a retailer to whom the manufacturer had sold it and who was injured by its explosion had no right to action against the manufacturer. The case does not advance matters, for it really turns upon the fact that the manufacturer did not know that the bottle was defective, and this, in the view of Horridge, J., as he read the authorities, was enough to absolve the manufacturer. I would observe that in a true case of negligence knowledge of the existence of the defect causing damage is not an essential element at all.

This summary survey is sufficient to show what more detailed study confirms, that the current of authority has by no means always set in the same direction. In addition to *George* v. *Skivington* (5) there is the American case of *Thomas* v. *Winchester* (14), which has met with considerable acceptance in this country and which is distinctly on the side of the appellant. There a chemist carelessly issued, in response to an order for extract of dandelion, a bottle containing belladonna which he labelled "extract of dandelion," with the consequence that a third party who took a dose from the bottle suffered severely. The chemist was held responsible. This case is quoted by LORD DUNEDIN in giving the judgment of the Privy Council in *Dominion Natural Gas Co.* v. *Collins* (6) as an instance of liability to third parties, and I think it was a sound decision.

In the American courts the law has advanced considerably in the development of the principle exemplified in *Thomas* v. *Winchester* (14). In one of the latest cases in the United States, *McPherson* v. *Buick Motor Co.* (15), the plaintiff, who had purchased from a retailer a motor car, manufactured by the defendant company, was injured in consequence of a defect in the construction of the car and was held entitled to recover damages from the manufacturer. CARDOZO, J., the very eminent Chief Judge of the New York Court of Appeals, and now an associate justice of the United States Supreme Court, thus stated the law:

> "There is no claim that the defendant knew of the defect and wilfully concealed it. . . . The charge is one not of fraud but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. . . . The principle of *Thomas* v. *Winchester* (14) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. . . . There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion."

The prolonged discussion of English and American cases into which I have been led might well dispose your Lordships to think that I have forgotten that the present is a Scottish appeal, which must be decided according to Scots law. But this discussion has been rendered inevitable by the course of the argument at your Lordships' Bar, which, as I have said, proceeded on the footing that the law applicable to the case was the same in England and Scotland. Having regard to the inconclusive state of the authorities in the courts below, and to the fact that the important question involved is now before your Lordships for the first time, I think it desirable to consider the matter from the point of view of the principles applicable to this branch of law which are admittedly common to both English and Scottish jurisprudence.

The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows, and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy, and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care and on the other side to a right to have care taken.

To descend from these generalities to the circumstances of the present case I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that if the appellant establishes her allegations the respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter may reasonably be characterised as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the respondent to be careless in his process of manufacture. The question is: Does he owe a duty to take care, and to whom does he owe that duty? I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship, which he assumes and desires for his own ends, imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health.

It is sometimes said that liability can arise only where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness" and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequences of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

The recognition by counsel that the law of Scotland applicable to the case was the same as the law of England implied that there was no special doctrine of Scots law which either the appellant or the respondent could invoke to support her or his case, and

Cases referred to:

(1) *Lewis* v. *Rucker* (1761), 2 Burr. 1167; 97 E.R. 769; 29 Digest 123, *760*.

(2) *Le Roy* v. *United Insurance Co.* (1811), 7 Johns. (N.Y.) Cas. 343.

(3) *Castellain* v. *Preston* (1883), 11 Q.B.D. 380; 52 L.J.Q.B. 366; 49 L.T. 29; 31 W.R. 557, C. A.; 29 Digest 52, *156*.

(4) *Visscherij Maatschappij Nieuw Onderneming* v. *Scottish Metropolitan Assurance Co., Ltd.* (1922), 10 Ll.L.R. 579; 38 T.L.R. 458; 27 Com. Cas. 198, C.A.; 29 Digest 223, *1807*.

(5) *Greenhill* v. *Federal Insurance Co., Ltd.*, [1927] 1 K.B. 65; 95 L.J.K.B. 717; 135 L.T. 244; 70 Sol. Jo. 565; 31 Com. Cas. 289; 17 Asp.M.L.C. 62, C.A.; Digest Supp.

(6) *Cotton* v. *Heyl*, [1930] 1 Ch. 510; 99 L.J.Ch. 289; 143 L.T. 16; Digest Supp.

(7) *Re Steel Wing Co., Ltd.*, [1921] 1 Ch. 349; 90 L.J.Ch. 116; 124 L.T. 664; 65 Sol. Jo. 240; [1920] B. & C.R. 160; 8 Digest (Repl.) 553, *82*.

(8) *Brice* v. *Bannister* (1878), 3 Q.B.D. 569; 47 L.J.Q.B. 722; 38 L.T. 739; 26 W.R. 670, C.A.; 8 Digest (Repl.) 553, *78*.

(9) *Durham Bros.* v. *Robertson*, [1898] 1 Q.B. 765; 67 L.J.Q.B. 484; 78 L.T. 438, C.A.; 8 Digest (Repl.) 570, *216*.

(10) *Brandt & Co.* v. *Dunlop Rubber Co.*, [1905] A.C. 454; 74 L.J.K.B. 898; 93 L.T. 495; 21 T.L.R. 710; 11 Com. Cas. 1, H.L.; 8 Digest (Repl.) 573, *230*.

(11) *Gibson* v. *Winter* (1833), 5 B. & Ad. 96; 2 Nev. & M.K.B. 737; 2 L.J.K.B. 130; 110 E.R. 728; 29 Digest 90, *482*.

Appeal from an order of MACKINNON, J., in an action tried by him without a jury.

The action was brought upon a policy of marine insurance, and the plaintiff, Leonard Lloyd Williams, claimed against the defendants in respect of a loss on twenty cases of textile goods shipped on board the *Parthian*, a ship on the American register in 1921, on a voyage from Alexandria to Liverpool. The action was originally brought in the names of Andrea Constantinou and George Valsamis, formerly carrying on business in Egypt as Constantinou, Valsamis & Co., as assured, and the above-named Leonard Lloyd Williams as their assignee. On Nov. 23, 1927, the two first-named plaintiffs were crossed out by amendment of writ, and Leonard Lloyd Williams remained as the only plaintiff, being the person to whom the firm had assigned the benefit of all claims or moneys which might become due under the policy, which was dated July 7, 1921. The *Parthian* sailed on that date, put into Oran on July 16, and remained there until July 24, when a fire broke out on board. In order to extinguish the fire the port authorities sank the vessel, and the cargo was extensively damaged by fire and water.

MACKINNON, J., held that the defendants had failed to satisfy him that fraud had been established, or that there had been any concealment, but, in his opinion, £8,000 was in excess of the real value of the goods, and he gave judgment for the plaintiff for £4,000. The defendants appealed, and there was a cross-appeal by the plaintiff.

Porter, K.C., and *David Davies* for the defendants.

James Dickinson, K.C., and *John Whyatt* for the plaintiff.

Cur. adv. vult.

May 13. The following judgments were read.

SCRUTTON, L.J.—MACKINNON, J., begins his judgment by saying that this case is the most unsatisfactory case he ever had to deal with, the evidence as presented on both sides being hopelessly unsatisfactory. I entirely agree with him. The court in 1932 is asked to deal with a loss under a marine policy which occurred on July 24, 1921. Two material witnesses have died. The writ in the action was issued on July 23, 1927, one day before the Statute of Limitations would have destroyed the claim. The writ was originally issued in the name of Constantinou and Valsamis, formerly trading as the firm of Constantinou, Valsamis & Co., and Leonard Lloyd Williams. On Nov. 23, 1927, the first two plaintiffs were struck out and Williams remained as sole plaintiff. His interest being derived from the first two plaintiffs, he was exposed to all the defences available against them. They had insured through the Alexandria agency of the defendant company by an open and unvalued policy certain cotton goods on a voyage from Alexandria to Liverpool to the extent of £8,000, but with no agreement as to value. It was not in evidence who, on behalf of the insurers or assured respectively, effected the policy, or what was disclosed or not disclosed when the policy was effected, or how the very unusual device of an open instead of a valued policy was adopted. The plaintiff, Mr. Williams, against whom it is right to say no suggestion of fraud or bad faith was or could be made, came into the transaction after loss, because he had established a claim against Constantinou and Valsamis in the Egyptian courts for over £7,000 in respect of some improper dealings of theirs as his agents with some rum of his, and in settlement of the claim he took over their claim under the insurance policy on terms to be considered hereafter.

The cotton goods insured, the subject of the claim, were said to be shipped in the steamship *Parthian*, a steamer on the American register, but owned and commanded by Greeks. She, apparently, started from Alexandria with insufficient bunkers. Her captain put into Oran to get some more coal, but had no money to pay for it. The steamer lay in the harbour at Oran for some days. During a Sunday night the captain alleged that a fire broke out in the engine-room, an event which the judicial experts at Oran reported to be "not impossible, but little probable." To extinguish the fire the port authorities sank the vessel, and the cargo was extensively damaged by fire and water. The loss was very suspicious, as when the shipping boom of 1919–20 was followed by the disastrous shipping slump of 1921, that year, 1921, was the period in which this court found several Greek ships to have been intentionally scuttled or burnt with intent to defraud underwriters; and counsel for the insurers asked us to find that there was here a loss, not accidental, but by collusion between Greek shipowners and cargo-owners, Constantinou and Valsamis having at least three shipments on the vessel, all heavily over-valued. But the insurers had not the courage to plead this; no evidence was called about the ship, although there is reason to believe it was under-insured, and all the direct evidence as to the cargo-owners was an answer to a question to Constantinou:

> "I put it to you that both you and Valsamis were aware that the goods shipped in the *Parthian* were not likely to reach their destination?—(A.) This is not true."

I decline to deal with the matter on the suspicion that there was an arranged loss.

Starting, then, with the position that an honest assured has, this being an open policy, to prove the amount of his loss, s. 16 of the Marine Insurance Act, 1906, provides that

> "subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows: . . . (iii) in insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping, and the charges of insurance upon the whole."

"Prime cost" would ordinarily mean the first cost of manufacturing and would, on the cardinal principle of insurance indemnity, refer to the state of the goods at or about the time of their first being at risk, the time of commencing the adventure. Underwriters would not pay on an open policy on goods for the loss of a profit or rise in the market price which was expected to be made in the future; nor would the assured recover for a loss, which had already been made at the time of starting the adventure because the market price had fallen heavily since the assured bought or manufactured the goods.

But the assured may not be the manufacturer, or he may have bought some time before the adventure commenced. What is to be the measure of value? There is practically no English authority on the point. Lord Mansfield in *Lewis* v. *Rucker* (1) (2 Burr. at p. 1170) uses the phrase "prime cost"—in an open policy—"or value in the policy," but the point was not involved in the case, which related to a valued policy. Arnould on Marine Insurance (11th Edn.), s. 365 (2), has the sentence:

> "The prime cost of goods is generally evidenced by the invoice price, but is not conclusively fixed by it. . . . As a practical rule, the prime cost, as evidenced by the invoice price, is by far the most convenient standard."

A The United States have no statute, but that excellent writer, MR. PHILLIPS, who, I may say, has probably been taken as one of the most authoritative writers on marine insurance, puts the matter thus. Section 1226 says (vol. 2, 3rd Edn. at p. 39):

> "The amount of insurable interest in goods is their market value at the time and place of the commencement of the risk. The best, though not conclusive, criterion of this interest, is the cost of the goods to the assured. This is the most satisfactory B proof of the value, in case they are purchased near the time when the risk commences."

The first paragraph of s. 1229 says:

> "The amount of insurable interest is most frequently the invoice price. But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost."

C The test is put in the Supreme Court of New York by THOMPSON, J., in *Le Roy* v. *United Insurance Co.* (2) in this way (7 Johns. (N.Y.) Cas. at p. 355):

> "The prime cost of the goods might not, in many cases, be a just rule of computation, as where they were not purchased with a view to an immediate exportation, and had remained on hand for a considerable length of time. But in matters of D commerce the plainest and simplest rules are always the best. And I should incline to think that, generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is commonly the market price of the article. And as the shipment, in the usual course of business, is made soon after the purchase, the prime cost is, ordinarily, the real value of the subject."

It has frequently been pointed out by great judges, and especially by BOWEN, L.J., in E *Castellain* v. *Preston* (3) (11 Q.B.D. at pp. 397, 401, 406):

> "When there is a contract of indemnity no more can be recovered by the assured than the amount of his loss. . . . In all these difficult problems I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will always be found. . . . Apply the broad principle of indemnity, and you have the answer. The vendor cannot recover for greater loss than he suffers."

F Apply this to the present case. The assured has at the commencement of the risk goods of uncertain value. He desires to insure that value against marine risks. If he bought the goods a year before and the market has fallen heavily, he cannot insure against that loss; it has already happened. Nor can he recover on an open policy the loss he suffers by the possibility of the goods having a higher market value on arrival at the port of destination which he loses by the ship's not arriving. What he has lost G is the value when the adventure starts. Put the case of the insurance of a picture in an open policy which forty years ago, when the painter was fashionable, cost £4,000, but at the time of shipment, when the painter is out of date, would only sell for £400. The assured could not say: "The prime cost was £4,000." As PHILLIPS says: "The purchase price must be near the time when the adventure commences." Similarly, if Lawrence's "Red Boy," for which £95,000 has been refused, were insured on an open H policy, the underwriters could not say: "The prime cost when Lawrence painted it a hundred years ago was a few hundred pounds. That is its prime cost and the only amount recoverable." I approach the case, therefore, from the point of view of underwriters who are concerned to determine the cost to the assured, or the invoice or market value at or near the time of the shipment.

Constantinou, Valsamis & Co.'s connection with the goods is said to be that they held I them as security for a debt owed to the firm by Valsamis, one of the partners, in that he had promised when the firm was formed in July, 1919, to put £6,000 into the firm as capital, but had only paid £2,000, and consequently owed the firm £4,000, for which sum he had pledged the goods as security. There are no documents or books to prove this transaction, which rests upon the oral evidence of Constantinou. Valsamis refused to give evidence for Williams, unless the latter promised him 25 per cent. of the amount recovered. [The lord justice referred in detail to the evidence relating to the value of the goods at the time of shipment, dealing with the inconsistencies in the statement of each witness, and stated his conclusion thus:] I am unable to make any finding in view of the innumerable frauds and contradictions which the plaintiff, himself innocent, has to put forward to support his assignors' claim. If Constantinou and Valsamis were plaintiffs, I should unhesitatingly say they had not satisfied me of any amount of value. As it is, the first £1,000 recovered by Mr. Williams, if he should recover anything, will go to Constantinou, Valsamis & Co. I have very carefully considered the evidence, and the plaintiff has not satisfied me of any value that I can reasonably place on whatever goods were contained in the twenty cases described in the manifest as "twenty caisses manufacture," which I am satisfied were shipped in the *Parthian* by Constantinou, Valsamis & Co. I do not think MacKinnon, J., was himself satisfied on that point.

This is enough to put an end to the case, the judgment being set aside with costs, but I deal shortly with some other matters argued. The underwriters said that, if a value was proved for the goods, there must have been a concealment, either with or without fraud, of a material fact, namely, that the real value of the goods was so much below the amount insured. They, accordingly, pleaded, in the defence:

> "Alternatively, at the time of effecting the said insurance the said Constantinou, Valsamis & Co. fraudulently omitted to disclose or alternatively failed to disclose to the defendants a material fact which was then known to the said Constantinou, Valsamis & Co., and unknown to the defendants, namely, that the said goods were of far less value than the sum insured,"

but in the result they were in the very unusual position of not having called the underwriters to prove what they were or were not told when the insurance was effected in Alexandria by the agents of the defendants, Augustino & Co., through one Cohen. This question came before the court in *Visscherrij Maatschappij Nieuwe Onderneming* v. *Scottish Metropolitan Assurance Co.* (4), the case of a Dutch trawler. Rowlatt, J., found the trawler was scuttled, and this court did not disturb his decision. The underwriters, while pleading concealment, gave no evidence as to what they were or were not told. Lord Sterndale, M.R., said (10 Ll.L.R. at p. 583):

> "The underwriters gave no evidence at all as to what facts about the ship were communicated to them. They gave no evidence as to whether such an over-valuation as this would have been a material fact. They left the whole thing absolutely bare. Without saying the judge was wrong, I will only say I think the evidence was nothing like as complete as it ought to have been; and therefore I should have doubts about that if I had to give judgment on it. But I think my judgment on the other point is sufficient to dispose of the case."

However, I do wish to say I have the gravest doubt whether the judge was right on the question of concealment. The underwriters have not taken the course, which, in my view, should always be pursued, of going into the box and saying what they knew and what was the material fact which they did not know. In my view, an underwriter pleading concealment must come and say what he was or was not told. He may not remember directly, but may be able to say, as he said in *Greenhill* v. *Federal Insurance Co., Ltd.* (5), that he cannot have been told this material fact—that if he had known it he would never have dreamed of writing this policy at the ordinary rate of premium. Now in the present case the policy was underwritten by a foreign agent, who would get commission on the premium by underwriting the policy and who might think that, as the policy was an open policy, and, therefore, the assured must prove his actual loss, it would not matter how much was insured; the larger the sum the larger his commission. We do not know what happened; the underwriter may have been shown the invoices and made his own inquiries about value. Anyhow, the underwriter, Cohen or another, was not called. The London representatives of the defendants had intended to call him, but for reasons of which we have no evidence he was not found or called. An application was then made to re-open the commission; it was refused by MacKinnon, J., and the refusal was not appealed against. It is said that that very experienced judge in marine insurance matters said it was not necessary to call him. I can hardly believe this, but, if he said so, I cannot agree with him. In my view, in a plea of concealment the underwriter must be called to say what he was told, unless all communications are in writing. The defendants then got an affidavit from Cohen and applied at the trial

A to read it. The application was refused, and in view of R.S.C., Ord. XXXVII, r. 1, rightly refused, as it was obvious that there would be a bona fide desire to cross-examine on the affidavit. If, therefore, the case had turned only on concealment, I should have refused to decide against the plaintiff on it, as I think the matter of such general importance that calling the underwriter should be strictly required. As it is, the evidently gross over-valuation supports the insuperable difficulty I find in putting any value on
B the goods.

There remain some complicated points about the title of Williams to sue. The insurance was apparently effected by Constantinou, Valsamis & Co. to cover both the firm's interest as pledgees and Valsamis's interest as pledgor. Williams was engaged in litigation with Constantinou, Valsamis & Co., over the sum already referred to, and had an Egyptian judgment against them for £7,000. In part settlement of this claim
C they, on April 26, 1927, assigned to Williams 50 per cent. of the claim in the present action, and gave notice to the Atlantic Assurance Co. the defendants. This assignment is not produced, unless the document of Oct. 11, 1927, is said to be it. This document does not refer to the letter of April 26. On July 23, 1927, the present writ was issued in the names of Constantinou, Valsamis, and Williams, but not served. On Sept. 9 and 30, 1927, the solicitors for the underwriters informed the solicitors for the plaintiffs
D that the underwriters would not discuss the claim so long as Constantinou, Valsamis & Co. had anything to do with it, but if Williams got an assignment of the remaining 50 per cent. of the claim they would offer him without prejudice an ex gratia payment of £500, but he must take this or fight. Thereupon Williams's solicitors served, on Oct. 11, the writ they had issued on July 23, 1927, and amended it on Nov. 23, 1927, by striking out Constantinou and Valsamis as plaintiffs. Meanwhile, on Nov. 7, Williams pur-
E ported to accept an offer from Constantinou as liquidator of the firm, to assign the remaining interest of the firm in three policies, including the one sued on here, for £2,000, and enclosed a letter for Constantinou to sign, terms of payment £400 down, £600 in three months, and £1,000 when, and only when, Williams received payment to that extent from the insurance company. This was accepted on Nov. 10. Notice was given to the insurance company on Nov. 14 of an assignment of the remaining
F 50 per cent. of the claim. In fact the assignment was not executed until Nov. 18 and acknowledged on Dec. 6. The notice alleged that Williams was now the only person interested in the action. In view of the fact that Constantinou, Valsamis & Co. were interested in the recovery to the extent of £1,000, this was hardly accurate. The decision of LUXMOORE, J., in *Cotton* v. *Heyl* (6) appears to show that they had an equitable assignment of the proceeds of the action up to £1,000. The £400 and the £600 were
G paid, though not punctually.

MACKINNON, J., has held that the liquidator of the firm can only assign the interest of the firm as pledgees, which is only £4,000, and not the interest of the pledgor, Valsamis, to the remaining £4,000 claimed, and that, as he thinks the value of the goods at the time of shipment was more than £4,000, although he cannot find what it was between £5,000 and £7,000, the judgment must be limited to £4,000. The plaintiff cross-appeals against
H this, while the defendants appeal against any judgment for any amount.

On this part of the case the underwriters took various technical defences, which I think resolved themselves into the question whether the original assured must be parties to the action. They had been parties, and, as such, had made affidavits of ship's papers. I do not like the action of the underwriters in taking these points, as they induced Williams and his advisers to get rid of the original assignors by saying that they would
I not make any proposal to him so long as Constantinou and Valsamis were parties, and when he struck those parties out, but was not able to accept the proposal made to him without prejudice, the underwriters did not say: "Now mind, if you go on you must see you have the necessary parties to the action." It is unnecessary for me to decide these points, as I am against the plaintiff on the merits of the case, but I think it is fair that I should state provisionally, but not finally, the opinion I am inclined to form. Under s. 14 of the Marine Insurance Act, 1906, the mortgagee or pledgee may insure the whole value of the subject-matter insured, being under an obligation to the mortgagor to account to him for any surplus over the mortgage debt. MACKINNON, J., thinks that

the mortgagee cannot assign more than his actual pecuniary interest in the policy; this is why he limits the claim to £4,000. I am inclined to doubt the correctness of this and to think that the mortgagee can assign the whole interest he has, namely, the right to recover the whole amount, with an obligation to account for part of it to the mortgagor, which does not affect the underwriters. I think it is true that on this assignment the assignor retains against the assignee an equitable interest in the first £1,000 recovered, but I am disposed to think this is only as between assignor and assignee, and does not afford the underwriters any defence. I think the assignment pendente lite was valid under Order XVII, r. 3, and the pleadings were sufficient notice. But, as I have said, I do not think it necessary to decide these technical points finally. I decide against the plaintiff on the merits. I am sorry for him, as I think he is free from blame, except for getting into bad company, but he must suffer for the faults of his assignors.

The appeal must be allowed with costs, and the judgment below set aside and judgment entered for the defendants with costs. The cross-appeal must be dismissed with costs.

GREER, L.J.—I entirely sympathise with the great difficulty experienced by the learned trial judge in his effort to ascertain and find the facts relevant to any decision of this case. The evidence obtained by the examination of witnesses in Palestine is most unsatisfactory, and was insufficiently tested by cross-examination. The defendants contended that they were entitled to succeed for all or several or one of five distinct reasons: (i) They say in the first place the plaintiff failed in limine by not giving any evidence that should have satisfied the court that the goods had any ascertainable value. (ii) They contend that the judge should have inferred from the facts proved that these goods were shipped and insured as part of a fraudulent conspiracy on the part of those in charge of the ship that the ship should be scuttled and the shippers should thereby realise a value by over-insurance that they were totally unable to realise by sale. (iii) They say that the goods were over-insured to an amount which justifies the inference of fraudulent insurance. (iv) They say that, even if the over-insurance falls short of that which would afford a reasonable inference of fraud, it was such as to justify the inference of concealment of material facts; and (v) they say that the plaintiff's only title was as equitable assignee who could not succeed after the deletion of the names of his assignors as plaintiffs in the action.

It seems to me more convenient to deal first of all with the last point raised, as it amounts to a preliminary objection to the plaintiff's right to sue on the policy. It is said that he cannot sue under the Marine Insurance Act, 1906, s. 50 (2), because the assignment did not pass the beneficial interest in the policy, that is to say, the whole beneficial interest in the policy, so as to entitle the plaintiff Williams to sue thereon in his own name, and it is said in the second place that, inasmuch as there was no written notice of assignment within the terms of the Judicature Act, 1873, s. 25 (6), now the Law of Property Act, 1925, s. 136, he cannot sue in his own name as legal owner. This branch of the argument involved two distinct contentions. It was contended in the first place that the firm never had the whole beneficial interest in the policy, because the goods covered by the policy were goods of which they were only mortgagees for the amount of £4,000, the capital which Valsamis had agreed to provide for the firm of Constantinou, Valsamis & Co. In my judgment, this argument ought not to succeed. I deal with this point on the assumption that there is no reason to disbelieve what the witness Constantinou says in his evidence as to the arrangements he made with Valsamis with reference to the goods. According to his evidence all the goods which were shipped on the *Parthian* and insured by the policy which was the subject-matter of the action, were transferred by Valsamis to the firm of Constantinou, Valsamis & Co., on the terms that when sold the proceeds should be held to the amount of £4,000 as Valsamis's contribution to the capital of the firm, and the balance should be held to his credit. I think the meaning of this is that the goods and the whole of their proceeds of sale were to belong to the partnership, but that the partnership would have to account to Valsamis by putting £4,000 to the credit of his capital account, and crediting him with the balance, A if any, as the amount due from the partnership to him. The policy was taken out on behalf of the firm, and it was not a policy in which Valsamis had any interest except as a member of the firm. I think this contention fails.

But the defendants also contended that, inasmuch as in assigning the policy to Williams, Constantinou, representing the firm, stipulated as part of the arrangement that the first £1,000 received under the policy should be paid to him, the beneficial B interest in the policy was partly in Constantinou as representing the firm and partly in Williams, and that, even if the interest of Constantinou in the first £1,000 had been created by a separate transaction, it would have amounted to an equitable assignment of an interest in the policy. It seems to me this is established by the decision of LAWRENCE, L.J., then P. O. LAWRENCE, J., in *Re Steel Wing Co.* (7), and the decision of LUXMOORE, J., in *Cotton* v. *Heyl* (6). I think that these decisions correctly lay down C the law, and that it is impossible to say that the plaintiff Williams obtained the beneficial interest in the policy which would be necessary to enable him to sue in his own name under s. 50 of the Marine Insurance Act. It is not material whether the beneficial interest in part of the policy moneys arose after an assignment by the beneficial owner of the whole interest, or, as in the present case, by a retention of part of the beneficial interest by the assignor at the time of the assignment.

D The question remains whether the assignee of part of a debt is a legal assignee who can sue in his own name, or whether, if he be an equitable assignee, he can sue without having his assignor made a party to the action. It seems to me quite clear, notwithstanding the decision of LORD COLERIDGE in *Brice* v. *Bannister* (8) that the assignee of a part of a debt is merely an equitable assignee, and at any rate, unless the equitable assignment be accompanied by a power to give a discharge, it is impossible for the E assignee to succeed unless he sues in the name of the assignor: see the observations of the Court of Appeal in *Durham Bros.* v. *Robertson* (9), and the decision already cited in *Re Steel Wing Co.* (7). In *Brandt & Co.* v. *Dunlop Rubber Co.* (10) judgment was given in favour of equitable assignees who sued without their assignors having been made parties to the proceedings. The assignment was one like that in *Brice* v. *Bannister* (8), giving the power to give a perfectly good receipt. LORD MACNAGHTEN in his F speech says ([1905] A.C. at p. 462):

> "Strictly speaking, Kramrisch & Co. [the assignors] or their trustee in bankruptcy, should have been brought before the court. But no action is now dismissed for want of parties, and the trustee in bankruptcy had really no interest in the matter. At your Lordships' Bar the Dunlops disclaimed any wish to have him G present, and in both courts below they claimed to retain for their own use any balance that might remain after satisfying Brandts."

In the present case the defendants seriously object to the presence of Constantinou and Valsamis as co-plaintiffs with Williams. The objection is one which they are entitled to take, and, in my judgment, it is fatal to the action as at present constituted. We have not been asked to amend the proceedings by re-joining these two parties who were H struck out. I do not think the fact that the defendants refused to consider any question of compromise as long as the firm were parties with whom they had to deal, but were willing to offer £500 to Williams if he were the sole person with whom they were concerned, estops them from saying that, as he did not accept their offer, he was not entitled to proceed with his action in the absence of the two persons who were in law necessary parties, and who, if the action had proceeded with their names as plaintiffs, I might have been subjected to the duty of answering inconvenient interrogatories. In my judgment, the action should fail on this ground, but, inasmuch as the other grounds have been argued, I think it right to express my view on them.

I think the learned judge was right in refusing to infer that there was in this case a fraudulent conspiracy between the shippers, or one of them, and somebody on board the ship, that the ship should be scuttled. If the defendants based their defence on an accusation of that kind, they ought to have stated it plainly in their pleading. They not only did not state it, but they gave no evidence which would, in my view, have justified any such finding by the learned judge.

As regards the question of fraudulent over-valuation, or material concealment, it seems to me that the case made by the plaintiff was deficient in two respects. No evidence was given as to what facts were communicated by Constantinou, or whoever acted for him, to the insurers, or the agent acting for them in Alexandria, and I do not think the inference ought to be drawn either (i) that there was any concealment, or (ii) that if the facts had been stated in Alexandria to the company's agents, those facts would have been regarded as of sufficient importance to have resulted in the refusal of the insurance. It is to be remembered that a good premium is a desirable thing from the point of view of insurers and commission agents, and over-valuation may not be regarded by them as of great importance in an unvalued policy, because they would know that, whatever value has been put in the policy, the insurers, in the event of a loss, will not have to pay any more than the proved value, and that if there should be no loss the insurers would be able to profit by a higher premium than they would otherwise have obtained, and the agent by a higher commission. I have no doubt whatever that there was a very substantial over-valuation of the goods which were the subject-matter of the policy sued upon.

In my opinion, s. 16 of the Marine Insurance Act, 1906, is to be construed in the light of the consideration that the object of all insurance is indemnity: see especially per LORD ESHER, M.R. (then BRETT, L.J.) and BOWEN, L.J., in *Castellain* v. *Preston* (3) (11 Q.B.D. at pp. 386, 397). I think the words "prime cost" in that section mean the prime cost to the assured at or about the time of shipment, or at any rate at some time when the prime cost can be reasonably deemed to represent their value to their owner at the date of shipment. To hold that the prime cost at a period of boom long past must by statute be taken to be the value at a time when values had become diminished by 50 per cent. would have the effect of enabling the assured to recover under his right to indemnity for loss during the voyage a sum which would represent a loss incurred long before the voyage started. I am disposed to think that the values as stated in the invoices should, in the absence of evidence justifying a finding of fraud, be taken to be the value at the time when Valsamis acquired the goods towards the end of 1919, or the early part of 1920; and I am also inclined to think that the evidence is sufficient to prove that the goods had by the time of shipment retained value to the extent of about 50 per cent. But having regard to the view already expressed that the action fails because of the disjoinder of Constantinou and Valsamis as co-plaintiffs, it is unnecessary for me to give any decision on the question whether judgment might otherwise have been given for £4,000.

I agree that the appeal should be allowed with costs, and the cross-appeal should be dismissed with costs.

SLESSER, L.J.—In this appeal objection is taken at the outset by the defendants to the title of Mr. Williams, the plaintiff, to sue as assignee in law of the beneficial interest in the marine policy. No question is raised on the equitable title of Mr. Williams. Originally the assignors of the policy were joined with Mr. Williams as plaintiffs, but in November, 1927, they were struck out, and it is said that Mr. Williams can no longer rely on his equitable interest by reason of the fact that the legal owners are no longer parties to the action.

The history of the assignment reveals two matters, (a) as regards the immediate assignors to the plaintiff, a firm known as Constantinou, Valsamis & Co., Mr. Constantinou, as liquidator of the firm, on Nov. 18, 1927, for consideration purported to assign to the plaintiff the benefit of all claims and all money which might become due under the policy, and by letter of the same date Mr. Constantinou requested the agents of Mr. Williams, the plaintiff, to hand over to him the assignment on certain terms, which terms were accepted by Mr. Williams on Dec. 6. So far as is material to an ascertainment of the exact nature of the transaction, I quote from this letter of Dec. 6 to the following effect: Mr. Williams agrees to pay to the liquidator

> "from the first money received from the Atlantic Insurance Co. in respect of the insurance claim for manufactured textile goods lost per steamship *Parthian* off Oran, Algeria, in July, 1921, an amount up to but not exceeding £1,000, this

> amount to become due and payable only if and when I receive same from the said insurance claim. Should I only receive a lesser amount than £1,000, then my liability under this undertaking is limited to the amount I receive. This being the final payment in respect of the assignment to myself of the whole remaining interest of the said firm of Constantinou, Valsamis & Co. in the three marine insurance claims as set forth in the assignment to myself dated Nov. 18, 1927."

In my opinion, the real result of these transactions, apart from over-nice subtleties, was that the liquidator, who held the policy which had been taken out in the name of the firm, retained a beneficial interest in the policy to the extent of £1,000, and that, consequently, at most Mr. Williams had a beneficial interest in part only of the policy.

By s. 50 (2) of the Marine Insurance Act, 1906:

> "Where a marine policy has been assigned so as to pass the beneficial interest in such policy the assignee of the policy is entitled to sue thereon in his own name; and the defendant is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected."

These latter words indicate that the person by or on behalf of whom the policy was effected has parted in the conditions contemplated by the section with the whole of his beneficial interest. At common law the assignee could not sue in his own name on the policy, but an action could be brought by the assignor as trustee for the assignee: (*Gibson* v. *Winter* (11)). The power of the assignee to sue in his own name was conferred by the Policies of Marine Assurance Act, 1868, s. 1, and amended by the Act of 1906, and it is incumbent upon an assignee who wishes so to sue and does not join the assignor to satisfy the section. For the reasons I have stated Mr. Williams has failed to bring himself within the Act, for he is not, in my view, possessed of more than part of the beneficial interest in the policy, part of which is either still in the legal ownership of the liquidator on behalf of the assignors or at least is impressed with an equitable interest in their favour: see per P. O. LAWRENCE, J., in *Re Steel Wing Co.* (7), and LUXMOORE, J., in *Cotton* v. *Heyl* (6). In neither view has the beneficial interest passed within the meaning of the 1906 statute. The principle that the contract is one of indemnity implies that the beneficial interest in the policy cannot while it remains in force be severed from the interest assured: (ARNOULD ON MARINE INSURANCE (11th Edn.), s. 176).

A further ground to establish the title of Mr. Williams is sought in the Law of Property Act, 1925, s. 136, as applied by R.S.C., Ord. XVII, r. 3. There is no doubt that the requirements of s. 136 of the Law of Property Act, 1925, as such, have not been complied with, that is to say, no express notice in writing had been given to the defendants. The only written notice relied upon was given to them on Nov. 14, 1927, but the assignment was not executed until Nov. 18. Faced with this difficulty the plaintiff seeks to rely upon Order XVII, r. 3, which provides that in case of an assignment pendente lite the cause may be continued by the person to whom the title has devolved. Notwithstanding this rule, I am of opinion that the statutory requirements of express notice must be complied with, and that a tender of notice of the assignee as a party and an amended pleading is not in itself an express notice in writing within the meaning of s. 136; it is at most an indirect and adjectival notice. The statute amends the common law by giving the assignee a legal title and must be strictly complied with, though Order XVII, r. 3, operates to permit such express notice to be given pendente lite.

The second obstacle in the way of the plaintiff to establish his legal title to sue is as follows. I do not propose to review the evidence, but, in my opinion, the result of the tortuous transactions between Mr. Valsamis and his firm was that the firm never became more than pledgees of his goods to them to the extent of £4,000, his contribution owing to the capital of the firm. I think that the insured goods were bought by Valsamis himself, that the legal ownership remained in him, and that they were never transferred to the firm at all. The later invoices showing the goods in the possession of the firm clearly do not relate to any actual legal assignment of the goods or delivery of them from Valsamis to the firm. It follows that the interest of the firm is limited, in any event, to £4,000 as security, and as the declared interest was £8,000 I do not think that, in any event, they were in a position to assign more than £4,000, that is, 50 per cent. of the value, as mortgagees, for that was the full extent of their interest either in equity or in law. On this view it is immaterial whether Constantinou, Valsamis & Co. actually recover the £4,000 pledged or less. On any view of the value, the partnership were never interested as pledgees in more than one-half of the value of the goods whatever it was. At most they had only a moiety of the interest.

These conclusions operate to non-suit the plaintiff, but had I to consider the case on merits I should have arrived at the same result, that the plaintiff fails.

By s. 16 (3) of the Marine Insurance Act, 1906, it is provided that:

> "In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole."

As the policy here under consideration is an open policy, it becomes necessary for the plaintiff to prove the prime cost of the goods. This prime cost it is sought to prove by adducing as evidence certain invoice prices which are said to be the prices which the assignors of the policy paid for the goods. I have come to the conclusion that these invoices have no evidential value for the reasons stated by SCRUTTON, L.J., which it is unnecessary for me to repeat. In these circumstances the only evidence of value which exists is that contained in the Customs declaration of June 11, 1921, in which the goods are said to be worth £250. [The lord justice then referred in detail to the evidence relating to and purporting to explain this declaration, and proceeded:] While I do not find it necessary to decide whether the Customs declaration was or was not a true declaration of value, I can find no evidence to support the claim of the plaintiff that the value was more than that declared to the Customs, and I take the £250 as the highest value which the plaintiffs have proved. It seems to me, even assuming that there was corruption among Customs officials, extremely undesirable that the plaintiff should be allowed to set up his own assignor's fraud as a means to escape the declaration of value which the assignor made in accordance with the laws of the country from which the goods were exported, and I see no sufficient reason to make the assumption. The misrepresentation that the goods were worth £8,000, when in fact they were worth, as I find, at any rate not more than £250, is an over-valuation so gross that it is calculated to influence and must in fact have influenced the underwriters in taking the risk. This misrepresentation, unlike the cases of concealment and fraud, is apparent on the face of the documents, and, if I am wrong on the technical question of assignment, I hold that under s. 20 of the 1906 Act, the underwriters were entitled to avoid the contract for an untrue material representation. That is to say, I find the value which was declared at £8,000 to have been in fact £250 and no more.

I agree, however, with my brothers that the allegation of concealment and fraud must fail. The underwriters have not proved that they were led to act upon any misrepresentation. It is not proved that their agent was unacquainted with the fall in the value of cotton goods at the time of shipment, nor is it proved that he did not know the true circumstances of the history of the invoices and other transactions relied upon. He who avers concealment or fraud must prove it and that it induced the results complained of, and in the present case such latter proof is wholly lacking.

I hold that this appeal must succeed, because the plaintiff has no title to sue, or alternatively, has so over-valued his goods as to entitle the defendants to avoid the contract.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Parker, Garrett & Co.*; *Thomas Cooper & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WIRRAL ESTATES, LTD. *v.* SHAW

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), March 7, 8, 1932]

[Reported [1932] 2 K.B. 247; 101 L.J.K.B. 370; 147 L.T. 87;
96 J.P. 143; 48 T.L.R. 281; 76 Sol. Jo. 185; 30 L.G.R. 171]

Rent Restriction—Crown property—Purchase by private person of freehold subject to tenancy—Termination of tenancy—Creation of new tenancy—Revival of control.

Property of the Crown is not subject to the Rent Restrictions Acts, but that immunity is lost where the private purchaser of the freehold from the Crown subject to a tenancy has determined that tenancy and created a new tenancy. On the creation of the new tenancy the protection given to the tenant by the Acts revives.

Notes. See now, as to rent restriction generally, the Rent Act, 1957, and as to the position of sub-tenants, see Crown Lessees (Protection of Sub-Tenants) Act, 1952. For these Acts see 37 HALSBURY'S STATUTES (2nd Edn.) 165 and ibid., vol. 32, 394. For cases see DIGEST Supps., tit. Landlord and Tenant, cases 7028a et seq.

Applied: *Clark* v. *Mead* (1933), 49 T.L.R. 433. Explained: *Wheeler* v. *Wirral Estates, Ltd.*, [1935] 1 K.B. 294. Considered: *Rudler* v. *Franks* (1947), 176 L.T. 326. Followed: *County of London Territorial and Auxiliary Forces Assocn.* v. *Nichols*, [1948] 2 All E.R. 432. Referred to: *A.-G.* v. *Hancock*, [1940] 1 All E.R. 32.

Cases referred to:

(1) *Clark* v. *Downes*, *Clark* v. *Mawby* (1931), 145 L.T. 20; 29 L.G.R. 571, D.C.; Digest Supp.

(2) *Lyon* v. *Reed* (1844), 13 M. & W. 285; 13 L.J.Ex. 377; 3 L.T.O.S. 302; 8 Jur. 762; 153 E.R. 118; 31 Digest (Repl.) 570, *6911.*

(3) *Nickells* v. *Atherstone* (1847), 10 Q.B. 944; 116 E.R. 358; sub nom. *Nicholls* v. *Atherstone*, 16 L.J.Q.B. 371; 11 Jur. 778; 31 Digest (Repl.) 582, *7028.*

(4) *Perry* v. *Eames*, [1891] 1 Ch. 658; 60 L.J.Ch. 345; 64 L.T. 438; 39 W.R. 602; 7 T.L.R. 297; 19 Digest 63, *358.*

Appeal by the landlords, Wirral Estates, Ltd., from an order of the Divisional Court.

Chappell, K.C., *W. E. P. Done*, and *G. Russell Vick* for the landlords.

Doughty, K.C., and *Salter Nichols* for the tenant (the respondent).

LORD HANWORTH, M.R.—The argument in this case has ranged over a wide field, but the point which has to be decided is a short and narrow one.

In September, 1916, the Crown were in possession of certain property at Eltham on which some houses had been built. I gather that they were put up for the purposes of the munition workers who were concentrated in that area. On Sept. 4, No. 38, Allenwood-road was let by the Crown to one McCardie at a sum of 9s. 6d. per week. On Sept. 15, 1919, the same house was let to the present tenant, Shaw, at 7s. 5d. per week. The occupation at the time was one under, I suppose, the Defence of the Realm Acts, and at that time it was not certain how long the Crown would continue its occupation. On July 16, 1920, by an indenture of that date, there was a sale of the freehold of the land to the Woolwich Corporation. In October, 1924, the Crown bought the freehold, and it appears that from and after Oct. 3, 1924, the proprietors were the Commissioners of His Majesty's Works and Public Buildings. On Aug. 13, 1928, an agreement was entered into for the purchase of the property by the present landlords from the Crown, and on Oct. 1, 1928, there was a conveyance of the parcel from the Crown to the present landlords.

The tenant, Shaw, had been in possession from 1919, although the terms of his tenancy had varied. There had been an increase in rent on Feb. 25, 1921, by a sum of 1s. 7d. per week. On June 1, 1929, a notice was served upon him by the present landlords, which was in these terms:

"We hereby give you notice to quit and deliver up to us as authorised agents on the tenth day of June next the house and premises situate at 38, Allenwood-road,

> which you now hold of us as a weekly tenant or in the alternative take notice that we intend to increase the rent of 7s. 5d. per week to 10s. 6d. per week."

The tenant responded to that notice; instead of giving up possession, he agreed, continued in possession, and paid 10s. 6d. rent. It is said that at that time both parties supposed that the tenancy was one to which the Rent Restrictions Acts applied, but the fact was that the tenant continued in possession, and he paid his rent at the advanced sum. Later, the landlords came to the conclusion that it was doubtful whether or not this tenancy was one to which the Rent Restrictions Acts applied; and so on April 30, 1931, they served notice to quit on the basis that the tenant was in possession under what has been called a tenancy at common law—a common law tenancy. The expiry of that notice would be on May 11, 1931. Shaw did not give up possession, and on May 22, 1931, the landlords issued a plaint against him claiming to be entitled to recover possession of the premises, No. 38, Allenwood-road, on the ground that the tenancy had been determined by notice to quit.

The hearing took place on July 1 last year: judgment was reserved and was given on July 29. Under that judgment the learned judge, who very carefully considered the matter, came to the conclusion that, if the Rent Restrictions Acts did apply, possession could not be recovered from Shaw, but by a certain interpretation which he gave to a passage in ROMER, L.J.'s judgment in *Clark* v. *Downes* (1), he came to the conclusion that the property was one which was still under the ægis of the Crown, and, inasmuch as the Crown is not bound by the Rent Restrictions Acts, those Acts could not be applied or adduced by Shaw as a defence for him to rely upon, and thus that the order ought to go for possession.

The matter came before the Divisional Court (TALBOT and MACNAGHTEN, JJ.) on Jan. 20 last. They did not take the same view as the county court judge had felt compelled to do of *Clark* v. *Downes* (1). They held that there was a tenancy to which the Rent Restrictions Acts did apply and that the Acts were available to the tenant. They reversed the judgment of the county court judge and held that the order for possession ought not to go. From that judgment an appeal is taken to this court.

A good deal has turned in this court upon the question of the actual condition of the tenancy. What was the tenancy? Was it a common law tenancy, or was it a tenancy to which the Rent Restrictions Acts applied? Be it remembered that from and after October, 1928, the landlords were the owners of the premises, and the Crown had had nothing to do with the property. It is important, I think, to ascertain what were the facts as found by the county court judge. It has been claimed on behalf of the tenant that when the notice of June 1, 1929, was served upon him—a notice which is in the alternative form; either deliver up possession or pay 3s. 1d. a week increase of rent—when that notice had been given and the tenant responded, although they might not have known what their position was, in fact a new tenancy was created between the parties. Whether or not a new tenancy is created by an alteration in the terms of an existing tenancy is a question of fact. A small alteration, such as the abandonment of a single field out of a farm holding of a large number of acres at a reduction of a small sum in rent may make no difference, and the same holds good where there is either an increased rent or a decreased rent. In both cases where there is an alteration there is evidence of a new tenancy, with the consequence that there would be a surrender of the old tenancy, for there could not be a new tenancy created between the parties except on the basis that there had been a surrender in law of the old tenancy.

When one turns to the judgment of the county court judge his opening words are these:

> "This is an action brought by the owners of an estate at Eltham, on which are a large number of small dwelling-houses, against one of their tenants, to recover possession of the house he occupies on the ground that his tenancy has been duly determined by notice to quit. The house is primâ facie within the Rent Restrictions Acts, that is to say, it is a dwelling-house the value of which is within the limits laid down by those Acts; but it is contended that the plaintiffs are free from the restrictions imposed thereby because this house, together with the rest of the estate,

A was formerly the property of the Crown from whom the plaintiffs acquired it in 1928. There is no dispute about the facts, the only question involved being the question of law whether the fact that the house formerly belonged to the Crown deprives the defendant of the right to claim the protection of the Acts."

It is interesting to see the problem which at the time the judge thought was the one on which he had to pronounce judgment. When he comes to the questions of fact, he B makes this observation:

> "It is clear that the rent payable under a common law tenancy cannot be raised without first terminating the existing tenancy by a notice to quit."

It may be that he puts the proposition to which I have referred somewhat too widely, but I think he is referring to that proposition. He goes on:

> C "The increase of rent is an alteration of the terms of the tenancy, and when, after the expiration of a notice to quit, the tenant stays on and pays a higher rent, a new tenancy is created. Such a notice to quit was served in the present case, and the tenancy created by the Crown was, in my opinion, thereby determined."

It seems to me that the county court judge, who at the outset had said there was no dispute about the facts, definitely came to the conclusion after considering the matter D from the point of view of law, although he may have stated the direction which he gave to himself in law too widely, that in fact there was, after the response made to the notice to quit of June, 1929, a new tenancy created between the parties. It was not a mere alteration of a single term of the old tenancy; it was a new tenancy created between the parties, with a surrender of the old one. Counsel for the landlords has said that at that time they did not intend to effect a surrender in law, and that, unless there E was an intention to make a contract, there could not be a contract; but it must be remembered that a surrender in point of law is not a matter of intention, and for that the authority of PARKE, B., can be quoted in *Lyon* v. *Reed* (2) and *Nickells* v. *Atherstone* (3). What is effected is that by the operation of law a new relation is created in fact between the parties. In the present case I think that the county court judge intended to hold that a new tenancy had been created. He would not have ordered F the judgment for possession unless he had felt bound by the terms of some additional words which are appended by ROMER, L.J., to his judgment in *Clark* v. *Downes* (1). It appears to me that a careful examination of those words shows by their very terms that the lord justice was speaking of the reversion upon existing tenancies—tenancies which have been created by the Crown immune from the Rent Restriction Acts—and that it would be impossible to hold in respect of those tenancies that the Rent Restric- G tions Acts applied, for the position of the landlord and the tenant would have been in many respects modified by the application of those Acts. Therefore, so long as that tenancy continues which had been created apart from the Acts, so long must the immunity continue even though the reversion has passed from the Crown; and we have the authority of ROMER, L.J., now that he did not intend to convey what the learned county court judge thought he had intended.

H Really that disposes of the case, because if the words that are used by ROMER, L.J., are appropriate only to an existing tenancy—a tenancy created by the Crown—the immunity cannot be carried on when there has been a succession of owners of the reversion. There does not appear to be any means whereby the immunity of the Crown, which is clear from the Rent Restrictions Acts, because the Crown is not named in them, and for other reasons which I point out in my judgment in *Clark* v. *Downes* (1), I can enure, and it cannot be said that that immunity shall enure, to the benefit of subsequent purchasers who are in quite a different position after the tenancies created by the Crown have run their course or been determined by notice to quit.

I think it is quite plain that the Divisional Court considered the case on the basis of a new tenancy having been created. TALBOT, J., says this with reference to the claim that the immunity enured in favour of the subsequent owners after the Crown had sold the reversion:

> "I personally am not prepared in the absence of any authority to extend what possibly may in itself seem to be rather an extreme application of the doctrine with

> regard to the effect of statutes on the Crown. I am not prepared to give it such an extension as that, and I think when the new tenancy was granted and accepted in 1929 this house ceased to be the subject of what is really the prerogative exemption of the Crown."

It seems plain from those words that, just as the county court judge had dealt with the case on the basis of the new tenancy in 1929, so the parties when they were before the Divisional Court were also treating the basic facts as being that the house was under a new tenancy created in 1929. That being so, the only point that is open is, does that passage in the judgment of ROMER, L.J., intend to convey, and ought it to convey, that there is an immunity of the Crown which passes to subsequent owners of the reversion or not? As I have said, the words were never intended to convey such a meaning, nor are they to convey such a meaning. I can find no warrant, no authority, for that proposition. The immunity of the Crown depends on the Crown not having been named in the Act, and for the other reasons I have referred to. It is said it would be inconvenient if immunity did not prevail even though the tenancies had ceased to exist. We have had our attention called to *Perry* v. *Eames* (4), which, perhaps, may be said to be an illustration of the same principle to which ROMER, L.J., referred at the end of his judgment in *Clark* v. *Downes* (1); but neither that case nor any other case is sufficient to support a sort of immunity running with the land which is to enure in favour of subsequent purchasers after the tenancies created by the Crown have come to an end.

On all these grounds it appears to me that the county court judge misdirected himself finally as to the effect of *Clark* v. *Downes* (1). The judges in the Divisional Court were perfectly right, and therefore this appeal must be dismissed with costs.

LAWRENCE, L.J.—In my judgment, the decision of the Divisional Court in this case is right and ought to be affirmed.

In the first place, I agree that the question whether a new tenancy was or was not created in June, 1929, is not open in this court. The learned county court judge decided clearly that a new tenancy had been created. In the Divisional Court the whole of the argument proceeded on the assumption that that decision was right, and the point that no new tenancy had been created was not taken. In these circumstances I think it would be wrong to allow the landlords to raise that question in this court.

The next question which has to be considered is whether *Clark* v. *Downes* (1) covers a case where a new tenancy has been created. It is obvious that the actual decision in that case was only that the Rent Restrictions Acts did not apply to the case of a continuing tenancy, but it is said that the ratio decidendi covers the case of a new tenancy. A perusal of the judgments in that case has convinced me that this contention is not well-founded, and that the question whether that case was rightly or wrongly decided does not arise in the present case. I, therefore, prefer not to express any opinion upon that question one way or the other as I have not had an opportunity of hearing the arguments against the soundness of that decision, or of considering the cases upon which it was founded.

In these circumstances the only question on this appeal is whether the prerogative immunity of the Crown extends to a case where the purchaser of a freehold from the Crown subject to a tenancy has determined that tenancy and has created a new tenancy, and on this question, for the reasons given by TALBOT, J., and by the Master of the Rolls, I am clearly of opinion that the immunity does not extend to such a case. The appeal, therefore, fails and ought to be dismissed.

ROMER, L.J.—I agree with the Master of the Rolls and LAWRENCE, L.J., that in the circumstances it is not open to the landlords in this court to contend that the tenancy created by the Crown in 1919 is still in existence, and that a new tenancy was not created as a result of what took place in the month of June, 1929. On that part of the case I do not desire to add anything. I do, however, desire to say something about the decision of the Master of the Rolls and myself when sitting as a Divisional Court in *Clark* v. *Downes* (1), especially as to its applicability to the case that we now have to determine. The ground of the decision of the Master of the Rolls in that case, and the principal ground of my own decision, was this. It has been laid down that the Rent Restrictions Acts operate in rem and not in personam—in other words, that the Acts affect the status of a house. Section 12 (2) of the Act of 1920 defines the houses or parts of a house to which the Act is to apply, and the subsection says:

> "This Act shall apply to a house or a part of a house let as a separate dwelling where either the annual amount of the standard rent or the rateable value does not exceed the sums"

which are therein mentioned. It followed from that, that in order to ascertain whether the status of the house had been affected by the Act it was necessary to look at the date the house was let, and when the lease or tenancy was created which it was asserted affected the status of the house. It being admitted that the Crown was not bound by the terms of the Acts, we, as it seems to me, necessarily came to the conclusion that the tenancy created by the Crown had not affected the status of the house; and that is all that the Master of the Rolls decided and that I decided in the first part of my judgment. We were not, of course, considering in any way the question whether a tenancy subsequently created by the purchaser from the Crown would or would not have the effect of altering the status of the dwelling-house. But having so decided, I perhaps unnecessarily, and certainly I think in the circumstances, unfortunately, proceeded to give another reason which would have enabled me, and which did enable me, to arrive at the same conclusion, assuming that I could have accepted the argument put forward on behalf of the tenant. That argument was this. The house having been let at a rent which, apart from any question relating to the Crown, would have had the effect of altering the status of the house, the status was not altered, but that was so only during such portion of that tenancy as the reversion remained vested in the Crown; and I ventured to point out that if at the moment that the Crown sold the reversion of that tenancy the status of the house was altered, the result would be that the reversion in the hands of the Crown would necessarily be of smaller value than if we held that the status of the house was unaltered during the whole continuance of that tenancy.

I ventured in the argument of this case to give an example, and I venture to repeat it now. If the house at any time during the tenancy was affected by the Act, then, according to s. 1 of the Act, the moment the reversion became vested in a purchaser from the Crown he would not be able to recover the rent that the Crown had reserved so far as that rent exceeded the standard rate by more than is provided for by the Rent Restrictions Acts. The houses in the present case, for instance, were built by the Crown, and presumably let by the Crown at a rental which they thought would repay them sufficiently for the capital expended on the houses. If the effect of selling the reversion was that the purchaser of the reversion immediately after the assignment was unable to recover from the tenant the rent so far as it exceeded what would be permitted by the Acts, assuming the Acts applied, the value of the reversion to the Crown would be seriously affected. It could not sell the benefit of the tenancy it had created for as much as it could have sold the benefit of that tenancy if the Acts had never applied at all. I gave that as a reason for coming to the conclusion in that case, and on that reasoning we must hold that the purchaser obtained the benefit free from the restrictions imposed by the Acts. I found that on the principle which I stated there in giving my judgment—the principle which I think is a well-established one, namely, that, as I suggested then, the Acts not binding the Crown, it is the duty of the courts so to construe the Acts that the Crown and its property are in no way prejudicially affected by the Acts. That is a principle which was applied by CHITTY, J., in *Perry* v. *Eames* (4), to which our attention has been called. But while I think that that is a principle to be applied to the Rent Restrictions Acts and to other Acts of Parliament, it does not apply here, and for the sufficient reason that, having regard to the Rent and Mortgage Interest Restrictions Act, 1923, the purchaser of the reversion was in a position to avoid the Rent Restrictions Acts ever applying to the property which he had bought. He had only to determine the tenancy created by the Crown and enter into possession, and had he done so, then, as I understand s. 1 of the Act of 1923, and the decisions which have been given upon it, any subsequent tenancy created by him would not have the effect of altering the status of the house and bringing it within the operation of the Rent Restriction Acts.

It is said that one ought to disregard the Act of 1923 and merely construe the Act of 1920. I do not take that view. The Act of 1923 and the Act of 1920 have now to be read as one Act, and that one Act is the Act which governs such matters as we have to consider here. Therefore, in considering whether the creation of a new tenancy by the purchaser from the Crown does or does not affect the status of the house, one must necessarily bear in mind that, whether it does or whether it does not, cannot in any way have affected, or ought not in any way to have affected, the value of the reversion on the existing lease while it was in the possession of the Crown. They would sell it for no more and no less whether we hold that the effect of the new tenancy is to affect the status of the house or whether we come to the opposite conclusion.

For these reasons, while in no way departing from the principle which I then stated, and which I still venture to think is a correct principle, the principle, as it seems to me, has no application to the present case. For these reasons I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodroffes*; *Schultess-Young, Warren & Bird.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re WHEAT

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), July 13, 14, 29, 1932]

[Reported [1932] 2 K.B. 716; 101 L.J.K.B. 720; 147 L.T. 437; 96 J.P. 399; 48 T.L.R. 675; 30 L.G.R. 396; 29 Cox, C.C. 535]

Husband and wife—Maintenance—Enforcement of order of Dominion court—Defence to summons—Ground of defence not included in statement transmitted to Secretary of State.

The effect of s. 4 (3) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, is to make the statement, transmitted to the Secretary of State under s. 4 (1) of the Act, of the grounds on which a provisional maintenance order made by a court in a Dominion might have been opposed conclusive evidence that the grounds stated therein are grounds on which objection might have been taken, but it does not confine to those grounds the possible defences of a husband called on to show cause why a provisional order should not be confirmed. In the present case the husband was not precluded from raising before the English court the defence of lack of jurisdiction in the Dominion court although that ground of defence was not included in the statement transmitted under s. 4 (1), because objection to the jurisdiction would have been open to him on the original proceedings had he been a party thereto.

In 1909 a husband and a wife were married in South Africa. In 1921 they entered into a voluntary agreement for separation and maintenance at St. Helena, where they had been living immediately prior thereto. The wife then returned to South Africa, and the husband came to England and purchased a medical practice. Since that date he had carried on practice in England and had not resided or possessed any property in South Africa. In 1931 the wife obtained a provisional maintenance order at the magistrate's court at East London, South Africa, and a summons for the confirmation of that order was, under s. 4 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, taken out in England. Objection was taken on behalf of the husband that the magistrate's court in South Africa had no jurisdiction to make the order on the grounds (i) that the domicil of the parties was English; (ii) that no order could be made against a husband who was neither resident nor the owner of property in South Africa; (iii) that it was essential that desertion in South Africa should be proved, and there was no evidence of such desertion.

Held: the first two objections failed on the construction of the relevant South African statutes, and the last objection also failed as desertion was a continuing act, and there was evidence that the wife had been deserted and left without means of support in South Africa.

Notes. Considered: *Hague* v. *Hague*, [1937] 2 All E.R. 539; *Harris* v. *Harris*, [1949] 2 All E.R. 318.

As to the reciprocal enforcement of maintenance orders, see 12 HALSBURY'S LAWS (3rd Edn.) 502 et seq., and for cases, see 27 DIGEST (Repl.) 720, 721. For Maintenance Orders (Facilities for Enforcement) Act, 1920, see 11 HALSBURY'S STATUTES (2nd Edn.) 856.

Cases referred to:

(1) *Foord* v. *Foord* (1924), South African L.R.W.L.D. 81.

(2) *Heard* v. *Heard*, [1896] P. 188; 65 L.J.P. 111; 60 J.P. 426; 12 T.L.R. 386, D.C.; 27 Digest (Repl.) 711, *6787*.

(3) *Wilkinson* v. *Wilkinson* (1894), 58 J.P. 415; 27 Digest (Repl.) 696, *6655*.

Case Stated by a metropolitan magistrate.

On July 10, 1931, a provisional maintenance order was made by the magistrate's court at East London, Cape of Good Hope, South Africa, whereby the appellant, Ernest Godfrey Wheat, was ordered to pay to his wife, Alice Magdalene Wheat, the sum of £25 sterling per month. On Aug. 31, 1931, on the requisition of the Secretary of State, a summons was issued by a metropolitan magistrate, under s. 4 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920, calling upon the appellant to show cause why the above order should not be confirmed. On Nov. 11, 1931, the magistrate confirmed the order, subject to the modification that the appellant should pay to his wife a sum of £3 weekly instead of the sum specified in the order, and he directed that all payments should be made through the chief clerk of the Clerkenwell Police Court.

Upon the hearing of the summons it was proved or admitted that (a) At the date of the making of the provisional order Mrs. Wheat was residing in East London, Cape of Good Hope, and the appellant was residing at 24, Meredith-street, Clerkenwell. (b) The appellant was married to Mrs. Wheat in Germiston, Transvaal province, Union of South Africa, in 1909, and that there had been three children of the marriage, namely, a girl who died in infancy, and two sons, aged respectively twenty and seventeen years at the date of the hearing. (c) After the marriage the parties lived together in South Africa. After the first European war they lived together in St. Helena. A voluntary agreement for separation and maintenance was signed there in February, 1921. Thereafter Mrs. Wheat returned to South Africa and the parties had not lived together since. Shortly after Mrs. Wheat's return to South Africa the appellant came to England and he had been resident in England since, except for three short intervals. (d) In 1922 the appellant purchased a medical practice in London and had since been and was still carrying on practice in England. (e) In April, 1928, Mrs. Wheat came to England and went to the appellant's house. He refused to remain there with her or to live with her, and in 1929 she returned to South Africa. (f) Since the parties separated in St. Helena in 1921 the appellant had contributed from time to time to the support of Mrs. Wheat and/or the children of the marriage. (g) The appellant was born in Sheffield and his father was English. The appellant went in the first instance to South Africa to take up a hospital position. The appellant regarded himself as domiciled in England since 1923. (h) The appellant had not at the time of the hearing of the summons in

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East London, nor had had since that date, any property whatsoever in the Union of South Africa. (i) At the time of and since the date of the hearing of the proceedings before the magistrates at East London, Cape of Good Hope, the appellant had had no residence in South Africa. (j) In the evidence upon which the provisional order was made it was stated by Mrs. Wheat that she had obtained a maintenance order against the appellant on June 11, 1927, in the Westminster County Court, London. The magistrate was satisfied that that was incorrect and that what really happened was that on June 11, 1928, Mrs. Wheat obtained a judgment in the Westminster County Court against the appellant for £100, being arrears of moneys due to Mrs. Wheat under the voluntary agreement made in February, 1921, at St. Helena. The magistrate was further satisfied that at no time had Mrs. Wheat obtained any order for maintenance against the appellant other than the aforesaid provisional order made in the East London Court, Cape of Good Hope. (k) There was conflicting evidence as to the means of the parties. The magistrate accepted the appellant's evidence as to his means. Nothing turned upon that for the purposes of the present case, except that upon that evidence the magistrate modified the amount payable after confirming the provisional order. (l) Eight grounds upon which the making of the provisional order might have been opposed were stated in the "Statement in terms of s. 4 (3) of Act 15 of 1923." (m) For the appellant, Percival Frere Smith, a barrister-at-law of the Inner Temple, and an advocate of the Supreme Court of South Africa, gave evidence as to the law of South Africa in support of the contentions on behalf of the appellant, hereinafter set out.

On behalf of the appellant it was contended (a) that the statement of grounds under s. 4 (3) was conclusive that those grounds were grounds upon which the appellant might have opposed the making of the order if he had been present at the hearing, but was not exclusive of other grounds, and that, therefore, it was open to the appellant to submit the additional ground of excess of jurisdiction on the part of the magistrate's court at East London as a defence to the application for the confirmation of the provisional order. (b) that since 1923 the domicil of the appellant had been and still was England, and that, therefore, the domicil of Mrs. Wheat during the same period by virtue of her husband's domicil had been and still was England. (c) that there was no jurisdiction in any court in South Africa to make a maintenance order against a husband unless he had property in South Africa or his real home was there, or he was resident there: in support of this *Foord* v. *Foord* (1) was cited. (d) that there was no jurisdiction in the magistrate's court at East London to make the provisional order, inasmuch as Act No. 7 of 1895, gave power only to make orders against husbands or fathers who have within the territory of the Cape of Good Hope deserted or left destitute wives or children, and such power where the husband or father was absent from the Colony was given only in the cases of desertion. (e) that as the provisional order had been made without jurisdiction the magistrate had no power to make an order against the appellant under the Maintenance Orders (Facilities for Enforcement) Act, 1920, confirming the said provisional order.

The magistrate was of opinion (a) that it was open to the appellant to raise the defence of excess of jurisdiction by the magistrate's court at East London on the hearing before him of the application for the confirmation of the provisional order, although such grounds of defence were not included in the "statement of grounds" under s. 4 (3). (b) that the domicil of the parties did not affect the jurisdiction either to make the provisional order or to confirm it. (c) that, if there were any such general rule limiting the jurisdiction of a South African court, the effect of s. 4 of Act No. 15 of 1923 was to make an express exception to that rule, and when read with s. 4 of the Maintenance Order (Facilities for Enforcement) Act, 1920, the effect was to give power to make a provisional order in South Africa against a person not resident there, and to confirm such provisional order in this country against that person if he were resident there. Also, the magistrate was of opinion that *Foord* v. *Foord* (1) was not in point, having regard to the provisions above mentioned and Act No. 7 of 1895. (d) that the jurisdiction given by Act No. 7 of 1895 was not in the district in which a husband deserted or left his wife destitute, but in the district in which the wife (who had previously been deserted or left destitute whether in that district or elsewhere) resided at the time of making her complaint. (e) that the magistrate's court at East London had jurisdiction to make the provisional order, and that therefore the magistrate in England had jurisdiction under the provisions of s. 4 of the Maintenance Order (Facilities for Enforcement) Act, 1920, to confirm and modify such provisional order.

The questions upon which the opinion of the court was desired were:

(i) Whether the magistrate had jurisdiction to hear a ground of defence which was not included in the "statement of grounds" under s. 4 (3) of the Act, namely, that the magistrate's court at East London acted in excess of jurisdiction in making the provisional order;

(ii) If so, whether he came to a correct determination and decision upon that ground of defence; and

(iii) Whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

N. H. Moller for the appellant.

A. Cairns for the respondent.

Wilfrid Lewis as amicus curiæ on behalf of the Home Secretary.

Cur. adv. vult.

July 29.—The judgment of the court was read by

HUMPHREYS, J.—This is a Case Stated by a metropolitan magistrate, who desires the opinion of this court as to the correctness in point of law of his decision, upon a summons issued under the provisions of s. 4 (1) of the Maintenance Orders (Facilities for Enforcement) Act, 1920.

The summons called upon Ernest Godfrey Wheat (the appellant before us) to show cause why a provisional maintenance order made by the magistrate's court at East London, Cape of Good Hope, whereby the said Ernest Godfrey Wheat was ordered to pay a sum of £25 per month to his wife Alice Magdalene Wheat, should not be confirmed. The provisional order is dated July 10, 1931, and it purports to have been made in terms of s. 3, Act No. 7 of 1895 (Cape), read with s. 4 of Act No. 15 of 1923, by the assistant magistrate in the magistrate's court for the district of East London, Cape of Good Hope, Union of South Africa. The learned magistrate confirmed the provisional order with certain modifications which are not material to the points raised in the Case.

The facts as found by the magistrate, so far as material, are as follows. Ernest Godfrey Wheat, the appellant, is the husband of the said Alice Magdalene Wheat, their marriage having taken place in the Transvaal province of the Union of South Africa in 1909. In 1921, while the parties were living together in St. Helena, a voluntary agreement for separation and maintenance was executed. Thereafter Mrs. Wheat returned to South Africa, and the parties have not lived together since that date. In 1922 the husband, who is English by birth and parentage and a doctor by profession, purchased a medical practice in London, and has since that date resided in England. In April, 1928, the wife came to England and went to her husband's house in London. The husband refused to live with her. In June, 1928, the wife obtained a judgment in the Westminster County Court against her husband for £100, being arrears of moneys due to her under the voluntary agreement made in 1921 in St. Helena. The wife then returned to South Africa, and at the date of the making of the provisional order she was residing in East London, Cape of Good Hope. At that date the husband was residing at Clerkenwell, London, England. Upon the hearing of the summons it was argued on behalf of the husband that the provisional order was made without jurisdiction. Three points were taken: (i) that the jurisdiction of the court at East London depended upon the domicil of the parties which, it was contended, was English; (ii) that there was no jurisdiction in South Africa to make a maintenance order against a husband who was not resident there unless he had property there, and *Foord* v. *Foord* (1) was cited in support of this contention; (iii) that it was essential that desertion should be proved to have taken place within the territory of the Cape of Good Hope and that there was no evidence of such desertion. The magistrate overruled all the objections, and confirmed the provisional order.

In our opinion, the magistrate was right in holding that the provisional order was not made without jurisdiction. Act No. 7 of 1895 of the Cape of Good Hope is entitled "The Deserted Wives and Children's Protection Act," and is expressed to be

> "An Act for the prevention of destitution and to make provision for the relief of wives and families deserted and left destitute."

Section 2 enacts:

> "When any husband unlawfully deserts his wife or leaves her without means of support . . . if complaint thereof be made on oath to the resident magistrate of the district in which such wife . . . shall reside . . . such resident magistrate may issue his summons to such husband . . . to show cause why he should not support his wife."

The Act proceeds to empower the magistrate in a proper case to order the husband to make periodical payments towards the maintenance of his wife. In the case of a husband, however, who did not attend the hearing of the summons, such order could only be made upon proof of service of the summons upon him, which might be

> "in cases of desertion where the husband was absent from the colony [by] publication in the 'Gazette' or in some newspaper circulating at any place in South Africa where the magistrate shall have reason to suppose that such husband . . . resides or is."

No provision was made at that date for dealing with the case of a husband who was not in South Africa, and the remaining sections of the Act show that its operation was and was intended to be confined to South Africa.

In 1920 the Maintenance Orders (Facilities for Enforcement) Act was passed. The scope of that Act may be sufficiently gathered from the full title, which is

> "An Act to facilitate the enforcement in England and Ireland of maintenance orders made in other parts of His Majesty's Dominions and Protectorates and vice versa."

Section 12 of that Act provides in effect that it shall extend to such parts of His Majesty's Dominions outside the United Kingdom as have made reciprocal provisions for the enforcement of maintenance orders made in England or Ireland. In 1923 the legislature of the Union of South Africa enacted such reciprocal provisions by Act No. 15, and s. 4 of that Act enables a magistrate's court in the Union to which application is made for a maintenance order against a person resident in England to make in the absence of that person,

> "any such order as it might have made if a summons had been duly served on that person and he had failed to appear at the hearing,"

but provides that such order shall be provisional only and shall have no effect until confirmed by a competent court in England.

This Act affords no guide as to the jurisdiction of a magistrate's court to make a maintenance order in any particular case, and we are thrown back upon the language of Act No. 7 of 1895 to ascertain whether the order in this case is one which the court "might have made" under that Act. A consideration of those Acts makes it apparent that the domicil of the parties does not in any way affect the jurisdiction of a resident magistrate to make such a provisional order, nor is the residence of the husband in England any bar to the making of such an order. *Foord* v. *Foord* (1) is not an authority for the proposition in support of which it was cited. In that case a wife who was suing for divorce applied to the court for alimony pendente lite; the application was refused on various grounds, none of which has any relation to an application for maintenance under the Act of 1895. The first two points raised before the learned magistrate on behalf of the appellant therefore fail, and were rightly overruled. Upon the third point the opinion of the learned magistrate is stated in the Case as follows:

> "That the jurisdiction given by Act No. 7 of 1895 is not in the district in which a husband deserts or leaves his wife destitute, but in the district in which the wife

> (who has previously been deserted or left destitute whether in that district or elsewhere) resides at the time of making her complaint."

This court must not be taken to assent to that proposition of law in the form in which it is expressed, but, in our judgment, the decision of the learned magistrate may be supported on other grounds.

Counsel who argued the case in support of the magistrate's decision submitted that there was evidence that the wife was deserted and left without means of support in East London. We think this is so. There can be no doubt that desertion is a continuing act. Many authorities could be quoted in support of that view, but it is sufficient to refer to *Heard* v. *Heard* (2) ([1896] P. at p. 190) and to the judgment of Sir Francis Jeune, P., in that case, a judgment in which Gorell Barnes, J., entirely agreed. It is desirable I should first read the headnote of the case:

> "For the purpose of proceedings under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, the desertion of a married woman by her husband is a continuing act; an application by the wife for an order under that section need not, therefore, be made within six months of the commencement of the desertion."

This is the judgment of the President:

> "In this case the husband left the wife more than six months before the summons was taken out against him, and the question is whether in consequence the proceeding is barred by the limitation of time imposed by the Summary Jurisdiction Acts, in accordance with which applications under the Summary Jurisdiction (Married Women) Act, 1895 must be made; or, in other words, whether desertion is a continuing act within the meaning of s. 4 of the last-mentioned Act. It is quite true that the desertion of a wife by her husband—that is to say, his leaving her against her will, with the intention of not returning—may be considered as an act complete in itself. But it is equally true that, so long as a husband remains absent, he continues to desert his wife, and desertion may in this way be considered as a continuing act."

In the course of that judgment reference was made to *Wilkinson* v. *Wilkinson* (3) decided in this court. It would be useful to read a few lines from the judgment of Day, J., in that case. The court consisted of Lord Coleridge, C.J., and Day, J. In the course of his judgment Day, J., observed as follows:

> "The mistake is in assuming that desertion is a specific act, whereas it is more proper to describe it as a course of conduct continuing over a considerable period."

It is further to be observed that the words of the statute in the present case are "deserts his wife or leaves her without means of support." We have not been supplied with a copy of the deposition of the wife made in East London which was before the learned magistrate who stated this Case, but we are bound to assume, in the absence of any suggestion to the contrary, that there was evidence before the magistrate who made the provisional order that the wife, who had been deserted in England, was still being deserted and was left without means of support by her husband in the place where she was residing at the time when the provisional order was made.

That disposes of the appeal in this case, but it is desirable to refer to a question raised in the case by the learned magistrate which was not argued before us. The question arises upon the language of s. 4 (3) of the Maintenance Orders (Facilities for Enforcement) Act, 1920. Subsection (1) of s. 4 provides:

> "Where a maintenance order has been made by a court in a part of His Majesty's dominions outside the United Kingdom to which this Act extends, and the order is provisional only and has no effect unless and until confirmed by a court of summary jurisdiction in England or Ireland, and a certified copy of the order, together with the depositions of witnesses and a statement of the grounds on which the order might have been opposed has been transmitted to the Secretary of State, and it appears to the Secretary of State that the person against whom the order was made is resident in England or Ireland, the Secretary of State may send the said

> documents to the prescribed officer of a court of summary jurisdiction, with a requisition that a summons be issued calling upon the person to show cause why that order should not be confirmed, and upon receipt of such documents and requisition the court shall issue such a summons and cause it to be served upon such person." A

It was on the hearing of the summons under that section that this question arose. Subsection (3) provides as follows: B

> "At the hearing it shall be open to the person on whom the summons was served to raise any defence which he might have raised in the original proceedings had he been a party thereto, but no other defence, and the certificate from the court which made the provisional order stating the grounds on which the making of the order might have been opposed if the person against whom the order was made had been a party to the proceedings shall be conclusive evidence that those grounds are grounds on which objection may be taken." C

The learned magistrate asks this court to say whether he was right in holding that the above provisions did not preclude the husband from raising the defence of want of jurisdiction in the court which made the provisional order, although such ground of defence was not included in the certificate of grounds on which the making of the provisional order might have been opposed. D

In our opinion, he was plainly right in so holding. The subsection makes the certificate conclusive evidence that the grounds stated therein are grounds upon which objection may be taken, but does not confine the possible objections to those grounds. The only limitation upon the objections which may be raised by the person opposing the confirmation of the order is that the objection must be one which would have been open E to him upon the original proceedings had he been a party to them. Objection to the jurisdiction of the court would clearly have been open to the husband upon the original proceedings, and that objection was therefore open to him on the proceedings before the learned magistrate. The appeal, therefore, must be dismissed.

Appeal dismissed.

Solicitors: *Houseman & Co.*; *F. H. Adams*; *Treasury Solicitor.* F

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

WILKINS *v.* LEIGHTON

[CHANCERY DIVISION (Luxmoore, J.), March 3, 4, 8, 1932]

[Reported [1932] 2 Ch. 106; 101 L.J.Ch. 385; 147 L.T. 495;
76 Sol. Jo. 232]

Nuisance—Adjoining premises—Damage to boundary retaining wall by weight of house—Liability of occupier—Need of knowledge of nuisance.

The rule in *Rylands* v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, that a person who brings on his land and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and, if he does not do so, is primâ facie liable for all the damage which is the natural consequence of its escape does not apply to anything brought on the land in the course of the normal use of the land. Therefore, where the weight of a newly-erected house caused to collapse, a retaining wall which separated the land on which the house was built from the adjacent land, the owner of the newly-erected house was held not to be liable for the damage to the retaining wall.

St. Anne's Well Brewery Co. v. *Roberts* (2) (1928), 140 L.T. 1, applied.

The occupier of land is not liable for a nuisance thereon if he did not create the nuisance, unless, knowing of the nuisance, or being in such a position that he ought with reasonable care to have known of it, he allows it to continue.

Barker v. *Herbert* (3), [1911] 2 K.B. 633, applied.

Notes. Referred to: *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349.

As to injury to property by nuisance, see 24 HALSBURY'S LAWS (2nd Edn.) 42, and for cases see 36 DIGEST (Repl.) 281 et seq.

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1; 92 J.P. 180; 44 T.L.R. 703; 26 L.G.R. 638, C.A.; 36 Digest (Repl.) 292, *391*.

(3) *Barker* v. *Herbert*, [1911] 2 K.B. 633; 80 L.J.K.B. 1329; 105 L.T. 349; 75 J.P. 481; 27 T.L.R. 488; 9 L.G.R. 1083, C.A.; 36 Digest (Repl.) 297, *419*.

(4) *Ilford Urban District Council* v. *Beal*, [1925] 1 K.B. 671; 94 L.J.K.B. 402; 133 L.T. 303; 89 J.P. 77; 41 T.L.R. 317; 23 L.G.R. 260; 36 Digest (Repl.) 294, *407*.

(5) *A.-G.* v. *Cory Bros. & Co., Ltd.*, [1921] 1 A.C. 521; 90 L.J.Ch. 221; 125 L.T. 98; 85 J.P. 129; 37 T.L.R. 343; 194 L.G.R. 145, H.L.; 36 Digest (Repl.) 285, *346*.

(6) *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex.D. 5; 48 L.J.Q.B. 109; 39 L.T. 355; 27 W.R. 95; 2 Digest 65, *412*.

(7) *Hoare & Co.* v. *McAlpine*, [1923] 1 Ch. 167; 92 L.J.Ch. 81; 128 L.T. 526; 39 T.L.R. 97; 67 Sol. Jo. 146; 36 Digest (Repl.) 292, *385*.

(8) *Middleton* v. *Humphries* (1913), 47 I.L.T. 160; 36 Digest (Repl.) 329, **238*.

(9) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 36 Digest (Repl.) 256, *67*.

(10) *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; 35 L.T. 639; 42 J.P. 116, H.L.; 34 Digest 725, *1071*.

Action for a declaration that the defendant is bound to erect a wall or other sufficient works to prevent the land or buildings in his possession at "Brown Eaves," Michelgrove Road, Boscombe, from encroaching or subsiding upon or injuring the plaintiff's land adjacent thereto and to indemnify the plaintiff against all damage, expense or loss incurred by the plaintiff as a result of such encroachment, subsidence or injury, and for an injunction to restrain the defendants or either of them from suffering or causing such encroachment, subsidence or injury; for an order that the defendants or either of them should forthwith erect a wall and take all necessary steps to prevent such encroachment, subsidence or injury from taking place and to repair all damage thereby caused; and for damages for trespass and nuisance.

The following statement of the facts is taken from the judgment:

"The plaintiff is the owner of a house called Aberdare Hall, Lea Road, Boscombe. It was built on a natural slope about the year 1888. When it was built the ground on the east side was excavated to a depth of thirteen feet, and in this way a miniature cliff has been formed on the boundary of the property. The geological formation consists of strata of mixed sand and gravel. There is little tendency for the land to slip except where there has been weathering. To prevent the weathering of the face of this miniature cliff a wall some seventy feet long and thirteen feet high was built by the owner of Aberdare Hall. In 1925 the land on the east side of Aberdare Hall was mostly waste, but in that year the owner, a Mr. McArdle, was minded to build on it, and he employed an architect to design a house for him. The house called Brown Eaves was then erected. On the south-west side of this plot there was no artificial support for the house except the wall to which I have referred. A sun parlour was built (about this time) at Aberdare Hall. The house built on the east of the plaintiff's property was completed in 1926, and was purchased by the defendant Mrs. Leighton. At that time a Mrs. Ward was the owner of Aberdare Hall, and she had erected a high wattle fence between substantial posts embedded in the ground of Aberdare Hall. The highest part of this wattle fence was at the end of the wall nearest the south-east corner of Aberdare Hall; further down it was some seven feet or eight feet lower. In 1927 the plaintiff purchased Aberdare Hall, and in 1928 a portion of the wall fell—that to which the lower end of the wattle fence was attached, and it fell for a distance of about twenty feet. I find as a fact that this fall was due to the effect of the south-westerly gales on the wattle fencing. I have had a clear account of what was done when the wall was repaired; it was re-built and re-opened with cement mortar so as to leave it in a stronger condition than it had been before. As the plaintiff, Mr. Wilkins, said he was not going to re-erect the wattle fence, the defendant, Mrs. Leighton, had a light close wooden fence erected on her land to fence it off from Aberdare Hall. On Feb. 12, 1930, the plaintiff's wall fell over a distance of some seventy feet, and the plaintiff alleges that the fall was due to the pressure of the house Brown Eaves upon the superincumbent soil. He says that the defendant's land has, so to speak, overflowed on to his land as the result of the placing on the land of a burden which ought not to have been placed there. It is said that the collapse of the wall began at a point where the defendant's house, Brown Eaves, was causing the maximum thrust on the plaintiff's land. I have heard a considerable body of evidence, and I am satisfied that the wall in fact fell owing to the additional thrust on it caused by the weight of the house, Brown Eaves, though it may have been affected to some extent by the effect of the south-westerly gales on the wattle fencing. The evidence satisfies me that, if the foundations of Brown Eaves had been carried down level with the garden of Aberdare Hall no additional strain would have been imposed on the wall."

J. D. Casswell for the plaintiff.—The building of Brown Eaves, on the land above the retaining wall, constituted a danger to the plaintiff's property: *Rylands* v. *Fletcher* (1); *Ilford Urban District Council* v. *Beal* (4); *Attorney-General* v. *Cory Bros., Ltd.* (5); *Crowhurst* v. *Amersham Burial Board* (6). The following cases were referred to: *Hoare & Co.* v. *McAlpine* (7), and *Middleton* v. *Humphries* (8).

A. Newman Hall for the defendants.—A man may do certain things on his land: *Bradford Corpn.* v. *Pickles* (9). The doctrine of *Rylands* v. *Fletcher* (1) does not apply. The case is covered by the decision in *St. Anne's Well Brewery Co.* v. *Roberts* (2), and *Attorney-General* v. *Cory Bros.* (5) does not apply. The defendants have caused no nuisance, and had no knowledge of its existence.

LUXMOORE, J., stated the facts and continued: On the assumption that the building of Brown Eaves was the cause of the collapse of the plaintiff's wall, the question is: Is the defendant liable to the plaintiff for the damage? It has been argued that he is liable on either one of two grounds: (a) that the case comes within the principle of *Rylands* v. *Fletcher* (1), and (b) on the ground of a common law nuisance. So far as I know, the rule in *Rylands* v. *Fletcher* (1) has never been applied to anything brought on the land in the course of the normal use of the land. In my judgment, the rule in *Rylands* v. *Fletcher* (1) does not apply. It was argued by counsel for the plaintiff that it was not a normal use of the land to build a house without carrying down the foundations so as to ensure the safety of neighbouring property, and he relied on *Ilford Urban District Council* v. *Beal* (4), where the plaintiff was held not liable for damage to a sewer, because he did not and could not have known of the existence of the sewer, but would have been held liable if he had known.

The conclusion to which I have come is one that I should have been bound by authority to come to, apart from my opinion, because of the decision of the Court of Appeal in *St. Anne's Well Brewery Co., Ltd.* v. *Roberts* (2). In that case the plaintiffs were the owners of an ancient inn, one side of which was bounded by the ancient city wall of Exeter, part of which was the property of the defendants. On either side of the fireplace in the kitchen of the inn recesses had at some time unknown been formed by means of excavations made in the wall. In 1927 a considerable portion of the wall belonging to the defendants collapsed and completely demolished the plaintiffs' inn. The court held that, as there had been no abnormal or unnatural use of the defendants' property and they were not occupiers of the wall when the damage took place, the doctrine of *Rylands* v. *Fletcher* (1) did not apply. The plaintiffs in that case sought to make the defendants liable, both on the doctrine of *Rylands* v. *Fletcher* (1), and also on the ground of a common law nuisance. SCRUTTON, L.J., on the first point said this (140 L.T. at p. 6):

> "The first point that I have mentioned will, of course, be relevant when we come to see what the exact position of the defendants is, namely, whether they are owners or occupiers. But there is another matter which seems to me of great importance. It has been frequently said that the doctrine of *Rylands* v. *Fletcher* (1) does not apply to what may be called the normal use of land. I will not put it in my own words, I will put it in the words of LORD CAIRNS, L.C., in *Rylands* v. *Fletcher* (1) (L.R. 3 H.L. at p. 338), who says:
>
>> 'My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place.'
>
> That passage about the normal use of land not only expresses an opinion of LORD CAIRNS, because in a later case of *Wilson* v. *Waddell* (10), where LORD BLACKBURN gave the judgment of the court, the facts were that the land in its ordinary condition drained in a particular way, and the water went in a particular way. The occupier of a coalfield excavated all the coal from the land, with the result that the water went in quite a different way on to the land of a different adjoining owner who said: Your land in its natural state sends its water to A. You have done something to the land which sends it to me, B. You are liable under the doctrine of *Rylands* v. *Fletcher* (1), LORD BLACKBURN said (2 App. Cas. at p. 99):
>
>> 'The general rule of law in both countries [England and Scotland] is that the owner of one piece of land has a right to use it in the natural course of user, unless in so doing he interferes with some right created either by law or contract; and as a branch of that law, the owner of the minerals has a right to take away the whole of the minerals in his land, for such is the natural course of the user of minerals.'
>
> Then he cites the passage from LORD CAIRNS, which I have read, to the effect that if, when that is done, or if using the land in the normal way, the water is diverted somewhere else, there is no cause of action by third parties for damage caused by

> the receipt of the water, because the owner, the occupier of the land, is only using it in the normal way." A

Further on the learned lord justice says (140 L.T. at p. 6):

> "One of the most normal uses of land, it appears to me, is to put buildings upon it; and if you put a building on the land and it falls, for two reasons—either because your adjoining owner has done something to the building to weaken it, or because B the natural operations of nature by the fall of rain weaken its foundations without your knowing it—and you cannot be down at the foundations all the time to see how they are getting on—there is no cause of action in the adjoining owner, who has, first, weakened your wall and then complained of its falling. For these reasons, without going into the whole doctrine of *Rylands* v. *Fletcher* (1), I think that the attempt to say that this is a case of that class fails." C

In my judgment, the decision of the Court of Appeal in *St. Anne's Well Brewery Co.* v. *Roberts* (2) on this point, which is binding on me, is indistinguishable from the present case. I come to the conclusion, therefore, that on the first point, that of *Rylands* v. *Fletcher* (1), the plaintiff fails.

On the second point, that of nuisance at common law, SCRUTTON, L.J., said in the *St. Anne's Well Case* that the only person who could be made liable for a nuisance on land D was the occupier, and that the plaintiff must prove knowledge by him of the existence of a nuisance. He proceeded (140 L.T. at p. 6):

> "Then the next line of attack was this: It is said, 'Anyhow, this wall falling was a nuisance.' I think it was correct to say that it was a nuisance and not a trespass, because neither the owner nor the occupier themselves threw this wall into the E plaintiffs' property; it fell into the plaintiffs' property from indirect causes, not by direct action of the owner or occupier of the plaintiffs' land, and therefore, I think, it is correct to treat it as a nuisance and not a trespass. . . . No doubt, the first question to decide—which also has a relevance with regard to the point about *Rylands* v. *Fletcher* (1), is: Who was the occupier of the wall?"

Having come to the conclusion that one Wilson was the occupier of the premises, he F goes on:

> "I think also it is clear law that the person liable for a nuisance on premises is certainly the occupier. And I think also that it has been established by authority binding on this court here, I refer to *Barker* v. *Herbert* (3), which has been followed by other cases in this court, that the occupier himself is not liable if he did not create the nuisance on the land he occupies unless—perhaps not even then—knowing of G the nuisance or being in such a position that he ought with reasonable care to have known of the nuisance, he allows it to continue. I refer to the passages in FLETCHER MOULTON, L.J.'s judgment in *Barker* v. *Herbert* (3) (105 L.T. at p. 354), and to the passage in FARWELL, L.J.'s judgment (at p. 355); and, therefore, if Wilson had been sued for nuisance, he being the occupier of this wall, which was the nuisance, I think the question to be determined in his case would have been: Did you know H that there was a nuisance? Ought you with the exercise of reasonable care to have known there was a nuisance? And if both those questions were answered in the negative there would have been no liability on the occupier."

To make the occupier liable the plaintiff must prove that he had knowledge of the existence of the nuisance.

In the present case there is no evidence to show that the defendant knew of the I existence of any nuisance or was guilty of any negligence. The action, therefore, fails, and I must dismiss it with costs.

Solicitors: *Bentleys*, for *Other & Manning*, Bournemouth; *James & James*, for *Oscar H. Whittingham*, Bournemouth.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

HARPER *v.* G. N. HADEN AND SONS, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 14, 17, November 14, 1932]

[Reported [1933] Ch. 298; 102 L.J.Ch. 6; 148 L.T. 303; 96 J.P. 525; 76 Sol. Jo. 849; 31 L.G.R. 18]

Nuisance—Highway—Temporary obstruction—Damage to owner of adjoining premises—Scaffolding or hoardings for building work—Liability of building owner.

A temporary obstruction to the use of the highway or the enjoyment of adjoining premises does not give rise to a legal remedy where it is reasonable in quantum and duration. Accordingly, the owner of a house adjoining the highway is entitled in the course of repairing or re-building his house to obstruct the highway by scaffolding or hoardings or by the carrying into the house of necessary material where those things are necessary for the carrying out of the work and the obstruction is no greater in degree or longer in duration than the necessity demands. But, if either of the limitations mentioned are exceeded so that a nuisance to the public is created, the obstruction is wrongful and an indictment to abate it will lie, and if an individual can establish (a) a particular injury to himself beyond that which is suffered by the rest of the public; (b) that the injury is directly and immediately the consequence of the wrongful act; (c) that the injury is of a substantial character and not fleeting or evanescent, he can bring an action and recover damages for the injury he has suffered.

Wilkes v. *Hungerford Market Co.* (1) (1835), 2 Bing. N.C. 281, and *Herring* v. *Metropolitan Board of Works* (2) (1865), 19 C.B.N.S. 510, not overruled.

Lingké v. *Christchurch Corpn.* (3), [1912] 3 K.B. 395, explained.

Per LAWRENCE, L.J. (in a case of obstruction in the metropolis): In view of the express terms of s. 122 of the Metropolis Management Act, 1855, in an action for damages for the obstruction the defendants could only justify the erection of any such scaffolding and hoarding by proving that they had first obtained a licence from the proper local authority for their erection and had complied with the conditions of such licence.

Notes. Considered: *Dwyer* v. *Mansfield*, [1946] 2 All E.R. 247; *Almeroth* v. *Chivers & Sons*, [1948] 1 All E.R. 53.

As to nuisance on the highway, see 16 HALSBURY'S LAWS (2nd Edn.) 354 et seq., and for cases, see 26 DIGEST 413 et seq.

Cases referred to:

(1) *Wilkes* v. *Hungerford Market Co.* (1835), 2 Bing. N.C. 281; 2 Scott, 446; 1 Hodg. 281; 5 L.J.C.P. 23; 132 E.R. 110; 26 Digest 453, *1684*.

(2) *Herring* v. *Metropolitan Board of Works* (1865), 19 C.B.N.S. 510; 34 L.J.M.C. 224; 144 E.R. 886; 11 Digest (Repl.) 151, *284*.

(3) *Lingké* v. *Christchurch Corpn.*, [1912] 3 K.B. 595; 82 L.J.K.B. 37; 107 L.T. 476; 76 J.P. 433; 28 T.L.R. 536; 56 Sol. Jo. 735; 10 L.G.R. 773, C.A.; 11 Digest (Repl.) 151, *285*.

(4) *Harrison* v. *Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409; 60 L.J.Ch. 630; 64 L.T. 864; 36 Digest (Repl.) 253, *46*.

(5) *R.* v. *Jones* (1812), 3 Camp. 230, N.P.; 26 Digest 423, *1414*.

(6) *A.-G.* v. *W. H. Smith & Sons* (1910), 103 L.T. 96; 74 J.P. 313; 26 T.L.R. 482; 8 L.G.R. 679; 36 Digest (Repl.) 252, *33*.

(7) *Hubert* v. *Groves* (1794), 1 Esp. 147; 26 Digest 453, *1690*.

(8) *Rose* v. *Miles* (1815), 4 M. & S. 101; 105 E.R. 773; 36 Digest (Repl.) 312, *601*.

(9) *Greasly* v. *Codling* (1824), 2 Bing. 263; 9 Moore, C.P. 489; 3 L.J.O.S.C.P. 262; 130 E.R. 307; 26 Digest 454, *1691*.

(10) *Ricket* v. *Metropolitan Rail. Co.* (1867), L.R. 2 H.L. 175; 36 L.J.Q.B. 205; 16 L.T. 542; 31 J.P. 484; 15 W.R. 937, H.L.; 11 Digest (Repl.) 150, *281*.

(11) *Benjamin* v. *Storr* (1874), L.R. 9 C.P. 400; 43 L.J.C.P. 162; 30 L.T. 362; 22 W.R. 631; 36 Digest (Repl.) 312, *598*.

(12) *Fritz* v. *Hobson* (1880), 14 Ch.D. 542; 49 L.J.Ch. 321; 42 L.T. 225; 28 W.R. 459; 24 Sol. Jo. 366; 36 Digest (Repl.) 254, *50*.

(13) *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8; 42 L.J.Ch. 122; 27 L.T. 569; 37 J.P. 100; 21 W.R. 129, L.C.; 36 Digest (Repl.) 259, *87*.

(14) *Beckett* v. *Midland Rail. Co.* (1867), L.R. 3 C.P. 82; 37 L.J.C.P. 11; 17 L.T. 499; 16 W.R. 221; 11 Digest (Repl.) 151, *287*.

(15) *Blundy Clark & Co., Ltd.* v. *London and North-Eastern Rail. Co.*, [1931] 2 K.B. 334; 100 L.J.K.B. 401; 145 L.T. 269; 20 Ry. & Can. Tr. Cas. 92, C.A.; Digest Supp.

(16) *Iveson* v. *Moore* (1699), 1 Ld. Raym. 486; Carth. 451; Comb. 480; 1 Com. 58; Holt, K.B. 10; 1 Salk. 15; Willes, 74, n.; 91 E.R. 1224; sub nom. *Jeveson* v. *Moor*, 12 Mod. Rep. 262; 36 Digest (Repl.) 312, *590*.

(17) *Harvey* v. *Truro Rural Council*, [1903] 2 Ch. 638; 72 L.J.Ch. 705; 89 L.T. 90; 68 J.P. 51; 52 W.R. 262; 19 T.L.R. 576; 1 L.G.R. 758; 36 Digest (Repl.) 321, *665*.

(18) *Higgs and Hill, Ltd.* v. *Stepney Borough Council*, [1914] 1 K.B. 505; 83 L.J.K.B. 294; 110 L.T. 377; 78 J.P. 134; 30 T.L.R. 198; 12 L.G.R. 395; 34 Digest 590, *100*.

Appeal by defendants from an order of BENNETT, J.

The facts are shortly stated in the headnote and are fully set out in the judgment of the Master of the Rolls.

W. P. Spens, K.C., and D. Lloyd Jenkins for the defendants.

Elliot Gorst and *V. Harrington* for the plaintiff.

Cur. adv. vult.

Nov. 14. The following judgments were read.

LORD HANWORTH, M.R.—This appeal raises a question which is rendered less easy of solution by reason of the decided cases.

The facts material to the point at issue lie in a narrow compass. The plaintiff and the defendants, who now appeal, occupy adjoining premises in Great Queen Street, Lincoln's Inn Fields. The plaintiff carries on upon his premises the business of a fruiterer and some of the custom which he enjoys is derived from casual purchasers who pass along Great Queen Street. In the early part of 1931 the defendants determined to add another floor to their premises. To do this work, it became necessary to erect a scaffolding, in part outside the defendants' premises and upon the highway, and also a hoarding and a gangway carrying the footway round the hoarding, to protect the ladders and those who were working upon the job, and those who passed on the highway. The licences to erect these obstructions to the highway were obtained from those concerned. The learned judge has found, as a fact, that the obstructions were not greater than were reasonably necessary for the purpose of carrying out the operations which the defendants set out and required to do, and also that they did not continue for a longer period of time than was reasonable for the purpose of enabling them to carry out and complete their alterations.

But the plaintiff also established to the satisfaction of the learned judge that his weekly takings were reduced by reason of these operations which rendered his premises less obvious to passers-by and that he thus suffered damage to an amount estimated at £150. The learned judge entered judgment for the plaintiff for that sum with the costs of the action. The defendants now appeal to this court to reverse this on the ground that, as the learned judge has found that the erection and obstructions were reasonable in quantum and duration, the plaintiff has not suffered any loss for which damages can be recovered from the defendants, but only such an inconvenience as he must put up with, occasioned by the reasonable conduct of the defendants upon their premises, not prolonged for an unreasonable space of time.

A long sequence of authorities and judicial pronouncements can be referred to which declare that many inconveniences of the kind in question in this action must be submitted to without there being a legal remedy in respect of them. Thus, the repairing of a house may necessarily cause inconvenience to the public using the highway abutting upon it and to the neighbours: *Harrison* v. *Southwark and Vauxhall Water Co.* (4) ([1891] 2 Ch. at pp. 413, 414); carts and wagons may be unloaded in proximity to premises other than those which are the destination of the goods; trenches in which are placed drains to connect with sewers may be opened. It is when the inconvenience is unreasonably prolonged that the public have a right to complain and the party may be indicted for a nuisance: see per Lord Ellenborough, in *R.* v. *Jones* (5); *A.-G.* v. *W. H. Smith & Son* (6). And in cases where an indictment for a nuisance would lie, as for obstructing a public way by the deposit of earth and rubbish, a party in an action on the case can only succeed if he can prove a special injury and grievance to himself: *Hubert* v. *Groves* (7); *Rose* v. *Miles* (8); *Greasly* v. *Codling* (9). That injury must be the direct, necessary, natural, and immediate consequence of the wrongful act: *Ricket* v. *Metropolitan Railway* (10). In *Wilkes* v. *Hungerford Market Co.* (1) a bookseller recovered the loss occasioned to his business by the diversion of customers from frequenting his shop during the time that the obstruction was unnecessary and unreasonable, but not for the time during which the obstruction was reasonable. The wrongful act was only during the former span; and it seems that the loss was treated as directly arising from the wrongful act, otherwise it would have been too remote: see per Lord Selborne, in *Ricket* v. *Metropolitan Railway* (10) (L.R. 2 H.L. at p. 188).

The above principles were affirmed and illustrated in *Herring* v. *Metropolitan Board of Works* (2) ((1865), 19 C.B.N.S. at p. 524). Willes, J., says:

> "It appears to me that, the construction of the hoarding being necessary for the due performance of the works by the board, and the obstruction not having been more than was necessary, or kept for an unreasonable time, it would give the appellant no cause of action, and consequently no claim for compensation under the Act. Upon that short ground I am of opinion that the decision of the magistrate was right, because damnum must mean cum, not sine, injuria. It would clearly be sine injuria to erect a hoarding to an extent and for a period not unreasonable. These temporary inconveniences must from time to time occur everywhere; and, if an action would lie against the Metropolitan Board of Works each time a sewer is opened for repair, the burthen would be intolerable. Individuals must be content to bear these small inconveniences in consideration of the general benefit to the public."

These cases establish the following propositions: (i) A temporary obstruction to the use of the highway or to the enjoyment of adjoining premises does not give rise to a legal remedy where such obstruction is reasonable in quantum and in duration. (ii) If either of those limitations is exceeded so that a nuisance to the public is created the obstruction is wrongful and an indictment to abate it will lie. (iii) If an individual can establish (a) a particular injury to himself beyond that which is suffered by the rest of the public; (b) that the injury is directly and immediately the consequence of the wrongful act; (c) that the injury is of a substantial character, not fleeting or evanescent, he can bring his action and recover damages for the injury he has suffered: see *Ricket* v. *Metropolitan Railway* (10) (L.R. 2 H.L. at p. 189); *Benjamin* v. *Storr* (11); *Fritz* v. *Hobson* (12) (14 Ch.D. at p. 555). These conditions mean that there must be a wrongful act in the sense that the user complained of was unreasonably exercised: *Fritz* v. *Hobson* (12) (14 Ch.D. at p. 554); something "exceptive and unreasonable": *Gaunt* v. *Fynney* (13) (L.R. 8 Ch. App. at p. 12); and an injury thereby directly caused to the plaintiff. In the present case the finding of the learned judge that the obstruction did not offend in quantum or duration, negatives any wrongful act and thus the plaintiff cannot recover.

But it is said that *Wilkes* v. *Hungerford Market Co.* (1) and *Herring* v. *Metropolitan Board of Works* (2) have been criticised in later cases and can no longer be regarded as sound in law. I turn, therefore, to examine them, though the words of Lord Selborne, in *Ricket* v. *Metropolitan Railway* (10) (L.R. 2 H.L. at p. 196) remain and are of higher authority:

> "I have satisfied myself that the temporary obstruction of the highway, which prevented the free passage of persons along it, and so incidentally interrupted the resort to the plaintiff's public house, would not have been the subject of an action at common law as an individual injury sustained by the plaintiff in error, distinguishing his case from that of the rest of the public. That, therefore, he altogether fails to bring himself within the general principle upon which a claim to compensation under the Acts in question has been determined to depend."

Lord Selborne also considered the interruption of persons who would have resorted to his house but for the obstruction of the highway too remote a claim for damage to be recoverable.

Lingké v. *Christchurch Corpn.* (3) is the case in which *Herring* v. *Metropolitan Board of Works* (2) was distinguished by two members of the Court of Appeal, and the third (Fletcher Moulton, L.J.) said that it should be treated as overruled. The facts of the case were somewhat unusual. The plaintiff was a furniture dealer, and the situation of her shop such that it was not possible to throw the soil, excavated for the purpose of laying a drain, upon any part of the roadway. The workmen were compelled to throw it against the plaintiff's house and shop, thereby stopping access to them. The plaintiff was deprived of the ordinary access to her premises for about three months, during which time, if she bought furniture it could not be delivered to her, and if she sold furniture, it could not be delivered to her customers. An arbitrator awarded her damages, but the county court and Divisional Court held that she could not recover in an action upon the award. The Court of Appeal reversed this decision. Vaughan Williams, L.J., expressly accepts the principle on which *Herring's Case* (2) was decided: "I adopt the principle. I accept it." He accepts *Ricket's Case* (10). But he holds that the facts of the case before him take it outside the principle that temporary inconveniences provide no legal injury.

> "The claimant has sustained injury beyond that which any of the people with houses abutting upon this highway have suffered."

It was the case of an exceptional and unreasonable impediment being caused to the plaintiff's premises. Buckley, L.J., held that the plaintiff was entitled to recover because by s. 308 of the [Public Health Act, 1875] the corporation was liable to make compensation in any case in which the exercise of the statutory powers resulted in a state of facts which, in the absence of the statutory powers, would give a cause of action. He does not quarrel with *Herring's Case* (2) as he understood the decision. Moulton, L.J.'s observations about *Herring's Case* are obiter. He gave his judgment upon the effect of s. 308, which gave compensation side by side with the statutory powers which justified the acts complained of, but upon terms, i.e., of paying compensation. I cannot accept that judgment as effective to destroy the principles which I have set out above which appear to me to be illustrated by a large number of authorities.

Some confusion arises in some of them because the claims made were in respect of works done under statutory authority with a special section providing for compensation in the cases therein indicated, or under statutes incorporating the Lands Clauses Act, of which s. 68 provides for compensation for injurious affection. In some other cases the damage claimed may well be considered too remote. But these cases cannot be used as setting aside or overruling the authorities to which I have referred for the propositions above stated. The disquisition of Willes, J., in *Beckett* v. *Midland Railway* (14), while he observes upon the various cases and points out some where the damage has been held too remote, affirms them. Finally, in *Blundy Clark & Co., Ltd.* v. *London and North-Eastern Rail. Co.* (15), the Court of Appeal held that a plaintiff who had suffered special and particular damage above that sustained by the public generally might recover for that damage, so far as it was occasioned by an unnecessary delay in effecting repairs to the lock which had collapsed, but not for the full time that elapsed between the collapse of the lock and its re-instatement. Greer, L.J., states expressly ([1931] 2 K.B. at p. 362), and I agree with him, that *Wilkes* v. *Hungerford Market Co.* (1) ought not to be considered to have been overruled. As I have pointed out above, the chief criticism directed against it is as to the remoteness of the damage, A not that there was no primâ facie right of action in respect of the injury suffered. The court went over the ground again and accepted the series of authorities of which *Iveson* v. *Moore* (16) and *Rose* v. *Miles* (8) are typical examples.

On these grounds I think that the decision in *Lingké's Case* (3) must be taken as depending upon its particular facts, and not as a bar to the current of authority which affirms that the plaintiff must prove that the defendant's act was wrongful, in the sense B that it was unnecessary, or unreasonable, and so unjustifiable. The judge has held otherwise upon the facts of the present case, and I think, therefore, that he ought not to have followed the opinion of MOULTON, L.J., in *Lingké's Case* (3), but to have given judgment for the defendants. The appeal must be allowed with costs here and below.

LAWRENCE, L.J.—The defendants are the tenants and occupiers of certain premises C which include the upper floors of a building on the north side of Great Queen Street in the metropolitan borough of Holborn. The plaintiff is the tenant and occupier of certain premises in the same building, consisting of a shop on the ground floor and a basement where he carries on the business of a fruiterer.

In the summer of 1931 the defendants decided to add another storey to their premises. Before beginning to construct the additional storey, the defendants, on Aug. 15, 1931, D erected along the whole of their frontage in Great Queen Street a tubular scaffolding resting on the footpath and also put up a wooden hoarding next door to the plaintiff's shop for the purpose of enclosing a space to be used during the alterations to their building for depositing bricks, rubbish, and other material brought down from or going up to the top of the building. This hoarding, which was 7 ft. high, extended across the footpath and for a distance of 9 ft. along the street; it had the usual platform and E handrail outside it for the convenience of the public. Before placing the scaffolding and hoarding on the footpath, the defendants had duly obtained the necessary licence for these erections from the district surveyor of the Holborn Borough Council (the proper authority to grant such a licence), and the plaintiff does not allege that any of the conditions of this licence have not been complied with by the defendants. The learned trial judge found that the scaffolding and hoarding were reasonably necessary for the F execution of the works, and that they did not cause any greater obstruction or remain for any longer period than was reasonably necessary. These matters, however, are under the special legislature hereinafter referred to for the consideration, not of the court, but of the local authority, who are charged with the statutory duty of determining those matters before granting the necessary licence and fixing its duration.

On Aug. 28, 1931, the plaintiff commenced this action for an injunction to restrain G the defendants from obstructing the footpath of Great Queen Street in the vicinity of his shop by scaffolding or otherwise and for damages for loss of custom caused by such obstruction. An application for an interlocutory injunction to restrain the defendants from maintaining the scaffolding and hoarding was refused, and the action then proceeded for trial on the question of damages. The plaintiff alleged that the obstruction of the footpath caused by the scaffolding and hoarding was an illegal obstruction of the H highway constituting a public nuisance and that he had suffered particular direct and substantial damages by reason of such illegal obstruction. The defendants denied that the obstruction was illegal, and further contended that in any event damages for loss of custom were too remote. The learned judge held that the obstruction was illegal, and that the plaintiff was entitled to maintain the action and awarded him £150 damages. The defendants appeal.

I In these circumstances, the first and main question which falls to be determined is whether the erection of the scaffolding and hoarding constituted an illegal obstruction of the street. Counsel on both sides have contended that this question ought to be decided by applying to the facts of this case certain well-established principles which may shortly be summarised as follows: A permanent obstruction erected in a highway without lawful authority is necessarily wrongful and constitutes a public nuisance at common law as it in fact operates as a withdrawal of part of the highway from the public. A temporary obstruction of the highway may or may not constitute a public nuisance according to circumstances. As a general rule, such an obstruction is wrongful and constitutes a public nuisance unless it is negligible in point of time or authorised by Parliament or occasioned in the reasonable and lawful user of the highway as a highway. Every wrongful obstruction of the highway (be it permanent or temporary) exposes the person answerable for it to civil as well as criminal process—in other words, it is actionable as well as indictable. The fact that the highway authority has given its consent to such an obstruction affords no defence as such consent cannot legalise that which is otherwise illegal: per JOYCE, J., in *Harvey* v. *Truro Rural Council* (17) ([1903] 2 Ch. at p. 645). A private individual can maintain an action in respect of a wrongful obstruction of the highway, but, in order to do so, he must establish that he has suffered some particular, direct and substantial loss or damage beyond what is suffered by him in common with all other members of the public affected by the nuisance.

In my opinion, however, the present case does not fall to be decided by applying these general principles. In my judgment, the plain and conclusive answer to the plaintiff's contention that the hoarding and scaffolding erected by the defendants in Great Queen Street constitute an illegal obstruction, and, therefore, a public nuisance, is that Parliament has long since recognised that an owner of property abutting upon a public street in the metropolis and other towns cannot exercise his undoubted right of building, repairing, or altering his house without (to some extent at least) obstructing and rendering inconvenient part of the street in front of his property, and has accordingly made special provision for regulating such obstructions with a view to public safety and convenience.

The relevant statutory provisions in the present case are contained in the Metropolis Management Act, 1855. Section 121 of that Act provides that every person who shall build or begin to build any building or wall or alter or begin to alter the outward part of any building or wall shall in all cases in which the footway is thereby obstructed or rendered inconvenient cause to be put up a proper and sufficient hoard or fence with a convenient handrail, if there be room enough for same, to serve as a footway for passengers outside such hoard or fence, and shall continue such hoard or fence standing and in good condition during such time as may be necessary for the public safety; and imposes a penalty upon any person who fails to put up and maintain in good condition any such hoard or fence and platform. Section 122 provides that it shall not be lawful for any person to erect or set up in any street any hoard or fence or scaffold for any purpose or any hoards or other things by way of enclosure for (inter alia) depositing bricks, rubbish, and other materials without a licence in writing first had and obtained from the clerk or surveyor of the vestry or district board of the parish or district in which such street is situate, and every such licence shall state the place where and the purpose for which such hoard or fence, scaffold or enclosure is to be set up or made and the size thereof and the time for which it is permitted to be continued. Section 123 imposes a penalty on every person who erects in any street any hoard, fence or scaffold or any boards or other things by way of enclosure without a licence from the vestry or district board or in any other manner than as permitted by such licence or continues the hoarding, fence or enclosure beyond the time stated in the licence.

The Act of 1855 is a consolidation Act. Sections 122 and 123 are taken from s. 75 of Michael Angelo Taylor's Act (57 Geo. 3, c. 29), and s. 121 is taken from s. 80 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). In *Higgs and Hill, Ltd.* v. *Stepney Borough Council* (18) the Divisional Court held, in my opinion rightly, that s. 121, making it compulsory on the owner to erect a hoarding in a street in the cases therein mentioned, was not inconsistent with the prohibition contained in s. 122 against erecting such a hoarding without first obtaining a licence from the proper authority, and that, therefore, a licence was required before a hoarding could lawfully be erected in a street notwithstanding that the erection of such a hoarding was made compulsory.

The effect of these enactments is that, whenever the owner of a house abutting upon a public street in the metropolis desires to repair or alter his house, he must first obtain a licence from the proper authority to erect any necessary hoarding and scaffolding in the street, and that it is the duty of such authority in every proper case at the request of the owners to grant a licence for that purpose, which licence must not contain any conditions not authorised by s. 122 or by any subsequent enactment, such as s. 5 of the

Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27), which authorises the inclusion in any such a licence of a condition prohibiting the affixing of any advertisement to the hoarding or scaffold or sanctioning the affixing of advertisements thereto, upon payment of such a sum as the authority granting the licence may determine, and provides that any payment received by the authority under that section shall be applied in aid of the rate levied for the repair of the highway.

Similar statutory provisions to those contained in ss. 121 to 123 of the Metropolis Management Act, 1855, are in force outside the metropolitan area in every urban district in England. It is an everyday experience in London and all other towns throughout the country to see scaffolding and hoardings erected on the footways of streets where building operations are in progress, and, in view of the legislation to which I have referred, it seems to me hopeless to contend that such scaffolding and hoardings are illegal and constitute a public nuisance unless it can be established in any particular case that they were erected without a proper licence having been first had and obtained, or were put up in a manner or at a place not authorised by the licence, or where maintained for a longer period than that authorised by the licence.

In these circumstances it is not surprising that counsel have not been able to cite a single case in which it has been held or even suggested that a hoarding and scaffold temporarily erected and maintained in the street of the metropolis for the purposes mentioned in and in strict accordance with the provisions of the Act of 1855 constituted a wrongful obstruction of such streets. The defendants, however, for some reason I do not profess to understand, did not either in the court below or in this court rely upon or refer to the legislation dealing with the management and control of the streets in the metropolis, but based their defence entirely upon general principles applicable to obstructions of the highway of a totally different kind.

Only three out of the numerous cases cited by counsel contain any reference at all to obstructions of streets in towns caused by building operations of the kind undertaken by the defendants, namely, *R.* v. *Jones* (5), *Herring* v. *Metropolitan Board of Works* (2) (19 C.B.N.S. at p. 525), and *Lingké* v. *Christchurch Corpn.* (3) ([1912] 3 K.B. at p. 603).

In *R.* v. *Jones* (5), the owner of a timber yard was indicted for depositing, hewing, and sawing logs of wood in a public street, and LORD ELLENBOROUGH, in the course of giving judgment against the defendant, said (3 Camp. at p. 231):

> "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time the public have a right to complain, and the party may be indicted for a nuisance."

This case was decided five years before Michael Angelo's Act was passed, and the dictum as to the public being compelled to submit to the inconvenience occasioned by repairing a house must now be read with the qualification that the person causing such inconvenience must obtain a licence from and comply with the condition imposed by the local authority charged with the management of the streets, otherwise any obstructions caused by such repairs are clearly illegal.

In *Herring's Case* (2) the obstruction complained of consisted of a hoarding occupying the whole width of a street in the metropolis erected for the purposes of enabling the defendants to construct a sewer running under the street. In the course of his judgment, BYLES, J., said (19 C.B.N.S. at p. 525):

> "As a general rule all the Queen's subjects have a right to the free and uninterrupted use of a public way; but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and wagons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the

> purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances."

As this case was decided when the Act of 1855 was in operation, it would seem as if the learned judges, when treating hoardings enclosing part of the public footway on the same footing as carts and coal-shoots, had not in mind that the erection of such hoardings are expressly prohibited by the Act unless a licence has first been obtained from the local authority, and that, therefore, obstructions caused by such hoardings stand on a somewhat different footing from obstructions caused by carts or coal-shoots.

In *Lingké's Case* (3) the obstruction complained of was caused by the defendants laying an air main and a main drain and constructing a manhole and pumping station under and on the side of a street in the borough of Christchurch. In the course of his judgment, Vaughan Williams, L.J., in commenting upon the examples of lawful obstructions of the highway given by Byles, J., in the above-quoted extract from his judgment in *Herring's Case* (2) said ([1912] 3 K.B. at p. 603):

> "These are the sort of things that it is recognised people may do in respect of the highway, which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action."

Later on, the lord justice, still referring to *Herring's Case* (2), said:

> "I accept the principle that every physical obstruction of a highway does not constitute an obstruction in the eye of the law. Putting it shortly, those obstructions which are absolutely necessary for the convenient and safe user of the highway are not deemed by the law to be obstructions of the highway for the purposes of indictment or for the purposes of the individual cause of action. All that was held there as not an obstruction was the hoarding, which I have already pointed out, I think, in the course of the discussion, when a house is being pulled down, is essential for the protection of the public, for the protection of the King's subjects who are using the King's highway; and you should put up such a hoarding as will prevent the stones and other things, which often result in the course of road repairing or building a house, falling upon those who are using the King's highway."

The learned lord justice may or may not have had in mind the special legislation to which I have referred when making the statement about the obligation to put up hoardings, but it cannot be said that this statement is an authority for the legality of the erection of a hoarding in a street without first obtaining a licence from the proper authority.

The judicial dicta contained in these three cases do not, in my opinion, support the proposition which I understood the defendants to contend for, that they had the free right to erect scaffolding and hoardings in Great Queen Street whenever reasonably required for re-building, altering, or repairing their building. In view of the express prohibition contained in s. 122 of the Act of 1855, the defendants can only justify the erection of any such scaffolding and hoarding by proving that they had first obtained a licence from the proper local authority for their erection and had complied with the conditions of such licence.

Besides citing other cases where private persons have been held liable for wrongfully obstructing the highway in various ways, other than by hoardings or scaffolding erected during building operations, counsel have referred us to a number of cases of obstruction of the highway by bodies acting under Parliamentary powers where the special or general Acts under which they were acting provided for compensation being paid to persons who or whose property was thereby injuriously affected. In that class of cases it is well settled that in order to establish a claim to compensation for interference with the highway, the claimant must show that the cause of damage would have been actionable if there had been no Act authorising such interference.

Bearing in mind that Parliamentary powers to interfere with the highway are only granted when such interference is necessary to carry out works of public utility, and that such powers generally involve the power of breaking up, stopping up, or diverting the highway, it is difficult to imagine a case where a private person could lawfully cause such an interference. *Lingké's Case* (3) was a case of that class. Although the obstruction there was temporary, it was of such a kind that, if it had been caused by a private person, it would without doubt have been a public nuisance exposing him to civil as well as criminal process. The passage in the judgment of Fletcher Moulton, L.J., upon which Bennett, J., has based his decision in the present case, must be read in light of the facts in that case. The lord justice did not purport to deal with interference by scaffolding and hoardings lawfully erected in the public streets during building operations, but was referring only to wrongful interferences with the street such as unlawfully breaking up its surface and digging trenches in it.

I have not dealt more fully with the numerous cases cited by counsel, because I think they are all beside the point in the present case, which, in my judgment, falls to be decided on the simple ground that, as the defendants have complied with the relevant provisions in the Metropolis Management Act, 1855, and the conditions contained in the licences granted by the Holborn Borough Council, the scaffolding and hoarding erected by them in Great Queen Street was not a wrongful obstruction of that street and did not constitute a public nuisance, and that, therefore, the plaintiff has no cause of action.

In these circumstances it becomes unnecessary to consider the defendants' second head of defence (based on the decision in *Ricket* v. *Metropolitan Rail. Co.* (10)), that the loss of custom suffered by the plaintiff was in any event too remote a damage to give him a right of private action. The point raised by this head of defence is one of some difficulty upon which I prefer not to express my opinion.

In the result, I agree that this appeal succeeds and that the action ought to be dismissed with costs here and below.

ROMER, L.J.—In order to succeed in this action it is incumbent upon the plaintiff to show that the defendants unlawfully obstructed the highway, and that the plaintiff thereby suffered some special or peculiar damage beyond what was suffered by the rest of the public. That this is the law upon the subject is beyond controversy, though there has been some difference of judicial opinion as to what sort of special or peculiar damage would be sufficient to enable the plaintiff to maintain the action.

The first matter, then, to be determined is whether the obstruction of the highway admittedly caused by the defendants during the alteration of their premises was or was not an unlawful one. It was contended on the part of the defendants that they had caused no greater obstruction than they were entitled to do in exercise of a reasonable user of the highway. Counsel, on their behalf, expressly disclaimed before us any wish to justify their acts by reason of any rights conferred or obligations imposed upon them by statute. I do not, therefore, intend to express any opinion whether the relevant statutes would or would not by themselves afford an answer to the plaintiff's claim. The point was not argued before us or before Bennett, J. The learned judge, however, decided that the defendants' obstruction was unlawful at common law, feeling constrained to do so by reason of a statement made by Moulton, L.J., in giving judgment in *Lingké* v. *Christchurch Corpn.* (3) ([1912] 3 K.B. at p. 608). That statement was as follows:

> "If there is a public right such as the user of a street and it is interfered with by an individual, that interference does constitute an actionable wrong and give a right to damages to those members of the public who can prove special damage therefrom, i.e., some damage flowing to them which does not flow to ordinary members of the public."

In one sense the defendants undoubtedly "interfered" with the user of the street, and thereby caused, in the opinion of the learned judge, some special or peculiar damage to the plaintiff. But Moulton, L.J., did not mean that any member of the public who found himself obstructed when passing along a highway was entitled to complain of the obstruction if he thereby sustained special and peculiar damage. To have so held would have been contrary to well-settled law and contrary also to common sense. No one could safely use a highway if such were the law, as was pointed out by Vaughan Williams, L.J., in the same case ([1912] 3 K.B. at p. 602): "There would be none on the highways," he said, "if every obstruction of the highways constituted a legal obstruction." The fact is, of course, that many obstructions of a highway are lawful, and give no right of complaint either to the Attorney-General on behalf of the public or to an individual who may thereby suffer damage. No member of the public has an exclusive right to use the highway. He has merely a right to use it subject to the reasonable user of others, and if that reasonable user causes him to be obstructed he has no legal cause of complaint. This was, indeed, recognised by Moulton, L.J., in other parts of his judgment, to which I will refer when considering, as I must now proceed to do, what is a reasonable user of a highway. For this purpose it will be sufficient to begin by referring to the statement of the law made by Lord Ellenborough, in the case of *R.* v. *Jones* (5). In that case the defendant, who had a timber yard adjoining a highway, had been depositing timber in the street and having it cut up there before taking it into his own premises. This was held to be an unreasonable use of the highway. "He is not," said Lord Ellenborough (3 Camp. at p. 231), "to eke out the inconvenience of his own premises by taking in the public highway into his timber yard." But upon the general law relating to the matter he said this (3 Camp. at p. 231):

> "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance."

The importance of this statement of the law lies, of course, for the present purpose in the recognition of the right of a person to obstruct the highway for the purpose of repairing his house so long as the inconvenience thereby caused to the public is "necessarily" so caused, and it is not prolonged for an unreasonable time. This right was affirmed in greater detail by Byles, J., when stating the law as to obstruction of highways in *Herring* v. *Metropolitan Board of Works* (2) (19 C.B.N.S. at p. 525).

> "As a general rule, [he said] all the Queen's subjects have a right to the free and uninterrupted use of a public way; but, nevertheless, all persons have an equally undoubted right for a proper purpose to impede and obstruct the convenient access of the public through and along the same. Instances of this interruption arise at every moment of the day. Carts and waggons stop at the doors of shops and warehouses for the purpose of loading and unloading goods. Coal-shoots are opened on the public footways for the purpose of letting in necessary supplies of fuel. So, for the purpose of building, re-building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way. Houses must be built and repaired; and hoarding is necessary in such cases to shield persons passing from danger from falling substances."

If the statement of the law so made by Byles, J., is to be accepted as accurate, the plaintiff must fail in his action. For Bennett, J., has found as a fact that the scaffolding and hoarding complained of were reasonably necessary for the purposes of the work that the defendants were doing. We are asked, however, by counsel for the plaintiff to differ from Byles, J., and perhaps also from Lord Ellenborough, and to hold that the owner of a house adjoining a highway is not entitled in the course of repairing or re-building his house to obstruct the highway by scaffolding or hoardings, however necessary it may be to do so for the purpose of carrying out the work, and however reasonable may be the precautions he takes to minimise the inconvenience thereby occasioned to the public. This I am not prepared to do, for, in my opinion, the statement of Byles, J., is good law and good sense. It is, moreover, supported by the high authority of Willes, J., who, in the same case, said this (19 C.B.N.S. at p. 524):

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> "The construction of the hoarding being necessary for the due performance of the works by the board and the obstruction not having been more than was necessary, or kept for an unreasonable time, would give the appellant no cause of action."

It is true that FLETCHER MOULTON, L.J., in the judgment to which I have already referred, seemed to think that BYLES, J., had stated the law too widely, and it may be, B though it is not at all certain, that he considered that the erection of scaffolding and hoardings would be an unreasonable user of the highway. But, as against this, is to be set the fact that the observations of BYLES, J., received the express approval of VAUGHAN WILLIAMS, L.J., in the same case. After the observations that I have already quoted, the lord justice proceeded as follows ([1912] 3 K.B. at p. 602):

> "But if the user that you are making is of such a character that the people generally C who use that road will find it necessary to do this, that, and the other, whether it is to stop for a time on the highway, or any of the other matters which are mentioned by BYLES, J., in his judgment, this is no legal obstruction. You must remember these instances begin with carts and wagons stopping at the doors of shops and warehouses. Then he takes coal-shoots; then he takes what to my mind is a very much wider instance but equally true: 'So, for the purpose of building, re-D building, or repairing houses abutting on the public way in populous places, hoardings are frequently erected enclosing a part of the way.' These are the sort of things that it is recognised people may do in respect of the highway which, although they physically obstruct, do not constitute an obstruction of the King's highway either for the purpose of indictment or for the purpose of civil action."

With this observation of VAUGHAN WILLIAMS, L.J., I find myself in complete agree-E ment. It seems to me to be eminently reasonable that the owner of a house adjoining the highway should be entitled to use it for the purpose of carrying into his house the materials necessary for repairing and re-building it when occasion so requires, and if in so doing he causes an obstruction of the highway not greater in degree or longer in duration than the necessity demands, the other members of the public using the highway have no ground of complaint. In *Fritz* v. *Hobson* (12) the obstruction caused by F such an owner was greater than the occasion required, and he was held liable to the plaintiff who had been obstructed. But the right of the defendant to create a reasonable obstruction was plainly recognised by STIRLING, J. So, too, in my judgment, is it permissible for such an owner, subject, of course, to obtaining any such licence from the local authorities, to erect and maintain for a reasonable time scaffolding and hoardings on the highway where he could not otherwise conveniently repair or re-build his G house.

The law relating to the user of highways is, in truth, the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.

H For these reasons I have come to the conclusion that the plaintiff has failed to prove any unlawful obstruction of the highway, and that his action should have been dismissed. In my opinion, the appeal should be allowed with costs here and below.

Appeal allowed.

Solicitors: *Cronin & Son*; *J. H. Milner & Son.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

SUTTON *v.* DORF

[KING'S BENCH DIVISION (Acton and Talbot, JJ.), April 19, May 3, 1932]

[Reported [1932] 2 K.B. 304; 101 L.J.K.B. 536; 147 L.T. 171; 96 J.P. 259; 48 T.L.R. 430; 76 Sol. Jo. 359; 30 L.G.R. 312]

Bankruptcy—Property available for distribution—Rent restriction—Statutory tenancy—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 54, *s.* 167.

A "statutory tenancy" created by the Rent Restriction Acts confers on the statutory tenant only a personal right to possession, and, therefore, it is not "property" within the meaning of s. 167 of the Bankruptcy Act, 1914, so as to vest in the trustee in the bankruptcy of the statutory tenant.

Parkinson v. *Noel* (1), [1923] 1 K.B. 117, disapproved.

SEMBLE: such a tenancy would be unaffected by purported disclaimer by the trustee under s. 54 of the Act of 1914.

Notes. Considered: *Stafford* v. *Levy*, [1946] 2 All E.R. 256. Referred to: *Oak Property Co., Ltd.* v. *Chapman*, [1947] 2 All E.R. 1.

As to property available for distribution in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 404, and for cases see 5 DIGEST 630 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Parkinson* v. *Noel*, [1923] 1 K.B. 117; 92 L.J.K.B. 361; 128 L.T. 538; 67 Sol. Jo. 184; 21 L.G.R. 130; 31 Digest (Repl.) 697, *7887*.

(2) *Keeves* v. *Dean*, *Nunn* v. *Pellegrini*, [1924] 1 K.B. 685; 93 L.J.K.B. 203; 130 L.T. 593; 40 T.L.R. 211; 68 Sol. Jo. 321; 22 L.G.R. 127, C.A.; 31 Digest (Repl.) 694, *7865*.

(3) *Roe* v. *Russell*, [1928] 2 K.B. 117; 97 L.J.K.B. 290; 138 L.T. 253; 92 J.P. 81; 44 T.L.R. 278; 26 L.G.R. 145, C.A.; Digest Supp.

(4) *John Lovibond & Sons, Ltd.* v. *Vincent*, [1929] 1 K.B. 687; 98 L.J.K.B. 402; 141 L.T. 116; 93 J.P. 161; 45 T.L.R. 383; 73 Sol. Jo. 252; 27 L.G.R. 471, C.A.; Digest Supp.

(5) *Skinner* v. *Geary*, [1931] 2 K.B. 546; 100 L.J.K.B. 718; 145 L.T. 675; 95 J.P. 194; 47 T.L.R. 597; 29 L.G.R. 599, C.A.; Digest Supp.

Appeal from Shoreditch County Court.

The plaintiff claimed possession from the defendant of premises known as No. 90, Osbaldeston Road, Stoke Newington. The premises had been let by the plaintiff to the defendant for a period of three years from March 25, 1916, at a rent of £48 a year. At the end of the term the defendant remained in possession as a statutory tenant. On Feb. 28, 1930, he was adjudicated a bankrupt, and on Sept. 1, 1931, the trustee in bankruptcy disclaimed the tenancy under s. 54 of the Bankruptcy Act, 1914. The judge made an order for possession, holding that the statutory tenancy was "property" within the meaning of s. 167 of the Bankruptcy Act, 1914, on the authority of *Parkinson and others* v. *Noel* (1). The defendant appealed.

The Bankruptcy Act, 1914, s. 167, provides:

> "In this Act, unless the context otherwise requires . . . 'property' includes, money, goods, things in action, land, and every description of property, whether real or personal and whether situate in England or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined."

R. F. Levy for the defendant.

C. R. D. Richmount for the plaintiff.

Cur. adv. vult.

May 3. **ACTON, J.,** read the following judgment of the court. The short point raised by this case is whether what is usually called a "statutory tenancy" under the Rent Restriction Acts is "property" within the meaning of s. 167 of the Bankruptcy

Act, 1914, and, therefore, passes to the trustee in bankruptcy of a statutory tenant. There was a case tried by GREER, J. (*Parkinson* v. *Noel* (1)), in which it was decided that that is so, but that was a decision of the question in 1922, and since then the tendency of all the later decisions seems to be in the opposite direction.

In *Keeves* v. *Dean, Nunn* v. *Pellegrini* (2), it was decided that the right of a statutory tenant is merely a personal right and cannot be assigned. In *Roe* v. *Russell* (3), it was decided that a statutory tenant could not assign or sublet his tenancy of the whole of the premises whether for value or not: per SCRUTTON, L.J. ([1928] 2 K.B. at p. 130). It was held in *Lovibond* v. *Vincent* (4) that the right of a statutory tenant is a purely personal right and cannot be transmitted by will. If the tenant dies intestate, his widow or some other member of his family residing with him is given a right to continue in possession under s. 12 (1) (g) of the Act of 1920; but this is due to the express statutory provision by which the definition of "tenant" is made to include such person, and apart from that nothing passes to the statutory tenant's administrator as such. In *Roe* v. *Russell* (3), SARGANT, L. J., said:

> "When once the conclusion is reached that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property, it is difficult to apply to him, as part of the terms and conditions of his former tenancy, rights essentially incidental and due to the possession of property."

And in *Keeves* v. *Dean, Nunn* v. *Pellegrini* (2) BANKES, L.J., said:

> "His right is a purely personal one and, as such, unless the statute expressly authorises him to pass it on to another person, must cease the moment he parts with the possession or dies."

In arguing the present case counsel was, accordingly, constrained to contend that it is only in the case of bankruptcy (apart from the express statutory provisions already referred to) that a statutory tenancy can pass as "property" to a person other than the statutory tenant himself. In *Skinner* v. *Geary* (5) ([1931] 2 K.B. at p. 558), SCRUTTON, L.J., said that

> "the history of the Rent Restriction Acts is a very gradual feeling of one's way to the principles on which the Acts should be worked."

And later on, in the course of an authoritative review of the decided cases, he added that

> "throughout that series of decisions the court had been gradually working to the view that the right [i.e., of the statutory tenant] was not a right of property unless it was so provided by the Act,"

and he went on to make reference to the section dealing with intestacy.

In our opinion, it is impossible to reconcile with the principles clearly enunciated in the decisions of the Court of Appeal subsequent to *Parkinson* v. *Noel* (1) the proposition that a statutory tenancy under the Rent Restriction Acts is "property" of a tenant within the meaning of s. 167 of the Bankruptcy Act, 1914, and as such passes to the trustee in bankruptcy of the statutory tenant. That conclusion seems to us to be inevitable even after a careful consideration of the observations on *Parkinson* v. *Noel* (1) made obiter by GREER, L.J., in *Lovibond* v. *Vincent* (4). We are, therefore, of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors: *Charles T. Nicholls*; *Howard A. Lawrance & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

SIMON *v.* PAWSON AND LEAFS, LTD.

[Court of Appeal (Scrutton, Greer and Slesser, L.JJ.), October 21, 22, November 7, 1932]

[Reported (1932), 148 L.T. 154; 38 Com. Cas. 151]

Contract—Breach—Damages—Remoteness—Damages not in contemplation of parties at date of contract.

The authorities of a school informed the parents of their pupils that the pupils must wear certain clothes, that these could only be obtained from the plaintiff, a dressmaker, and that the pupils must be in possession of the clothes by April 21. The plaintiff was informed that these instructions had been given to the parents, but no formal appointment was given to her in writing and nothing was said as to the duration of the appointment. The plaintiff ordered dress materials from the defendant company, telling them that she had an appointment to supply these clothes at the school and that they were wanted by a certain date. The plaintiff was not ready to supply all the parents' demands by that date and a week later the head of the school wrote to the plaintiff that on that ground and on the ground of defects in some of the clothes supplied no further orders would be placed with her. The plaintiff claimed damages from the defendant company, inter alia, for loss of her appointment as school outfitter, on the ground that the defendants, by not keeping sufficient material of the right description in stock, had broken their contract with the plaintiff and so had caused the delays which resulted in her losing the appointment.

Held: by Scrutton, L.J., and Slesser, L.J., that the damages for loss of appointment were not such as might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as a probable result of the breach of it, and, therefore, were too remote.

Held: on the facts by Greer, L.J., and Slesser, L.J., that the loss of the plaintiff's appointment was due, not to any breach of contract by the defendants, but to the plaintiff's own failure to obtain in time the material elsewhere.

Notes. Referred to: *Askey* v. *Golden Wine Co.*, [1948] 2 All E.R. 35; *Maules* v. *Philip Trant & Sons, Ltd.* (*Mackinnon Third Party*) (*No. 2*), [1953] 1 All E.R. 651.

As to measure of damages in contract, see 11 Halsbury's Laws (3rd Edn.) 241 et seq., and for cases see 17 Digest (Repl.) 127 et seq.

Cases referred to:

(1) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

(2) *British Columbia and Vancouver's Island, Spar, Lumber and Saw Mill Co., Ltd.* v. *Nettleship* (1868), L.R. 3 C.P. 499; 37 L.J.C.P. 235; 18 L.T. 604; 16 W.R. 1046.

(3) *Horne* v. *Midland Rail. Co.* (1873), L.R. 8 C.P. 131; 42 L.J.C.P. 59; 28 L.T. 312; 21 W.R. 481, Ex.Ch.; 8 Digest (Repl.) 153, *964*.

(4) *The Edison*, [1933] All E.R.Rep. 144; [1932] P. 52; 101 L.J.P. 12; 147 L.T. 141; 48 T.L.R. 224; 37 Com. Cas. 182; 18 Asp.M.L.C. 276; on appeal, [1933] All E.R.Rep. 156; [1933] A.C. 449; 102 L.J.P. 73; 77 Sol. Jo. 176; 38 Com. Cas. 267; 18 Asp.M.L.C. 380; 149 L.T. 49; 49 T.L.R. 289, H.L.; Digest Supp.

(5) *Cointat* v. *Myham & Son*, [1913] 2 K.B. 220; 82 L.J.K.B. 551; 108 L.T. 556; 77 J.P. 217; 29 T.L.R. 387; 11 L.G.R. 760; on appeal (1914), 84 L.J.K.B. 2253; 110 L.T. 749; 78 J.P. 193; 30 T.L.R. 282; 12 L.G.R. 274, C.A.; 17 Digest (Repl.) 118, *297*.

(6) *Blake* v. *Fenner* (1911), cited in [1913] 2 K.B. at p. 224; 82 L.J.K.B. at p. 554; 108 L.T. at p. 558, C.A.; 39 Digest 478.

(7) *FitzGerald* v. *Leonard* (1893), 32 L.R.Ir. 675; 17 Digest (Repl.) 135, **295*.

(8) *Grébert-Borgnis* v. *Nugent* (1885), 15 Q.B.D. 85; 54 L.J.Q.B. 511; 1 T.L.R. 434, C.A.; 17 Digest (Repl.) 132, *390*.

Appeal by defendants from an order made by GODDARD, J., in an action tried by him without a jury.

The plaintiff was a dressmaker, and the defendants were a company supplying dress materials. The authorities of a convent school for girls informed the parents of their pupils that the girls must wear certain clothes, that these could only be obtained from the plaintiff, and that the girls must be in possession of the clothes by the beginning of the summer term. The Mother Superior informed the plaintiff that these instructions had been given to the parents. There was no formal appointment given to the plaintiff in writing or any agreement as to the duration of the appointment. The plaintiff ordered about £200 worth of dress materials from the defendants. GODDARD, J., found that the plaintiff told the defendants that she had an appointment to supply these goods at the school, and that they were wanted by April 21. No notice was given to the defendants of the terms or duration of the appointment. On April 21 the plaintiff was not ready to supply all the parents' demands, and on April 28 the Mother Superior wrote to the plaintiff:

> "Owing to the fact that you have failed to keep your agreement to supply school uniforms to all the pupils in time for the re-opening of school on April 21, we cannot place any further orders with you. Besides the delay in supplying, there are further causes of complaint, namely: (i) that there are several shades of brown instead of the one agreed upon, also several kinds of material; (ii) some of the material is so defective that dresses have split upon a first day's wear; (iii) the blazers supplied are boys' blazers, and, consequently, a bad fit. In these circumstances I do not feel justified in again asking parents to deal with you."

The plaintiff sued the defendants for breaches of contract, claiming £210 for specified items and £4,137 for loss of position as school outfitter, on the basis of five years' loss of profits. She alleged that the defendants had agreed to keep the dress material in stock and had failed to do so, thus causing delay in delivery. GODDARD, J., gave judgment for the plaintiff for £480, being £450 for loss of appointment, and £30 for the supply of defective quality of dress material, and judgment for the defendants for £90, price of goods sold and delivered. The defendants appealed.

Henry Collins, K.C., and *A. T. Denning* for the defendants.
Laski, K.C., and *Cartwright Sharp* for the plaintiff.

Cur. adv. vult.

Nov. 7. The following judgments were read.

SCRUTTON, L.J.—Mrs. Simon, the plaintiff, carried on a small dressmaking business with very little capital or experience. She had a girl at the Convent School, Carshalton, and the Mother Superior, at Mrs. Simon's request, gave her the opportunity of supplying blazers and dress material and other articles to the parents in connection with a change of school uniform which the school authorities were making. The opportunity, as I understand, did not give rise to any contractual relations between the school and Mrs. Simon. She did not supply goods to the school, nor was she paid by them. The school authorities informed the parents that their daughters must wear certain clothes, and that these could only be obtained from Mrs. Simon, and that the girls must have their uniforms by the commencement of the summer term in April. A letter from the Mother Superior to Mrs. Simon, of Feb. 18, tells her the instructions that had been given to the parents; there is no formal appointment in writing, or any agreement as to the duration of the appointment, if any. To be ready to comply with the parents' requirements Mrs. Simon went to the defendants, a well-known wholesale house in St. Paul's Churchyard, and placed certain orders with them, in all for about £200 worth of goods. In the result, owing to various misfortunes, Mrs. Simon was not ready by April 21 to supply all the parents' demands, and on April 28 the Mother Superior wrote the following letter:

> "Owing to the fact that you have failed to keep your agreement to supply school uniforms to all the pupils in time for the re-opening of school on April 21, we cannot place any further orders with you. Besides the delay in supplying there are further

> causes of complaint, namely: (i) that there are several shades of brown instead of the one agreed upon, also several kinds of material. (ii) some of the material is so defective that dresses have split upon a first day's wear. (iii) the blazers supplied are boys' blazers, and, consequently, a bad fit. In these circumstances I do not feel justified in again asking parents to deal with you."

Mrs. Simon thereupon sued the defendant company for various breaches of contract, and claimed about £210 for various items specified in the claim, and £4,137 for loss of position as school outfitter, on the basis of five years' loss of profits. This latter claim, said to result from a purchase of goods to the value of £200, was somewhat startling. Goddard, J., heard with great patience a very complicated story of minute details, as the goods were not ordered all at once, but in small parcels. Many of the communications were by telephone, or oral, and the plaintiff's memory as to dates was very defective. He ultimately gave judgment for the plaintiff for £480, without specifying the amount he gave for each item of claim, and for the defendants for £90, price of goods delivered but not paid for. We have consulted the learned judge and he tells us that he gave £450 for loss of appointment, and £30 for matters he specifies in his judgment. These appear to be all for defective quality of dress material, as to which he accepts the plaintiff's statement that she asked for "a hard wearing material for schoolgirls' uniforms," and showed that she relied on Pawson and Leafs' judgment to provide it. He took great trouble in comparing samples and bulk produced, and finds that the material was defective. I see no reason for interfering with the judge's finding on that point. He gives no damages in respect to the complaints as to blazers. He bases his damages for loss of appointment on finding, in a conflict of evidence between Mrs. Simon and Mr. Busby, the head of the defendants' dress material department, that Mr. Busby did promise that he would at once put in stock all the necessary material without demanding payment for it in advance, that Mrs. Simon was right in her evidence that such a contract had been made, and that Mr. Busby did not keep the goods in stock, so that orders had to be specially dyed, occasioning considerable delay after ordering. I could not interfere with the view of the judge who saw the witnesses, as to which version he accepts. I should, however, have considerable doubt, as the plaintiff knew that the goods were not being stocked in ample time to give an immediate order for the dyeing of the whole quantity, which order could be complied with by April 21, and did not give such an order at once for financial reasons, whether the delay was not due to her action or inaction rather than to Mr. Busby's breach of contract. I will assume, however, that there was a breach of contract in respect of dress material, causing delay in delivery, and that this delay caused the Mother Superior to write her letter of April 28.

The question then is whether these facts and other evidence to which I will refer support the finding of £450 damages for loss of position, or whether such a head of damage is too remote and irrecoverable under the principles laid down in *Hadley* v. *Baxendale* (1), *British Columbia and Vancouver's Island, Spar, Lumber and Saw Mill Co., Ltd.* v. *Nettleship* (2), and *Horne* v. *Midland Rail. Co.* (3). This point is not referred to in the judgment, and the judge tells us he does not remember it was argued; counsel for the defendants, however, tells us his recollection is that it was argued, and it certainly occurred to all the members of this court the moment they saw the claim. In *Hadley* v. *Baxendale* (1) the shaft of a mill was broken and had to be sent to a repairing mill to form a pattern for a new shaft. It was handed to a common carrier, who was told that the mill was stopped, and was asked to send the shaft immediately. By neglect there was delay and the consignor claimed loss of profits of the mill during the negligent delay. It was held these profits were too remote to be recovered. The court composed of Parke, Alderson, Platt, and Martin, BB., took the opportunity to lay down a general rule as to measure of damages, which has since repeatedly been discussed and acted upon, in these terms (9 Exch. at p. 354):

> "Now we think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such

> as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

The court proceeded to hold that the circumstances alleged in that case were not sufficient to make the carrier liable for the loss of profits.

In *Horne's Case* (3), referred to later, Blackburn, J., observes that *Hadley's Case* (1) decided that notice of certain facts was not sufficient to entitle the plaintiff to certain damages, but does not decide what notice or special circumstances would be sufficient to entitle the plaintiff to recover exceptional damages. He was disposed to agree with the suggestion of Martin, B., that to be effective the notice must be so given that an actual contract arises on the part of the defendant to bear the exceptional loss. A similar suggestion had been made by Willes, J., in *British Columbia and Vancouver's Island, Spar, Lumber and Saw Mill Co., Ltd.* v. *Nettleship* (2) in the Exchequer Chamber. In that case a shipowner, not a common carrier, had notice that the goods shipped were intended as machinery for a mill to be erected. Part of the machinery was lost, with the result that the working of the mill was stopped for twelve months. Loss of profits of the mill was claimed and refused by the Exchequer Chamber, Willes, J., saying (L.R. 3 C.P. at p. 508):

> "What then, is the rule which ought to govern a case of this sort? I am disposed to take the narrow view, that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. The conclusion at which we are invited to arrive would fix upon the shipowner, beyond the value of the thing lost, and the freight, the further liability to account to the intended mill-owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default, for the full profits they might have made by the use of the mill if the trade were successful and without a rival! If that had been presented to the mind of the shipowner at the time of making the contract as the basis upon which he was contracting, he would at once have rejected it. And, though he knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it."

And, again, Willes, J., said (L.R. 3 C.P. at p. 510):

> "Take the case of a barrister on his way to practise at the Calcutta Bar, where he may have a large number of briefs awaiting him; through the default of the Peninsular and Oriental Company he is detained in Egypt or in the Suez Canal, and

> consequently sustains great loss; is the company to be responsible for that, because they happened to know the purpose for which the traveller was going?"

The case of loss under another contract was expressly considered by the Exchequer Chamber in *Horne's Case* (3). There the plaintiffs had a contract with the French government for delivery of shoes at a price much above the market price. The plaintiffs told the carrier that they were under a contract to deliver by Feb. 3, and that the goods would be rejected if not delivered by that date, but said nothing about the exceptionally high price. The goods were not delivered in time and were rejected, and the plaintiff claimed the loss of their exceptional profit. The majority of the Exchequer Chamber held that the loss of the exceptional price could not be taken to flow naturally from the breach of contract, or to have been in the contemplation of both parties when they made their contract, and that there was no sufficient notice of such exceptional damages. Loss of ordinary profit is frequently recovered when the seller has notice that the goods are purchased to fulfil a contract and does not deliver the goods. This court has recently discussed a similar question in tort, of loss of profits under a contract and disallowed the claim: *The Edison* (4).

In the present case the judge finds that the plaintiff told the defendants she had an appointment to supply the goods, and that they were wanted by April 21. No notice was given of the terms or duration of the appointment. On the principles laid down in the cases cited, I am of opinion that damages for loss of appointment were too remote, and not in the contemplation of both parties. It will be noticed this is not a case of a contract of re-sale; the plaintiff was under no obligation to continue to supply to the school.

In a considerable experience of contracts of sale of goods, I do not remember cases of claim for loss of repeat orders from the customer. We were referred to *Cointat* v. *Myham* (5), where Coleridge, J., on a claim for breach of contract to supply meat, the breach being supply of meat unfit for human food, whereby the plaintiff was convicted and fined, gave damages for "loss of trade owing to conviction." This judgment was set aside and a new trial ordered on quite another ground, the Court of Appeal saying they would say nothing as to other questions argued, leaving them to be determined on the new trial. Coleridge, J., purported to follow an unreported decision of the Court of Appeal in *Blake* v. *Fenner* (6). Unfortunately, the most careful research in these courts and in the Record Office has failed to discover the pleadings in this case, but from a note of the findings of the jury, it seems to have been a claim for supply of unsuitable oil to a fried fish shop. In the absence of any more exact information as to the circumstances of the case, I am unable to follow it. I follow the principle of the Exchequer Chamber cases already referred to, and I prefer the reasoning of Holmes, J., in the Irish case of *FitzGerald* v. *Leonard* (7), which appears to agree with the English authorities, to that of Coleridge, J. The appeal must, therefore, be allowed, and the judgment of Goddard, J., varied by entering judgment for the plaintiff on the claim for £30, and for the defendants on the counter-claim for £90.

GREER, L.J.—The defendants appeal from the judgment of Goddard, J., whereby he awarded to the plaintiff the sum of £480 as damages for certain alleged breaches of contract for the supply of blazers and other articles of girls' attire, and material for girls' dresses, which the plaintiff required to fulfil her duty as special school outfitter to the Carshalton Convent School. The learned judge found that there were certain defects in quality of some of the goods delivered, and awarded small sums on the plaintiff's claim with reference to the delivery of a wrong shade of blazers, and on the plaintiff's claim for damages for the delivery of defective dress material, amounting in all to £30. I see no reason to disturb the judge's finding on this part of the case. I think there was evidence on which he was entitled to find that there was an implied warranty in the contract or contracts of sale that the goods supplied should be reasonably fit for the uniforms required for the girls attending the convent school, and that this warranty was broken.

But the case raises a more important and difficult question, that is to say, whether the plaintiff is entitled to retain the judgment she has obtained for the substantial sum of

£450 on the ground that the defendants, having made with her a contract to procure and hold in stock material of the agreed description and quality sufficient to make frocks for 150 girls, broke their contract by failing to keep the stock as agreed. This depends on the answers to two questions: (i) Was the learned judge right in deciding that the defendants contracted as alleged? (ii) If they did, is the plaintiff, on the facts proved, entitled to recover as damages the money loss she sustained by the loss of her appointment as school outfitter to the convent school? The head mistress of the school stated that her chief complaint was with regard to the delay in delivering the dress material. I understand the learned judge's judgment to mean that, in his view, this was the effective cause of the cancellation of the plaintiff's appointment, and he treats the breach of contract as regards quality as being sufficiently met by the amount he has awarded expressly on this head. I think this is right. I do not think it is established that the other breaches of contract would have caused the loss of the plaintiff's appointment. I think, as the learned judge thought, that it was the delay in delivery which caused the cancellation.

With regard to the first question above stated, there is much to be said in support of the defendants' contention that no such contract was made. The evidence that Mr. Busby promised, as part of the defendants' contract, that he would keep a stock, is not very satisfactory. The plaintiff's evidence reads as if, after giving her first order, she expressed a wish that he would keep a stock for the rest of the girls, and he said he would. Words like these hardly read like words of a contract. Her statement in cross-examination on the second day of the trial is still more unsatisfactory. She was asked: "You knew after we delivered the 22 yards [that is, the quantity in stock and ordered on Feb. 6, the day when if at all, the contract to hold stock was made] that we had no more stock?" She answered "Yes." When asked: "We were to buy stock?" she answered, "That was my impression." In none of the letters she wrote, or that were written on her behalf, is there any allegation of a contract to hold stock. On Feb. 25 she ordered a second piece or roll, and received 29 yards of the very shade which she had seen and rejected at an earlier interview. She admits that she knew then that the defendants were not holding a stock for her. She says she rang up Mr. Busby, and said: "Surely you have some more to send us?" But she nowhere states that she said to him that he was breaking his promise. Again, on March 25, in her evidence-in-chief, she says she "'phoned for some, and he said he had not any in stock," and she replied, "Surely I shall not have to wait another three weeks?" He said: "Yes." "I said that was terrible, because I could not deliver the stuff in time for the mothers for the school opening." And Mr. Busby said he would get it as soon as possible. Again, she appears to have failed to remind him that he had promised to hold the goods in stock. According to the plaintiff's own evidence, Mr. Busby only got an order on Feb. 6 for 22½ yards, and an order for another roll to come as soon as possible. I think the plaintiff is mistaken in saying that she gave the order for this roll at the interview of Feb. 6. A letter received on Feb. 25, probably written on the 24th, reads as if it was the first order after the order for the 22½ yards. Be that as it may, in any event the plaintiff did not bind herself at most to more than the 22½ yards that were in stock, and a further roll. It seems unlikely that Mr. Busby would have promised to obtain and maintain a stock of goods of an "exclusive" shade—to use the plaintiff's own word—which would not be readily saleable to any other customer, without a firm order for the whole quantity. It seems to me much more likely that Mr. Busby said, as he admits, that it was a running line that he could get if it was ordered, and that the plaintiff and her mother, not knowing that the material would have to be dyed, thought that this was the same as having it in stock.

I gravely doubt whether I would have come to the same conclusion as the trial judge, that there was a contract, as alleged, to get and maintain a stock ready for the plaintiff whenever she chose to give an order. However, I did not try the case. I did not see and hear the witnesses, and the evidence of the plaintiff and her mother may have been more convincing when given than it seems to me, judging only by the shorthand note. I think we must accept the finding of the trial judge, that in consideration of the plaintiff ordering material from the defendants from time to time they would obtain and keep in stock sufficient of the agreed material to satisfy orders for this supply of dresses for at least 150 girls. That they did not do so is admitted. But that is not sufficient to entitle the plaintiff to recover damages for the loss of her post. The plaintiff knew, on Feb. 25, that the defendants were not carrying out their promise to keep a stock. I see no reason to refuse to accept the evidence of Mr. Busby as to what happened when the plaintiff returned the 29 yards. There is nothing inconsistent with it in the plaintiff's evidence except on the immaterial point whether the 29 yards was sent on approval or not. Mr. Busby says:

> "I saw Madam Pam [the plaintiff's business name] on the 26th. She was in the house. Then she complained that the piece we had sent forward for approval was too light in shade, and I told her at that time that the only way would be to dye a piece to the correct shade, and the delivery would be from three to four weeks. That order was passed to the manufacturer on the 26th."

Realising this situation on Feb. 26, the plaintiff might quite easily have assured delivery of the goods in due time by ordering the necessary material for dresses for 150 girls, deliverable, if she so decided, at different dates, but she did not then order any more. Nor did she give any further order until March 25. Owing to the defendants, in the ordinary course of business, having parted with the sample, they could not deal with this order until the plaintiff sent them a sample. This they received on the 28th which was a Saturday. They received a further order on April 1. Both these orders were passed on to the manufacturers. In all the plaintiff only ordered four pieces and 22½ yards, whereas six pieces in addition to the 22½ yards would have been required for 150 girls. See the question of plaintiff's counsel and the answer to Mr. Busby on p. 22 of the latter's evidence on the third day. The plaintiff knew at the end of February that the defendants were not keeping a stock, and did not intend to do so, but would comply with any order she gave them to get the goods dyed and deliver them in from three to four weeks from the order. She could then, by giving orders for the whole of her requirements, have obtained the material in ample time to supply the girls before April 21. She was not entitled to withhold her orders and rely on getting damages from the defendants for breach of contract. She did not order any more till the end of March or the beginning of April—too late to enable her to supply parents in sufficient time for them to have the dresses ready for April 21, and in any case she only ordered four rolls instead of the six which would be required to clothe the 150 girls then attending the school. In my judgment, the loss of her post was due to her failure to order the material in time, and not to the defendants' alleged breach of contract to maintain a stock of the material. Reasonable steps on her part would have enabled her to have the material ready in good time. She failed to take those reasonable steps.

In my judgment, she is only entitled to nominal damages for the breach of the defendants' undertaking to maintain a stock. In the view I take of the case it is unnecessary to decide the difficult question whether, if the plaintiff had been unable, when she knew the contract was being broken, by reasonable orders to have secured a supply of the material in time, the damages awarded would or would not be too remote. On this point I am disposed to agree with the opinions expressed in the judgment of SCRUTTON, L.J. The question as to the true application of the third rule in *Hadley* v. *Baxendale* (1), whereby damages within the contemplation of the parties at the time of making the contract are treated as within the measure of damages recoverable in law, is a very difficult one on which opinions have differed, and I prefer to leave it for decision to a case where it is directly necessary to decide it. We were pressed with the decision in *Grébert-Borgnis* v. *Nugent* (8), where the plaintiff recovered as damages the amount of damages which he had to pay to his sub-contractor, but that case has no bearing upon the question involved in the present appeal. It depends on the fact that the buyer was unable to prevent the damages from arising by buying goods in the market, because there was no market in which the goods could have been obtained, and, therefore, no method whereby the buyer could have prevented the damages from arising.

As I have pointed out, my view of the facts in the present case is that the plaintiff, when she knew that the defendants were not keeping, and did not intend to keep, a stock, had ample opportunity of preventing the defendants' breach from resulting in the loss of her appointment, and of the profits she expected therefrom. I agree the appeal should be allowed, in the terms which have been stated by my Lord in his judgment.

SLESSER, L.J.—In this case, in addition to the plaintiff's claim for damages for delivery of defective dress material, there is laid a claim by way of special damage, among other things, for the following:

> "Loss of position of school outfitter (on the basis £4 4s. per girl per year profit—197 girls—and the position being worth five years' purchase), £4,137."

On this head of damage, the learned judge, I understand, has awarded the plaintiff the sum of £450. In my opinion, the plaintiff is unable in law to show that she is entitled to this sum, assuming in her favour that the defendants have broken their contract, as found by the learned judge, on the ground that the loss alleged is, in any event, too remote and too speculative to be recoverable.

I accept for the purpose of this appeal the evidence of the plaintiff, which the learned judge has said that he prefers to that of the defendants. That evidence, as regards the matter I am here considering, amounts to no more than the following: When Mrs. Simon went to see Mr. Busby and Mr. Belding on the first occasion, she told them that she wanted to have patterns to take to the head mistress, as she was offered the school contract if she was able to give satisfaction. Mr. Belding said it was a wonderful contract to get for a small business. She had told Mr. Belding and Mr. Busby the name of the school and the number of girls in it. On the occasion of the second visit, she said that she had been appointed the official school outfitter, but gave them no further details of the nature of the appointment. I think it is clear from her cross-examination that the contract about which she spoke on that occasion was the contract to supply the 150 girls with costumes before the school opened on April 21 and not any general contract as school outfitters; indeed, there was none. Thus, for example, she said: "I was of the impression that the wholesaler held enough material for a retailer who had a contract," and "I told Mr. Busby I wanted the 150 girls supplied in time." Mrs. Raphael, the plaintiff's mother, says that the plaintiff told Mr. Busby that she had a contract for 150 girls and had a whole term to do it. So that, as the evidence stands, the only way in which it can be put that the defendants knew, or ought to have known, that the plaintiff relied on their fulfilment of the contract and knew the possible or probable consequences of such reliance, in so far as any damage is alleged to be recoverable (beyond the £30 attributable to the failure to supply that which was promised to clothe the girls before the opening of the school term) was that the plaintiff had told the defendants, through their servants, that she had been appointed a school outfitter.

The nature of the appointment was spoken to in evidence by the head mistress and amounted to no more than this—that the head mistress had placed the business of fitting out the school in the plaintiff's hands by sending a circular round saying that the parents must get their dresses or dress materials from the plaintiff. It was argued by counsel for the plaintiff that anyone in the trade of the defendants would know what were the implications of the appointment of school outfitter. No evidence was given on this matter, nor were the defendants asked whether such a statement did or did not convey any particular meaning to them. In fact, I am inclined to the opinion that the whole question of remoteness of damage was never really argued at all. In the absence of all evidence, I think that it would not be justifiable to draw the inference that the defendants would or ought of necessity to have knowledge of the nature of the office or appointment of school outfitter. It might have referred to the particular contract to supply dresses on one occasion or on many occasions, and, in the latter case, it might well have been the fact, for all the defendants knew, that the parents could choose for themselves whether they would, or would not, avail themselves of an outfitter's services. If the choice had been with them, it might have happened that the parents would have preferred to have gone elsewhere than to the plaintiff, notwithstanding that the plaintiff was entitled to be called school outfitter, Another quite uncertain feature is the duration of the appointment. Apparently, it could have been terminated, and in fact was, in the event, without any substantial period of notice, for any or no reason, because it is quite clear that there was no contractual relation between the school proprietors and the plaintiff. The whole matter is one entirely of speculation, and I find it quite impossible to say that the alleged loss was in fact actually in the contemplation, or ought to be taken to have been in the contemplation, of the wholesaler at the time of making the contract as a reasonable consequence of his breach and within the meaning of the third rule enounced in *Hadley* v. *Baxendale* (1).

Secondly, even if there can be brought home to the defendants a knowledge of the incidents of the office of school outfitter, I am unable to see that the plaintiff has shown that she lost that appointment by reason of the breach of contract of the defendants. Many of the costumes were in fact supplied and paid for, and the evidence of the head mistress shows that on April 21, 1931, she told the plaintiff that, if the material was not obtained within a week, she must tell the parents to get it elsewhere, and that on April 28, 1931, she said that by reason of the delay and other causes of complaint she did not feel justified in again asking parents to deal with the plaintiff. There is no evidence that the plaintiff on receiving warning on April 21 even attempted to get the material elsewhere. Had she done so and succeeded, she would in all probability not have lost the appointment.

In this view of the evidence I find it unnecessary to consider in this case the difficult problem in what circumstances damages may be recovered for loss of prospective custom on the ground that a special loss of custom was in the contemplation of the seller at the time of making the contract. It is sufficient here to say that, in my view, there is no evidence that the sellers contemplated such a loss, nor can it properly be said that they ought to have contemplated it, and there is no evidence that, even if they had or ought to have so contemplated, the breach of contract of necessity must have caused the loss of the appointment.

As regards so much of the appeal as relates to the £30 damages given to the plaintiff as direct damages for breach of contract I agree with what has been said by my Lord and I have nothing to add.

Appeal allowed.

Solicitors: *Biddle, Thorne, Welsford & Gait*; *J. N. Nabarro.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

FARDON *v.* HARCOURT-RIVINGTON

[House of Lords (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), January 21, 22, 1932]

[Reported 146 L.T. 391; 48 T.L.R. 215; 76 Sol. Jo. 81]

Negligence—Dangerous thing left within reach of public—Duty to guard against reasonably foreseeable danger.

Animal—Failure of owner to control—Liability for damage—Wild animal—Tame animal with mischievous propensity.

If a person allows something which may become dangerous to be in a position to which the public may have access, without his taking any precaution against that thing becoming dangerous, he is liable for the consequences in an action for negligence if the possibility of the danger emerging was reasonably apparent, and one which a reasonable man ought to have foreseen, but if the possibility of danger emerging was one which would never occur to the mind of a reasonable man there is no negligence in his not having taken extraordinary precautions.

The liability of the owner of an animal for failure to keep it under control with the result that it does damage exists only in the case of wild animals which by their nature have a mischievous propensity or of tame animals which are known to the persons having control of them to have a particular mischievous propensity.

The defendant parked his saloon car in a street with its back against the pavement. The car was left shut with a dog inside it. There was no evidence that the dog had a vicious propensity. When the plaintiff, who had parked his car near the defendant's car, was walking past the defendant's car the dog, which had been barking and jumping about the car, broke the window in the rear of the car, with the result that a glass splinter flew out and entered the plaintiff's eye, which later had to be removed. In an action for damages for personal injuries,

Held: the danger of a piece of glass being knocked by a dog out of a small window at the back of the car and of a splinter of glass hitting a passer-by was such an unlooked-for event that no man could be convicted of negligence for not taking any precautions against it.

Notes. Considered: *Deen* v. *Davies*, [1935] All E.R.Rep. 9; *Oldham* v. *United Dairies (London), Ltd.*, [1939] 4 All E.R. 522. Referred to *Fryer* v. *Salford Corpn.* [1937] 1 All E.R. 617; *Woodman* v. *Richardson and Concrete, Ltd.*, [1937] 3 All E.R. 866; *Wright* v. *Callwood* (1950), 66 (pt. 2) T.L.R. 72.

As to the liability of owners of animals, see 1 Halsbury's Laws (3rd Edn.) 663 et seq., and as to liability for negligence generally, see ibid., vol. 23, (2nd Edn.) 568 et seq. For cases, see 2 Digest 229 et seq., and 36 Digest (Repl.) 5 et seq.

Case referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

Appeal from an order of the Court of Appeal (Scrutton, Greer and Slesser, L.JJ.).

The plaintiff's claim against the defendant was for damages for personal injuries resulting in the loss of the plaintiff's eye. On the evening of April 4, 1929, the defendant visited Selfridge's shop in Oxford Street, London, with his wife. He parked his saloon motor car, with a large Airedale dog inside, in Somerset Street, at the rear of Selfridge's, with its back to the kerb. About half-an-hour afterwards the plaintiff drove his motor car into Somerset Street and parked it in the immediate vicinity of the defendant's car. He proceeded to walk past that car, when the dog, which had been barking furiously and jumping about inside the car, broke the glass panel in the rear of the car with the result that a splinter of broken glass entered the plaintiff's left eye, injuring it so severely that it had to be removed. The plaintiff alleged that the defendant was negligent in leaving the car with the dog inside unattended on the public highway. He further alleged that the defendant was negligent in failing to tie up or secure the dog in a safe and proper manner. The defendant denied negligence. At the trial the jury found for the plaintiff, awarding him £2,000 damages, and judgment was entered accordingly. The Court of Appeal held that there was no obligation to keep dogs under control. They might wander about and exercise their ordinary propensities, unless they had, to the knowledge of their owner, a vicious propensity and exercised it, in which case the owner was liable for any damage they might occasion. There being no evidence here that the dog had a dangerous propensity, there was no evidence upon which the jury could find for the plaintiff. Judgment was accordingly ordered to be entered for the defendant, and the plaintiff appealed.

Martin O'Connor, Hector Hughes, and Constance Colwill for the plaintiff.
J. F. Eales, K.C., and *Wilfrid Bennett* for the defendant.

LORD DUNEDIN.—As there is not the slightest difference of opinion among us, I think it would be a pity to give the appearance, which a prolonged consideration of this case would give, of thinking that this was either a difficult or a narrow matter. Counsel for the plaintiff has made a very valiant fight for his client, for whom, as a man, one is bound to feel sympathy as the victim of a very unusual and terrible accident. Unfortunately, sympathy is of very little use, and I confess I give him my sympathy, not only as a man but as a litigant, because I think it is a great pity that the learned judge did not take the case from the jury, in which event the plaintiff would not have been lured on to the protracted legal procedure which has followed.

A great deal has been said about the respective provinces of judge and jury, but it has been settled beyond the possibility of recall that if, in the opinion of the court, there is no evidence on which the jury should reasonably have come to the conclusion to which it did come, the verdict must be set aside. The jury are always the proper judges if there is a question of disputed fact, but in this case there is no dispute whatsoever as to the facts. The facts were these. The defendant and his wife, driving a saloon motor car without a chauffeur, went to the well-known establishment of Selfridge's and parked their car with its back against the pavement, as such cars are parked at Selfridge's, in order, of course, to accommodate more cars in the somewhat limited space at their disposal, and they then went into the shop to make purchases. They were accompanied by their very usual companion, an Airedale dog, and as to the dog himself no vicious propensities have in the slightest degree been proved. They went into the shop, leaving the dog in the shut car, and they stayed a long time, and before they came out persons who saw the occurrence said that the dog was in an excited state, jumping about and barking, that then there was a crash, a little window in the back of the car having been broken by the nose or the paws of the dog. Unfortunately a fragment of the broken window flew out and went into the eye of the plaintiff, with the result that he lost his eye. He now brings this action against the proprietor of the car.

It is true that the defendant and his wife say that they never knew the dog before to be in an excited state. I do not think anything turns on that. There was a suggestion made that the dog might have got into an excited state because of carbon monoxide. I think that was a foolish suggestion. I do not think there is any difficulty in supposing that the dog might get into an excited state. Dogs get bored just as human beings do, and the bark is the dog's ordinary expletive. Besides that, the dog might wish to get out for purposes of his own, and if he was a well-bred dog he would intimate his desire by barking. And, last of all, he might have been irritated by some passer-by who in some way spoke to him, and, as the dog considered, insulted him. But I do not think any of those things matter, because I am perfectly willing to take it that the defendant and his wife, leaving the dog for that time in the car, must have taken it that it would be possible that the dog might jump about. So much for the facts, and, as I say, they are not in dispute.

Mention was made in the argument of the well-known case of *Rylands* v. *Fletcher* (1), and although, to do him justice, counsel for the plaintiff did not rest his principal argument upon that case, yet he did not altogether disclaim its application. I have no doubt that *Rylands* v. *Fletcher* (1) has no bearing on the present facts. *Rylands* v. *Fletcher* (1) dealt with the duty cast upon a person who put on his land something which was dangerous if it escaped to the land of another to keep that thing on his own land at his own peril, and, if it escaped, then he was answerable for the consequences, whether the escape was due to negligence or not; but there is nothing that is parallel to that circumstance in this case. There is, however, another doctrine which, if the facts fitted, would be equally useful to the plaintiff, and that is that you must not put anything dangerous in itself where the public may possibly have access to it, and the best-known instance of that is the case of a loaded gun. There have been several cases, as a matter of fact, decided upon the question of loaded guns; but a motor car with a dog in it is not a thing dangerous in itself, and, therefore, one comes at last to this, which is really the point on which the plaintiff mostly relied, that if you negligently allow something which may become dangerous to be in a position to which the public may have access, without his taking any precaution against the thing becoming dangerous, you are then liable for the consequences. The root of this liability is negligence, and what is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

The danger we have to deal with in this case is the danger of a piece of glass being knocked by a dog out of the window of a car parked close to the pavement, and being projected so as to hurt a pedestrian. Given that a dog left for some time in a motor car may bark and jump about, would any person expect that in jumping about he would break a small window with a blow directed at such an angle as to project a fragment of the glass into the face of a passer-by on the pavement? This is such an extremely unlikely event that I do not think any man could be convicted of negligence if he did not take into account the possibility of its occurrence and provide against it either by not leaving the dog in the car or by tying it up so that it could not reach the window. In other words, people must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities. Many dogs have been left in many motor cars near pavements, but before this case who ever heard of a dog breaking a window at such an angle as to send a fragment of glass into the eye of a passer-by? I have, therefore, no doubt that the decision of the Court of Appeal was clearly right, though I do not put it as they do on what I may call the particular licence allowed to the domestic dog. I put it simply on the question what does and what does not amount to negligence in the circumstances of the case. I move your Lordships that the appeal be dismissed with costs.

LORD WARRINGTON.—I agree.

LORD ATKIN.—I agree. As I understand it, the case put forward by counsel for the plaintiff was on two grounds. In the first place, he relied upon the liability of the owner of an animal of known mischievous propensities to keep it under control, with the consequence that damage caused by the mischievous propensities is damage which falls upon the person who fails to exercise the control. That is a liability which exists only in the case either of wild animals, which have by their nature a mischievous propensity, or of tame animals which are known to the persons having control to have a particular mischievous propensity. In this case it is quite clear on the evidence that this ordinary tame dog was not known by the owner to have any mischievous propensity whatever, and, for the reasons given in the judgment of the Court of Appeal, the case must fail if it is put upon that ground. But it is also true that, quite apart from the liability imposed upon the owner of animals or the person having control of them by reason of knowledge of their propensities, there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour—the ordinary duty to take care in the cases put upon negligence. As far as that part of the case is concerned, it appears to me that, for the reasons given by the noble viscount on the Woolsack, the case was not established and there was no evidence upon which a jury could reasonably come to the conclusion that the defendant in this case had been guilty of any breach of duty at all. For these reasons I agree that this appeal should be dismissed.

LORD THANKERTON.—I concur.

LORD MACMILLAN.—Members of the public, motor owners, and pedestrians alike, in their use of the highway, owe to each other a duty to take care that they do not injure each other. The mere circumstance of their being on a highway brings them into a relationship with each other from which relationship arises the duty to have regard for each other's safety. In each case the question is whether there is any evidence of such carelessness in fact as amounts to negligence in law—that is to breach of the duty to take care. To fulfil this duty the user of the road is not bound to guard against every conceivable eventuality, but only against such eventualities as a reasonable man ought to foresee as being within the ordinary range of human experience. The noble and learned viscount on the Woolsack has rehearsed the circumstances of the present unfortunate accident, and the mere rehearsal of them is sufficient to show that the occurrence was of such an unprecedented and unlikely character that according to no reasonable standard could it be said that it ought to have been foreseen by the most careful owner of a motor car with a dog in it on a highway. There was, accordingly, in my view, no neglect on the part of the defendant of any duty owed by him to the plaintiff. It was, in short, a pure accident. I, therefore, concur in the motion that this appeal be dismissed.

Appeal dismissed.

Solicitors: *Darracotts*; *Watson, Sons & Room.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

PLACE *v.* SEARLE

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), May 5, 6, 1932]

[Reported [1932] 2 K.B. 497; 101 L.J.K.B. 465; 147 L.T. 188;
48 T.L.R. 428]

Husband and Wife—Consortium—Action for loss—Inducement to leave spouse—Evidence necessary to support action.

A husband has a right to the consortium of his wife, and a wife to the consortium of her husband, and either has a cause of action against a third party who without justification destroys that consortium. It is sufficient, to support such an action, to prove that the defendant induced the plaintiff's spouse to do an act which, but for his or her persuasion, would, or might, never have been committed. It is not necessary for the plaintiff to prove that his or her spouse's will was overborne by the stronger will of the defendant.

Ruling of DARLING, J., in *Sanderson* v. *Hudson* (1) (1923), The Times, Jan. 29, disapproved.

Court of Appeal—New trial—Disbelief of evidence—Need of "enormously strong case".

An enormously strong case is needed before the Court of Appeal can say that evidence given by a witness in the court below cannot reasonably be believed by a jury.

Notes. Considered: *Newton* v. *Hardy*, [1933] All E.R.Rep. 40. Applied: *Best* v. *Samuel Fox & Co.*, [1950] 2 All E.R. 798. Referred to: *Menon* v. *Menon and Warth*, [1936] 1 All E.R. 900; *Lough* v. *Ward*, [1945] 2 All E.R. 338; *Mallett* v. *Dunn*, [1949] 1 All E.R. 973.

As to consortium and actions for enticement, see 19 HALSBURY'S LAWS (3rd Edn.) 819 et seq., and for cases, see 27 DIGEST (Repl.) 86 et seq.

Cases referred to:

(1) *Sanderson* v. *Hudson* (1923), The Times, Jan. 29.

(2) *R.* v. *Jackson*, [1891] 1 Q.B. 671; 60 L.J.Q.B. 346; 64 L.T. 679; 39 W.R. 407; 7 T.L.R. 382; sub nom. *Re Jackson*, 55 J.P. 246, C.A.; 15 Digest (Repl.) 993, *9747*.

(3) *Winsmore* v. *Greenbank* (1745), Willes, 577; 125 E.R. 1330; 27 Digest (Repl.) 88, *673*.

(4) *Smith* v. *Kaye* (1904), 20 T.L.R. 261; 27 Digest (Repl.) 89, *676*.

(5) *Butterworth* v. *Butterworth*, [1920] P. 126; 89 L.J.P. 151; 122 L.T. 804; 36 T.L.R. 265; 27 Digest (Repl.) 545, *4936*.

(6) *Slingsby* v. *A.-G.* (1916), 32 T.L.R. 364, C.A.; on appeal, 33 T.L.R. 120, H.L.; 3 Digest 370, *120*.

(7) *Allen* v. *Flood*, [1898] A.C. 1; 67 L.J.Q.B. 119; 77 L.T. 717; 62 J.P. 595; 46 W.R. 258; 14 T.L.R. 125; 42 Sol. Jo. 149, H.L.; 34 Digest 189, *1553*.

(8) *R.* v. *Morris* (1867), L.R. 1 C.C.R. 90; 36 L.J.M.C. 84; 16 L.T. 636; 31 J.P. 516; 15 W.R. 999; 10 Cox, C.C. 480, C.C.R.; 14 Digest (Repl.) 383, *3736*.

(9) *Gray* v. *Gee* (1923), 39 T.L.R. 429; 27 Digest (Repl.) 90, *681*.

Appeal by the plaintiff against an order made on the further consideration of an action tried by McCARDIE, J., at Cambridge Assizes with a jury.

The plaintiff was a grocer's assistant residing at Cambridge, and the defendant was a medical practitioner residing in the same place. The plaintiff alleged that the defendant had enticed away his, the plaintiff's, wife. The defendant denied the allegations, and averred that Mrs. Place had left her husband on her own initiative and without any inducement on his, the defendant's, part. At the trial the jury disagreed, and the question whether there was any case to go before a jury was argued in London on March 12, 1932. His Lordship held that there was no evidence on which a reasonable jury could come to a conclusion in favour of the plaintiff and entered judgment for the defendant. The plaintiff appealed.

Martin O'Connor and *M. O'Sullivan* for the plaintiff.
G. O. Slade for the defendant.

SCRUTTON, L.J.—The plaintiff brought an action alleging that the defendant had without justification persuaded his (the plaintiff's) wife to leave him. The action was tried with a jury, but the jury was unable to agree. McCARDIE, J., then considered whether there was any evidence on which a jury could find in favour of the plaintiff, and came to the conclusion that there was no such evidence, and, accordingly, he gave judgment for the defendant. The question before this court is whether there was evidence on which a jury could reasonably find in favour of the plaintiff, although they might have found the other way.

It seems to me clear, at the present day, that a husband has a right to the consortium of his wife, and the wife to the consortium of her husband, and that either has a cause of action against a third party who without justification destroys that consortium. The old law has been altered to this extent that the means of enforcing the right to consortium have been materially weakened. In the old cases there are dicta to the effect that the husband has the dominion and property over the wife; but since the decision in *R.* v. *Jackson* (2) whatever rights the husband has he cannot enforce them by physical confinement; he cannot seize his wife when she attempts to leave the consortium and lock her up. But there still remain means of enforcing the right of the husband and the right of the wife. The court used to make orders for restitution of conjugal rights. Such decrees were obviously not enforceable by ordering specific performance, but the court could enforce them by writ of attachment. That power was taken away by s. 2 of the Matrimonial Causes Act, 1884. In *R.* v. *Jackson* (2), FRY, L.J., said ([1891] 1 Q.B. at p. 685):

> "That Act [the Act of 1884] deprived the court of the power to enforce a decree for the restitution of conjugal rights by attachment and substituted for that power two things: it gave the power in the case of both husband and wife to order certain pecuniary allowances, and it further provided that non-compliance with the decree for restitution of conjugal rights should be deemed to amount to desertion without reasonable cause. These provisions are substituted for the old power to enforce the decree by attachment."

The power to enforce by order money payments, and the fact that it is a matrimonial offence to desert, however that term may be defined, rest upon existing rights of consortium both in the husband and in the wife. There being such a right, it follows, and it has been so decided in numerous cases, that any person who without justification interferes with that right is liable to an action in tort. Counsel for the defendant agrees that the statement in Lush's Husband and Wife (3rd Edn. at p. 3) is correct, namely, that it

> "is the duty of the wife to reside and consort with her husband. This is a duty which she owes to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages; unless the person who harboured her acted from 'principles of humanity,' to protect her from her husband's ill-treatment, in which case no action can be maintained, even though it should turn out that the wife's allegation was unfounded."

Winsmore v. *Greenbank* (3) is cited in support of that statement. That case is not old law although it was decided a long time ago. In 1904 we find that in *Smith* v. *Kaye* (4) R. S. Wright, J., who was probably one of the greatest masters of the law on the bench, in considering a case where the brother and brother-in-law of a wife persuaded her to leave her husband, stated the law to the jury thus (20 T.L.R. at p. 263):

> "If the defendants persuaded her to leave, or induced her to leave, or incited her to leave, or procured her leaving, then they would be liable,"

and the jury returned a verdict for the plaintiff for £500. McCardie, J., stated the law in the same way in *Butterworth* v. *Butterworth* (5). The decision of Darling, J., in *Sanderson* v. *Hudson* (1), however, has been relied upon for the proposition that the defendant in such an action as this is not liable unless the wife's will has been overborne by the stronger will of the defendant. I know of no authority for that proposition, and, in my view, it is erroneous. It is quite sufficient to support the action if a wife of equal will with that of the defendant is persuaded to depart from the consortium of the husband. In following Darling, J.'s ruling in *Sanderson* v. *Hudson* (1), McCardie, J., was wrong.

That being so, the question on the facts is whether there was evidence on which the jury could reasonably come to the conclusion that the defendant's conduct offended against the rule of law I have stated. In considering that question I agree that it is not enough to find one statement in the plaintiff's evidence which, if believed, would constitute a breach of his right. We have to look at the whole of the evidence, and unless we can say that the statement for the plaintiff cannot be accepted, because all the evidence is the other way, the case must be left to the jury. A case which will illustrate what the court may do in such circumstances is *Slingsby* v. *Attorney-General* (6). Mrs. Slingsby swore that she had given birth to a child on a certain date and the judge believed her. The Court of Appeal reversed the learned judge's decision and entered judgment for the other party because the evidence was such as to render it overwhelmingly impossible that Mrs. Slingsby could be telling the truth, and that view was upheld in the House of Lords. An enormously strong case is needed before the Court of Appeal can say, that, though there is evidence given by a witness, it cannot reasonably be believed by the jury. Unless we get such a case as that, we must assume in considering the question whether there is any evidence on which the jury could reasonably find a verdict for the plaintiff, that they accepted the evidence in favour of the plaintiff and disbelieved the evidence given in favour of the defendant.

What is the evidence in this case? It is affirmed by the plaintiff and denied by the defendant that the plaintiff was entirely ignorant of the course of conduct which had been going on for some years between his wife and the defendant. It was said that the defendant and the plaintiff's wife, without the knowledge of the plaintiff, had been constantly meeting, and a great part of the evidence to that effect is given by the wife herself. Once a week the defendant took his car out from Cambridge to a place some miles off where he was met by the plaintiff's wife, and they then went to a place some twenty miles further off where they had dinner. Being asked why this weekly dinner took place there, she replied that they could not get anything fit to eat at Cambridge. Not only was there this weekly dinner, twice a week they met, not at the defendant's house or at the wife's, but at a shooting box some sixteen miles from Cambridge and there they spent the afternoon. Further, the plaintiff's wife was taken out for riding. All this had been going on without the plaintiff being aware of it.

Then came the day which has been so much talked of—July 11. There was in the plaintiff's house a lodger named Aurousseau, who said something suggesting to the plaintiff that the wife and the defendant had been committing adultery, and, as one might expect, the plaintiff did not receive this with perfect tranquillity; he went up to the room where the wife was in bed and an angry scene took place, the plaintiff threatening to stick a knife into her. Later that night the wife telephoned for protection—to whom? To the defendant. The two met outside the defendant's house and the defendant took her back to the plaintiff's house. When they arrived there, according to Aurousseau's evidence, which the jury may believe, this happened: "I'm sorry," said he, "that I precipitated matters, but I have not done so with any malicious intention towards you." The defendant said: "It's all right. Don't worry. It has to come sooner or later. Perhaps you've done us a good turn." The wife talked with the defendant; the latter said to the witness: "I've known Mrs. Place for six years. Gwen is the only woman I have ever loved." Obviously, the jury could draw one inference from that. A stormy scene and a fight then took place between the plaintiff and the defendant. The defendant said to the husband: "I shall do just as I am doing;" and a little later he said: "Come on, Gwen. We will go." And they went.

That is the evidence of Aurousseau, and, if the jury accepted it, and the story of the secret interviews between the defendant and the plaintiff's wife during the previous five or six years, would it be unreasonable to say that the wife had left her husband because of the persuasion and inducement and enticement of the defendant? I can quite understand that the jury might come to another conclusion. They might say that everything up to that date was harmless, or that the plaintiff knew of it, and that in what happened on this particular night, the defendant was merely protecting the wife against her husband's violence. If the jury took the latter view that would have meant a verdict for the defendant. If, however, they took the other view as to the five or six years' association, and that what happened in the end was merely the climax, they might reasonably find a verdict for the plaintiff.

It appears to me McCARDIE, J., was wrong in holding that there was no evidence on which a jury, properly directed, could reasonably find a verdict for the plaintiff. The case must go before another jury with proper and careful direction from the judge, limiting it to the particular question before him.

GREER, L.J.—I am of the same opinion. The question is whether the judge was right in saying that when all the evidence had been called there was no evidence for the jury to consider on the claim made by the plaintiff. I say that because, although the judge was asked at the end of the plaintiff's case to rule that there was no evidence to go to the jury, and he might, if he had been so disposed, have ruled there and then to that effect, he declined to do so. The evidence of the defendant and the plaintiff's wife was then called, and we cannot exclude from our consideration that evidence. I agree that there is no room for dispute as to the law to be applied. It is accurately stated in the words quoted by SCRUTTON, L.J., from LUSH ON HUSBAND AND WIFE (3rd Edn.), although I should like to make one or two verbal alterations in the proposition there stated. At the foot of p. 3 of that work it is said that:

> "Corresponding to the husband's dominion over the person of his wife is the duty of the wife to reside and consort with her husband. This is a duty which she owes

> to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages, unless the person who harboured her acted from 'principles of humanity.'"

I think it would probably be more accurate, if, instead of using the words "tempts or entices," it were said, "procures, entices, or persuades," and then, instead of the word "harboured," were substituted "procured, enticed, or persuaded," the statement then continuing as in the text.

It is unnecessary to recapitulate the evidence of the plaintiff's wife and the defendant as to what had been going on for some years before the events of July 11. If Aurousseau's evidence is to be accepted, it is obvious that this association had had one result on the mind of the defendant, namely, that the plaintiff's wife was a woman whom he loved and the only woman whom he had ever loved, and also that their opportunities for meeting should be allowed to continue. It was in that state of mind that he was summoned by the wife to go to her house and deal with the situation that had arisen from the plaintiff having discovered what had been going on. When the defendant reached the house, according to Aurousseau's evidence, he said: "I have known Mrs. Place for six years. Gwen is the only woman I have loved"; and then, when the plaintiff came in and said to the defendant: "You have no right to do what you have been doing," the defendant insisted that he had the right. The husband asked what the defendant intended to do about it, to which the defendant answered: "I shall do just as I am doing," meaning thereby: "I am going to insist upon having the opportunities I have had in the past of associating with the woman," whom he stated he loved. The plaintiff told the defendant to go outside, and a fight ensued, the defendant, being the more powerful man, getting the better of it. According to the witness, the defendant then said: "Come on Gwen. We will go." The defendant, apparently, thought that it was no use for the wife to stay longer in the house, but the jury might think that what was in the defendant's mind was that he knew that, unless Mrs. Place came away from her house, the opportunities of friendship with her would come to an end. I think it is extremely probable that when the defendant came to the house he had no intention of taking Mrs. Place away; what he probably thought was that he was going into the presence of a complaisant husband, and finding that this was not so, and, having to fight it out with the husband, he said: "Come on, Gwen. We will go." That, in my view, was evidence upon which the jury could find that the defendant, having discovered that he could no longer have the opportunities of meeting the wife without the husband's assent, the only course was to go away from the house. It is quite true that, having a wife of his own, he did not take Mrs. Place to his own house, and took her, not to the house of her mother, who was not then in good health, but to the house of a friend. It does not follow that, because next morning they may possibly have repented and desired to effect some kind of reconciliation, the defendant did not intend on the evening in question to persuade the wife that the parting of the ways had come and that they could not go on as before without leaving the house.

We have to determine the question whether there was evidence of an inducement or enticement on July 11, and in doing that we cannot shut our eyes to what took place before that date. Looking at it in that light, I have come to the conclusion that there was evidence to go to the jury, and that the judge was wrong in ruling that there was not. That does not pre-judge the result of a verdict that may be taken from another jury. There is a good deal to be urged in favour of the view that Mrs. Place might have said that the time had come when she could no longer remain in her husband's house. That is one of the points of view which will have to be considered by the jury when the case is re-tried. But I am quite satisfied that McCardie, J., was wrong in holding that there was no evidence on which a reasonable jury could come to the conclusion that Mrs. Place left in the end because she was persuaded to do so by the defendant.

SLESSER, L.J.—McCardie, J., has held that there was no evidence upon which the jury could find for the plaintiff on the cause of action alleged. In my view, the judge, in coming to that conclusion, applied a test which he was not justified by the authorities in applying. The test he applied appears clearly in these words of his judgment:

> "There were no words of persuasion, no words of enticement, not even words of advice—merely the words: 'Come on, Gwen. We will go.' In what way can it properly be said that the wish and will of the wife were overborne?"

In an earlier passage he said this:

> "It seems to me, if I may respectfully say so, that the first real recognition of the changed status of married women was made by Darling, J. (as he then was), in *Sanderson* v. *Hudson* (1). He there pointed out that the old authorities as to mere harbouring could not apply in view of the altered position of wives. He further said that in order to succeed in an action for enticement a plaintiff must prove that the wife had been induced to do that which she would not have done voluntarily; that she had in a real and effective manner been induced and persuaded to leave her husband, and that (in substance) her will had been overborne by the stronger will of the defendant."

As I read his judgment the judge has asked himself: Was there any evidence that the will of the wife had been overborne by the defendant? He had this amount of justification for asking the question that it appears to be the fact that Darling, J., in the case referred to did say that, in order to succeed in such an action, it must be proved that the wife's will had been overborne. In my view, that is an erroneous test to apply. If the matter is considered as one of principle this kind of action is founded upon a violation of a legal right, and so we have to enquire whether something has been done by the defendant which can be taken to amount to such a violation. The matter is put very clearly in *Allen* v. *Flood* (7) by Lord Watson in these words ([1898] A.C. at p. 107):

> "He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured."

That, it appears to me, is the proper test to apply in asking the question in this case—did the defendant induce Mrs. Place to do an act which, but for his persuasion, would, or might, never have been committed? That is a much lower standard as to what is necessary to constitute a violation of a legal right than that suggested by Darling, J., in *Sanderson* v. *Hudson* (1), that the wife's will must be overborne. That view I can only call a heresy. No such view had ever previously been suggested; no support is to be found for it in the decision of R. S. Wright, J., in *Smith* v. *Kaye* (4).

McCardie, J., says further in his judgment that the law on this subject has been greatly modified in recent years. As to that, it is true that in consequence of s. 2 of the Matrimonial Causes Act, 1884, and in accordance with the decision in *R.* v. *Jackson* (2), it is not now possible to attach a person who disobeys a decree for restitution of conjugal rights, nor is it permissible for a man to detain his wife by force. But these modifications have left the law as to the husband's right to the consortium of his wife unimpaired. In *R.* v. *Morris* (8), Byles, J., said that (L.R. 1 C.C.R. at p. 95):

> "It is a sound rule to construe a statute in conformity with the common law, rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law."

If there were any doubt on the matter now in question the decision in *Smith* v. *Kaye* (4), which was arrived at long after the passing of the Matrimonial Causes Act, 1884, and after the decision in *R.* v. *Jackson* (2), and curiously enough, after the decision of Darling, J., in *Gray* v. *Gee* (9), when he held, only three months after his decision in *Sanderson* v. *Hudson* (1), that an action will lie by a married woman against another woman for enticing away the plaintiff's husband, shows that the law as to the right to consortium entitling the injured spouse to bring an action against a third party who has committed a violation of that right has not been altered. As I have said, in considering whether there has been a violation of that right the test must be whether something has been done which, but for the interference of the defendant, would not have been done. The question whether what was done amounted to advice or persuasion, may be one of degree, and it is for the jury to consider. In this case the judgment of McCardie, J., is so infected with the error as to the overbearing of the will, that the wrong test has been applied. If the right test had been applied, there was, in my opinion, evidence which should have been left to the jury. I agree that there should be a new trial.

New trial ordered.

Solicitors: *Edmond O'Connor & Co.*, for *Sidney J. Peters*, Cambridge; *Few & Wild*, Cambridge.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

MIDLAND BANK, LTD. *v.* RECKITT AND OTHERS

[House of Lords (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), January 26, 28, 29, February 1, 29, 1932]

[Reported [1933] A.C. 1; 102 L.J.K.B. 297; 148 L.T. 374; 48 T.L.R. 271; 76 Sol. Jo. 165; 37 Com. Cas. 202]

Bank—Cheque—Conversion—Negligence—Onus of proof—Cheque drawn by agent without authority—Notice that cheque drawn by agent—No inquiry as to agent's authority—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 82.

A client gave his solicitor a power of attorney which included power to draw cheques on the client's banking account and to apply moneys for the client's purposes. The solicitor drew cheques on the client's bank, signing them as attorney for the client, and fraudulently paid them into his own account with the appellant bank to reduce overdrafts. In an action by the executors of the client against the bank for damages for the conversion of the cheques,

Held: the cheques not being drawn for purposes of the client, the solicitor had no authority to draw them or to receive the proceeds; the cheques remained the client's property; and, therefore, the bank, in presenting and receiving payment for them, converted them; the onus of proving that they had not acted negligently was on the bank; the bank knew that the solicitor was applying the cheques to his own use to liquidate his debt to them, and the form of the signature to the cheques gave the bank notice that the money was not his money, especially in view of the terms of s. 25 of the Bills of Exchange Act, 1882; there was no possible inference that he was applying the money in discharge of a liability of his principal; and, therefore, the bank were negligent, within s. 82 of the Act of 1882, in making no inquiry as to the solicitor's authority to make the payments, and were liable for the amount of the cheques as damages for their conversion.

Power of Attorney—Scope of authority—"Ratifies and confirms whatever the attorney shall do"—No extension of actual authority given by the power.

The inclusion in a power of attorney of a clause whereby the principal "ratifies and confirms and agrees to ratify and confirm whatsoever the attorney shall do or purports to do by virtue of these presents" cannot be construed as extending the actual authority given by the power of attorney, though it may amount to a promise to adopt acts done within the ostensible authority.

Notes. Considered: *Slingsby* v. *District Bank, Ltd.*, [1932] 1 K.B. 544. Referred to: *Rama Corpn., Ltd.* v. *Proved Tin and General Investments, Ltd.*, [1952] 1 All E.R. 554; *Marquess of Bute* v. *Barclays Bank, Ltd.*, [1954] 3 All E.R. 365.

As to the duty of a banker in receiving money on current account and collecting cheques, see 2 Halsbury's Laws (3rd Edn.) 166 et seq., and as to powers of attorney, see ibid., vol. 1, 161 et seq. For cases see 3 DIGEST 179–187, 201–205, and 1 DIGEST 295 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *A. L. Underwood, Ltd.* v. *Bank of Liverpool, Same* v. *Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C. A.; Digest Supp.

(2) *Morison* v. *London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; 3 Digest 230, *631*.

(3) *Reckitt* v. *Barnett, Pembroke, and Slater, Ltd.*, [1929] A.C. 176; 98 L.J.K.B. 136; 140 L.T. 208; 45 T.L.R. 36; 34 Com. Cas. 126, H.L.; Digest Supp.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), reversing a judgment of ROWLATT, J., given in favour of the appellants, the Midland Bank, Ltd. Sir H. J. Reckitt, the plaintiff in the action, died on Dec. 29, 1930, and the respondents were his executors.

The action was brought by the plaintiff to recover £17,890, being the proceeds of fifteen cheques wrongfully and fraudulently drawn by one Lord Terrington as the plaintiff's attorney upon the plaintiff's banking account with Barclays Bank, Ltd., at Hull, and wrongfully and fraudulently paid by the said Lord Terrington into his account with the appellant bank in the name of H. J. S. Woodhouse & Co. By his statement of claim the plaintiff alleged that the cheques were not drawn in relation to his business or affairs, but were drawn and handed to the appellants without the knowledge, authority, or sanction of the plaintiff and were wrongfully and fraudulently drawn and dealt with by Lord Terrington. The plaintiff alleged that in the premises the appellants were guilty of conversion of the cheques. He further alleged that the appellants were guilty of negligence, and would, therefore, not be entitled to the protection of s. 82 of the Bills of Exchange Act, 1882. In the alternative the plaintiff claimed the amount of the said cheques as money had and received by the appellants for the use of the plaintiff. The appellants denied any conversion or negligence. They set up that they received payment of the said cheques, which were crossed, for their customer in good faith and without negligence and were protected by s. 82 of the Bills of Exchange Act, 1882.

The Court of Appeal held, reversing the decision of ROWLATT, J., that the appellants had converted the fifteen cheques and were liable to the plaintiff for the amounts thereof with the exception of the first two cheques as damages for conversion, and they ordered judgment to be entered for the plaintiff for £13,490. There was a cross-appeal by the respondents in respect of the first two cheques.

By s. 82 of the Bills of Exchange Act, 1882:

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Rayner Goddard, K.C., and *D. B. Somervell, K.C.*, for the appellants.

F. P. M. Schiller, K.C., and *H. G. Robertson* for the respondents.

The House took time for consideration.

Feb. 9. The following opinions were read.

LORD ATKIN.—This case arises out of the fraudulent acts of Lord Terrington, who in 1922 and during the relevant period was practising as a solicitor in Clarges Street in the name of H. J. S. Woodhouse & Co. He had as a client Sir Harold Reckitt, now deceased, whose legal representatives are the respondents to the present appeal. Sir Harold Reckitt appears to have been a wealthy man in the habit of spending part of his time abroad. He employed Lord Terrington as his solicitor. In 1915 Sir Harold, being engaged in Red Cross work in France, gave Lord Terrington, then Mr. Woodhouse, a power of attorney in limited form, which did not include a power to draw cheques on his account. It was considered desirable that Lord Terrington should possess this particular power; and it was given by a letter dated Aug. 17, 1915, written by Sir Harold to his bankers, Barclays Bank, at Hull, empowering Lord Terrington to draw cheques upon the account at Hull "without restriction." In 1922 the original form of power of attorney which had been renewed from time to time was superseded by an extended form which expressly gave power to the attorney to draw cheques on the principal's banking account and to apply moneys for the purposes of the principal; but it does not appear that the general terms of the letter of Aug. 17, 1915, were in any way modified or that Barclays Bank were even informed of the extended power of attorney. The power of attorney of 1922 was renewed from time to time and was in force during all times relevant to this action. Lord Terrington, to Sir Harold Reckitt's knowledge, acted under the power of attorney at all times, whether Sir Harold Reckitt was in the country or not. Both principal and attorney, therefore, drew upon Barclays' account at Hull, a great number of cheques being drawn in the ordinary course by each of them. Lord Terrington drew cheques on cheque books supplied by Barclays Bank at the cost of the principal, signing the cheques on an impression made by a rubber stamp containing in the upper line "Harold G. Reckitt by" and on the lower line "his attorney" and placing his own signature between the lines, so that the completed signature on each cheque ran "Harold G. Reckitt by Terrington, his attorney." In 1926 it was discovered that Lord Terrington had been in the habit of fraudulently drawing cheques for his own purposes on Sir Harold Reckitt's account. Twenty such cheques had been paid into Lord Terrington's account with the appellant bank. In respect of fifteen of these cheques, amounting in all to £17,890, dated at different periods between May 15, 1922, and Feb. 20, 1926, Sir Harold Reckitt brought the present action claiming the amount mentioned as damages for the conversion of the cheques. The bank, denying the conversion, relied upon s. 82 of the Bills of Exchange Act, 1882, alleging that the cheques were crossed cheques and that they had received payment of them for a customer in good faith and without negligence. As to two of the cheques they also said that they were holders in due course. Rowlatt, J., decided in favour of the bank on the issue of negligence; the Court of Appeal decided against the bank in respect of all the cheques except the first two and gave judgment against the bank for £13,490. The bank appeal from the judgment of the Court of Appeal and the respondents cross-appeal seeking to have judgment for the whole £17,890.

For the purpose of determining the issues so raised, it is necessary to state the circumstances in which the cheques came into existence. Since 1899 Lord Terrington and his predecessors had had a banking account with the Cornhill branch of the appellant bank. In 1922, the first of the material years, Lord Terrington had two accounts, No. 1 and No. 2. They were both in the firm name, Lord Terrington being at this time the sole member of the firm. No. 1 account appears to have been used almost exclusively for meeting private expenditure; No. 2 seems to have been the business account. No. 1 account was, except for a short interval, always overdrawn. No. 2 account was throughout, except for a short interval, in credit. The net balance from time to time varied, at times being a credit, at others a debit. It is clear that the manager was never completely satisfied with the position of the account. It gave him "a certain amount of anxious care." The overdraft on No. 1 account was, at one time at any rate, considered by the bank not to be protected by the credit of No. 2. A solicitor's No. 2 account, they thought, was generally made up of clients' money: and, though Lord Terrington gave them assurances as to this, with which they said at the trial they were satisfied, it is obvious that the uneasiness never ceased. In January, 1923, acting it is said on legal advice, they took what they call an hypothecation form in which the customer charged any moneys standing in his name to the credit of any account with the repayment of the moneys owing on any account. How this increased their rights if the money was the customer's money, or gave them any rights if the money was clients' money, it is, perhaps, not necessary to discuss.

A reference to some of the earlier communications between the bank and Lord Terrington will suffice. In January, 1922, the bank record that at an interview Lord Terrington arranged that he would keep his overdraft on No. 1 account much smaller

A in the future, and that they were to advise him in writing before the figures got large. On Feb. 17, Lord Terrington is informed that No. 1 account stands overdrawn £1,129, which perhaps he would arrange to cover. On Feb. 24 it is £1,274 and his kind attention would greatly oblige. On April 4, at an interview the bank pointed out that they did not care about No. 1 being consistently overdrawn against No. 2, "the reason being that it is commonly understood that a solicitor's No. 2 account is commonly made up of B clients' money." Lord Terrington did not agree to this, but after some conversation said that he would place his No. 1 account in credit. On May 9, 1922, the bank write that No. 1 was £1,905 overdrawn, and would he kindly let them have a transfer from No. 2 to put No. 1 in credit. On May 15, 1922, the bank write a stiff letter:

> "We would again draw your attention to the amounts of No. 1 account overdrawn C £2,168. . . . As we mentioned to you recently, our head office insist that these accounts should be kept in credit, and we would ask you to be good enough to see that the present overdrafts are covered without delay, and that the accounts are kept in credit in future."

Nevertheless, No. 1 account continued to be overdrawn, and from time to time the net balance on both accounts was in debit. In January, 1923, as I have said, they took an D hypothecation form over No. 2, though with some doubts as to what their position would be in the event of bankruptcy. For the remainder of 1923 the account appears to have been kept to the satisfaction of the bank. In January, 1924, the bank were a little uneasy at being asked to pay some £600 worth of cheques, making the total of the two accounts overdrawn to that extent, on the strength of the premise of a cheque of £1,000 due on a completion. The cheque, however, duly arrived a day late.

E In February comes the first of the transactions in which the bank have been found to be liable. On Feb. 23, the bank write to their customer that with reference to their telephone conversation of the previous afternoon the net overdraft on his accounts amounted to some £250, and they would be obliged for his attention early on Monday morning. On Feb. 23, a Saturday, Lord Terrington drew a cheque for £500 on Sir Harold Reckitt's account, dated Feb. 25, in favour of Messrs. H. J. S. Woodhouse & Co. F or order, drawn as attorney in the form above described, and he enclosed it duly endorsed in a letter to the bank on Feb. 23 with another cheque of £23 "for credit No. 2 account, H. J. S. Woodhouse & Co." The drawing of this cheque was a fraud on Sir Harold Reckitt. It was not drawn to put the attorney in funds in respect of any past or future expenditure on behalf of his principal. In simple language the attorney stole the money and applied it to his own purposes—in fact, to pay his debt to the bank. On G March 11 the bank wrote that the firm's account frequently goes into debit, for which there is no arrangement, and at the present time is overdrawn some £88, and they would be glad of his attention, and think it very desirable they should have an interview. On March 13, Lord Terrington sent a cheque for £400 drawn as the last; the accounts on the evening before were on balance overdrawn £240. On March 14 the bank wrote:

> "Having regard to the circumstances last evening we must ask you in future to be H good enough to see that we are provided with funds to meet any cheques that are presented in your firm's account, as we cannot undertake to overpay the account, nor can we accept the responsibility of notifying you that funds are insufficient to meet your drawings."

On March 21 there was an important interview. The bank asked Lord Terrington to transfer sufficient funds from No. 2 account to wipe out the debit balance on No. 1 I account. They asked what was the cause of the account being constantly overdrawn and asked that arrangements should be made to keep it in credit. Lord Terrington replied that he had some £15,000 owing to him by clients. Such debts were all good, but he was unable, owing to pressure of business, to send out the necessary accounts. He does not appear to have suggested to the bank, nor would it have been the fact, that he had made any disbursements from his own account on behalf of Sir Harold Reckitt which he could as attorney repay himself. There is no evidence that at any time the bank knew that Lord Terrington acted on any occasion as Sir Harold Reckitt's solicitor. The same day he sent the bank a cheque for £450 drawn on Sir Harold

Reckitt's account as before. At the end of the day before the interview No. 1 account was in debit £5,190; there was a credit balance on the two accounts combined of £197. On March 28 there was another somewhat acrimonious interview when the combined overdraft was about £300, and on March 31, Lord Terrington sent another Reckitt cheque for £400. On April 8, the combined overdraft being £1,253, Lord Terrington, after another reminder from the bank, sent another Reckitt cheque for £250.

It is convenient, I think, to pause here and survey the legal relations of the parties in respect of this group of five cheques, amounting to £2,000, which in the course of forty-three days were paid in to his account by Lord Terrington. The Court of Appeal, rightly as I think, came to the conclusion that the rights of the parties would be determined by the view taken as to these particular transactions. In the first place, Lord Terrington had no actual authority to draw these cheques at all or to receive the proceeds. His only actual authority was to draw cheques for his principal's purposes. Accordingly, if it can be supposed that Sir Harold Reckitt found Lord Terrington standing at the counter of the bank waiting to pay in one of the cheques, he could, if he knew the true facts, have demanded the immediate delivery of the cheque to him. It was his property, and Lord Terrington had no title to it. In these circumstances I have no doubt that the bank in presenting and receiving payment for the cheques converted them. I venture to quote words of my own used in *A. L. Underwood, Ltd.* v. *Bank of Liverpool* (1) merely because they seem to me applicable and I cannot express the idea in simpler language ([1924] 1 K.B. at p. 795):

> "The bank so disposed of the chattels, the cheques, as to deprive both themselves and the true owners of the dominion over them, and in exchange for the pieces of paper constituted themselves the debtors of the customer. I cannot imagine a plainer case of conversion."

It is quite irrelevant to the issue of conversion that after payment the pieces of paper came into possession of the paying bank to be held as vouchers on account of the true owner, Sir Harold Reckitt. This position existed in *Morison* v. *London County and Westmister Bank, Ltd.* (2), where the collecting bank were held to have converted the cheques.

The only question, therefore, is whether the bank have established that they received payment in good faith and without negligence and so brought themselves within s. 82 of the Bills of Exchange Act, 1882. Their good faith is not challenged. The issue, therefore, is confined to negligence, and the onus of proving the absence of negligence is plainly cast upon the bank. But for the section they are liable for conversion, and it is for them to bring themselves within the statutory protection. It appears to me, when the facts are examined, that this case differs not in principle from *Reckitt* v. *Barnett, Pembroke and Slater, Ltd.* (3), where Lord Terrington drew a cheque as attorney on Sir Harold Reckitt's account in payment of a motor car supplied to himself. It was held that the vendors were liable to Sir Harold for the amount of the cheque. LORD CARSON shortly states the conclusion of all the members of the House when he says ([1929] A.C. at p. 191):

> "It is clear (i) that the cheque was used to liquidate the private debt of Lord Terrington; (ii) that the defendants knew it was so used; and (iii) that the form of the cheque gave them notice that the money was not the money of Lord Terrington. In that state of circumstances there is no evidence or any possible inference which can be drawn that the agent was applying his principal's money in discharge of any possible liability of his principal."

Precisely the same state of things exists here. Lord Terrington was applying these cheques in part payment of his overdraft—i.e., of money lent to him by the bank. The bank knew that he was doing so; indeed it was at their repeated request that he made the payments. They had the same notice in the form of the cheque that the money was not the money of Lord Terrington. There is in the same way no evidence and no possible inference that he was applying this money in discharge of any possible liability of his principal.

It seems to me clear that in an omission of an ordinary business precaution, in breach of a plain duty imposed upon a creditor to take reasonable care to see that a known agent paying his own debt to his creditor out of his principal's money is acting within his authority, the bank were negligent in making no inquiry as to their customer's authority to make these payments. I doubt whether he could have satisfied such inquiries, however superficially made. Even if he had answered the first inquiry the mere fact that the bank showed themselves to be on their guard would probably have stopped the frauds. But, be this as it may, no inquiry in fact was made and the bank fail to show that they acted without negligence. The form of the cheque, as has been pointed out, necessarily points to the money being Sir Harold Reckitt's money. But to make the matter clearer s. 25 of the Bills of Exchange Act, 1882, expressly provides that:

> "A signature by procuration operates as notice that the agent has put a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."

It seems to be suggested in the judgment of LORD READING, C.J., in *Morison's Case* (2) that the operation of this section was limited to the time before the instrument was honoured, but that after a bill so signed in excess of authority has been honoured s. 25 did not confer a right to recover the proceeds. If the words used meant to mark off a definite period within which alone the section affects legal rights, I see no ground for such a distinction. The effect of the statute is to give notice of limited authority on the face of the document, and this operates as and when the document is negotiated or delivered. The legal consequence of such notice may be to prevent the holder who obtains payment from supporting his right to have received payment. *Reckitt* v. *Barnett, Pembroke and Slater, Ltd.* (3), is a good instance. The rights in respect of a bill after payment are no doubt matters of special consideration; but whether before or after payment the fact that the bill contains on the face of it notice of limited authority to place on it the particular signature continues to be a fact affecting pro tanto the rights of the parties both before and after payment. What effect, if any, such notice has on an intermediate holder for value it is unnecessary to discuss.

As to the remainder of the cheques in respect of which the plaintiffs succeeded in the Court of Appeal, I find it unnecessary to discuss the facts in detail. In most cases the account was overdrawn, but not in all. In some cases only had there been pressure by the bank. But I agree with the view taken in the judgments below that the bank's position was affected by the transactions in 1924, and the notice and negligence then found to have existed must be taken into account when considering the subsequent transactions. When all the relevant facts are so considered, I think the Court of Appeal were right in concluding that, in respect of these cheques also, the bank had not discharged the onus of disproving negligence.

With regard to the first two cheques complained of in respect of which the Court of Appeal decided in favour of the bank, I have, after some doubt, come to the conclusion that the decision should not be altered. There was the same lack of actual authority as in the other cheques and the same notice; but the cheques were not specifically drawn to meet claims of the bank. They were drawn in one case to fictitious payees. Pearson & Co.; in the other case to Woodhouse & Co.; but in both cases a cheque of equivalent amount was drawn out practically simultaneously—in the first to Pearson & Co., in the second to one Buxton, with whom Lord Terrington seems to have had some joint adventure. They appear to have been the first cheques drawn fraudulently by the solicitor, and upon the whole I see no ground for differing from a decision that in these two cases the bank acquitted themselves of negligence.

It remains to deal with contentions of the bank based upon the terms of the power of attorney. The bank never in fact asked for or saw the terms of the document; and, for my part, I venture to doubt whether in such circumstances they could ever rely on any other than an actual authority. Ostensible authority appears to be excluded when the party averring it cannot show that any appearance of authority other than the actual authority was ever displayed to him by the principal. He neither shows a representation nor that he relied on it. But in this case, as the members of the Court of Appeal have pointed out, the notice found to exist defeats reliance on ostensible equally with actual authority. Neither in the one case nor in the other can the agent be assumed to have authority to pay his own debts with his principal's money. It was said, however, that the clause of the power of attorney whereby the principal

> "ratifies and confirms and agrees to ratify and confirm whatsoever the attorney shall do or purports to do by virtue of these presents"

protects the bank. The clause in some such form is of long standing. It does not appear to be happily worded; for a ratification in advance seems to contradict the essential attributes of ratification as generally understood. It cannot, I think, be construed as extending the actual authority given by the power of attorney; it may amount to a promise to adopt acts done within the ostensible authority; and this strengthens the position of those who rely on the ostensible authority by an express promise as well as by an estoppel. If this be so it is difficult to see how the promise could be available except to someone who was aware of it and who acted on the strength of it. But in any case it would appear to be a highly improbable construction to suppose that a principal using this form has precluded himself from objecting to a dealing with his property by a person who had notice in ordinary circumstances that the agent was exceeding his authority actual and ostensible. It would mean that the principal was saying either "I give you actual authority within defined limits, but ostensible authority to do what you like with my property so long as you pretend ('purport') to be doing it under this document"; or "I give you similar actual authority." Such a construction would make powers of attorney a danger instead of a business facility and would certainly defeat the intention of any reasonable principal. I think, therefore, that the notice in this case defeats this defence.

The cheques on which the bank have been held liable were crossed and marked not negotiable, except two—March 13, 1925, Lloyds or bearer, £1,000, and Feb. 20, 1926, Woodhouse & Co., £390. As to these two, the bank claim to be holders in due course to the extent of the overdraft existing when they were paid in. That they were holders for value to that extent is, I think, true whether the value is said to be the payment of the antecedent debt (the overdraft), or to be the lien to the extent of the overdraft (Bills of Exchange Act, 1882, s. 27 (3)). But the notice already referred to defeats their right to be considered holders in due course. In other respects it was not suggested that there would be any difference between these and the other cheques following the group which I have discussed in detail.

For the above reasons I think that the appeal and cross-appeal should be dismissed, with costs.

I am asked to say that my noble and learned friend, **Lord Dunedin**, and my noble and learned friend, **Lord Thankerton,** concur in the judgment which has been delivered.

LORD WARRINGTON.—I have had the advantage of reading the opinion of my noble and learned friend, LORD ATKIN, and I concur in it.

LORD MACMILLAN.—I also concur.

Appeal dismissed.

Solicitors: *Coward, Chance & Co.*; *Nicholl, Manisty & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

SYCAMORE *v.* LEY

[Court of Appeal (Scrutton, Lawrence and Greer, L.JJ.), June 21, 22, 1932]
[Reported 147 L.T. 342]

Animal—Liability of owner for injury to plaintiff—Need to prove knowledge by owner of dog's fierce nature—Absolute liability—Dog placed in circumstances likely to affect its temper.

Since the time of Lord Holt the law has taken notice that a dog is not of a fierce nature, but rather the contrary, and, therefore, before the owner of a dog can be made liable in an action for damages for injury done by the dog to the plaintiff it must be shown that that particular dog was of a fierce nature, and, further, that the owner knew it. But if the dog, to the knowledge of its owner, is ferocious, the owner is absolutely liable if it escapes from his control and injures some person. Further, he may be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that it will get excited, will lose its temper, and will cause injury to persons lawfully passing along the highway.

The plaintiff, aged five, when leaning over a motor car, stationary upon the highway, which she had been warned by her father not to approach, after a general warning by the defendant, the owner of the car, to the children accustomed to play nearby, was bitten by a dog which was owned by the defendant and was confined to the car by a leash so that it could project its nose only three inches over the rim of the door. In an action against the defendant claiming damages for negligence,

Held: the defendant was entitled to leave the dog in the car for the protection of the car and its contents; the warning which he gave that the dog might bite if interfered with was no evidence that he knew it to be of a ferocious nature and might attack persons lawfully using the highway; there was no other evidence of scienter on which a jury could act; and, therefore, judgment must be entered for the defendant.

Notes. Considered: *Deen* v. *Davies*, [1935] All E.R.Rep. 9; *Aldham* v. *United Dairies* (*London*), *Ltd.*, [1939] 4 All E.R. 522. Referred to: *Wright* v. *Callwood* (1950), 66 (pt. 2) T.L.R. 72.

As to the liability of owners of animals, see 1 Halsbury's Laws (3rd Edn.) 663 et seq., and for cases see 2 Digest 229 et seq.

Cases referred to:

(1) *Cox* v. *Burbidge* (1863), 13 C.B.N.S. 430; 1 New Rep. 238; 32 L.J.C.P. 89; 9 Jur. N.S. 970; 11 W.R. 435; 143 E.R. 171; 2 Digest 233, *218*.

(2) *Filburn* v. *People's Palace and Aquarium Co., Ltd.* (1890), 25 Q.B.D. 258; 59 L.J.Q.B. 471; 55 J.P. 181; 38 W.R. 706; 6 T.L.R. 402, C.A.; 2 Digest 238, *243*.

(3) *Marlor* v. *Ball* (1900), 16 T.L.R. 239, C.A.; 2 Digest 238, *244*.

(4) *Latham* v. *R. Johnson and Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(5) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(6) *Excelsior Wire Rope Co., Ltd.* v. *Callan*, [1930] A.C. 404; 99 L.J.K.B. 380; 142 L.T. 531; 94 J.P. 174; 35 Com. Cas. 300; 28 L.G.R. 543, H.L.; Digest Supp.

Appeal from an order of du Parcq, J., in an action tried by him with a common jury.

The plaintiff, an infant aged five years, suing by her father as next friend, claimed damages from the defendant, a medical man, for injuries received by being bitten on the cheek by the defendant's dog, a Sealyham terrier. The defendant was accustomed to leave his 12 h.p. Austin touring motor car in the highway near the plaintiff's place of residence, and to leave in it his Sealyham terrier. Children were accustomed to play nearby. The defendant had warned these children: "Do not go near the car, the dog may bite you," or "Do not go near the dog, he may bite you." The father of the A plaintiff had expressly warned her that she was not to go near the car. The defendant had owned the dog for seven years, and it had never bitten anyone. Evidence was given by one witness:

> "Dog was always fierce: anyone walking by, dog used to growl and bark fiercely and try to get at you: he was not able to get at you, unless you were near the car; I have seen him about three inches from edge of the car—from window. I mean B he got his head over the window."

On July 12, 1930, the car was left in the highway with the hood up, but with no side screens. The Sealyham was in the car, so fastened by a leash that it could only get its nose 3 in. over the top of the door of the car. The plaintiff either stood on tiptoe on the highway, her hands touching the lower part of the door and leant over the car, C or, according to her own account, prompted by her mother, stood on the running-board of the car, when the Sealyham bit her on the cheek.

The learned judge left the following questions to the jury: 1. Was this dog of a ferocious disposition? 2. If yes, was the defendant aware of its ferocity? 3. Was the defendant negligent in leaving the dog tied up in the motor car? 4. If yes, was his negligence the cause of the plaintiff's injuries? 5. Did the child climb or attempt to climb on to the car before she was bitten? On all these questions the jury were unable D to agree. Question No. 6: Was the plaintiff guilty of contributory negligence? Question No. 7: Damages? To the sixth question the jury answered "No." The answer to the seventh question was made, but not disclosed. No verdict was recorded, and the jury were discharged. The defendant applied for judgment, but this the learned judge refused, holding that the jury were unable to agree. Against this order the defendant E appealed.

R. C. Vaughan for the defendant.

Martin O'Connor for the plaintiff.

SCRUTTON, L.J.—We have had such a full discussion in this case, the length of the argument being justified, or attempted to be justified, by the desire that we should lay down a rule which would govern future cases of dogs of all sorts in cars in any circum- F stances, I feel able to give judgment at once, but not a judgment which will deal with the innumerable cases which have been suggested to us.

The action was tried before DU PARCQ, J., and a common jury. The plaintiff, who sued by her father and next friend, was a little girl aged five who had been bitten by a dog in the defendant's car. The dog was described as a very small dog, a Sealyham. The defendant's wife was the secretary of a large tenement building in which the next G friend of the little girl, her father, was a tenant. The defendant's wife used to come at least once a week, sometimes oftener, in this car, or her husband used to fetch her in this car, and while he went in to find her, or while she went in, the Sealyham stayed in the car. The dog was so fastened by a leash, which was produced to the jury so that its length was seen by them, that on the evidence of one of the plaintiff's witnesses it was possible for it to get its nose 3 in. outside the car. What happened was that this H small child of five, who had been told by her father not to go near the car, did so, and (again I take the language of the plaintiff's witness) leaned over the car, and

> "As she leaned I saw the dog bite her; she leaned over on tiptoe and her hands just touched the lower part of the door. She forced herself away with her hands when the dog bit her."

The child herself, assisted by her mother, said to the police constable directly after the I accident: "I got on to the running-board of a motor car and the dog bit me." The evidence of the police constable was that the little girl was prompted by her mother at the time. He said: "The child said she got on to the motor car; the word running-board was suggested by the mother."

The learned judge asked a series of questions of the jury, but they were unable to agree on all of them except two. In answer to one question they found that the child was not guilty of contributory negligence. Thereupon, the defendant applied for judgment on the ground that there was no evidence on which answers could have been given by the jury which would involve liability on him. This the learned judge refused, holding that the case remained as one on which the jury were unable to agree.

We have had an enormous number of cases cited to us; many of them have little to do with this case, because in this case the animal was a dog. Liability for animals has been laid down perfectly clearly. I will take from one of the leading cases what WILLES, J., said about this liability in *Cox* v. *Burbidge* (1) (13 C.B.N.S. at p. 439):

> "The distinction is clear between animals of a fierce nature and animals of a mild nature which do not ordinarily do mischief like that in question. As to the former, if a man chooses to keep them, he must take care to keep them under proper control, and if he fails to do so he is taken to know their propensities and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty."

Under this heading such animals as tigers, gorillas, various kinds of monkeys, elephants, and zebras have been held to be animals as to which a person keeping them takes that responsibility. I will only add to what WILLES, J., said what LORD ESHER said in *Filburn* v. *People's Palace and Aquarium Co.* (2). Speaking about an elephant he said (25 Q.B.D. at p. 260):

> "It falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself."

Under that heading a man who stroked a zebra and received an unexpected kick was held not able to recover: *Marlor* v. *Ball* (3).

As to the second class, and this is the class in which a dog comes, WILLES, J., said in *Cox* v. *Burbidge* (1) (13 C.B.N.S. at p. 439):

> "As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact."

It is not for the jury to say whether dogs are of that class, because since the time of LORD HOLT the law has taken notice that a dog is not of a fierce nature, but rather the contrary; consequently, before you can make the owner of a dog liable in any particular case, you must show that, the class of dogs not being called of a fierce nature, this particular dog is of a fierce nature, and, secondly, you must show that the owner of the dog knew it. That has been applied in this way. You keep a dog, you allow him to run in the street; in the street he bites a child; you are not liable, unless it be shown that that particular dog was of a ferocious character, dogs ordinarily not being of a ferocious character, and that you knew of the dangerous character of that particular dog. If that is the law when you let a dog run in the street, how much more are you not liable when you do not let a dog run in the street but confine him to your car so that he cannot get out of the car and he bites somebody who has come within reach while he is so confined. The present is a case, according to the plaintiff's witness, of someone who leans over the car and is thereupon bitten by the dog in the car. It must be shown that this dog was of a ferocious character, as distinct from dogs generally, whose ordinary character since the time of LORD HOLT has been taken by the law as not to be of a fierce nature, and that the defendant knew of it.

The first point that arises here is: Was there any evidence on which the jury could reasonably find that the owner of this dog knew that the dog was of a ferocious character as distinct from the ordinary character of dogs? The evidence was that the owner had had this dog for seven years; that it had never bitten anybody before; that while in the car it would jump and bark if people came near the car; but there was no evidence that it had ever bitten anybody. The evidence given, which was supposed to prove that the dog was ferocious, was this: Mitten, the only man who saw what happened said:

> "Dog was always fierce; anyone walking by, dog used to growl and bark fiercely and try to get at you; he was not able to get at you unless you were near the car; I have seen him about three inches from edge of the car—from window; I mean he got his head over the window."

Is that enough, bearing in mind that what happened occurred when the owner was not in the car, to justify the jury in finding that this dog was of a ferocious nature, and that the owner knew it? The other evidence to be considered is that the owner, on leaving the car, had said to children about: "Do not go near the car, the dog may bite you," or "Do not go near the dog, he may bite you." In my view, a warning like that, a very natural warning to give to people, is no evidence that the owner knows that the dog is of a different character from all other dogs, which are taken to be of a mild nature, but that it is of a ferocious nature and will bite, though he may bite if, as in the case put by LORD ESHER, somebody brings it on himself by getting into the car or putting his head over the car, or teasing the dog, or something of that kind. I, therefore, begin this case with the view which I think the learned judge took, that there was no evidence on which it was open to the jury to find that this dog was of a ferocious character, and that the owner knew it. The learned judge said, and I go a little further than he does:

> "I should be disposed, without deciding it now, to say that the evidence that this dog was of a ferocious disposition towards mankind and was known by the defendant to be of a ferocious disposition towards mankind, if it exists at all, is so slight that a jury could hardly act upon it."

I go further and say it is so slight that no reasonable jury could act upon it in finding what is sometimes described as scienter.

This case then, is, I think, different from all the other cases which have been cited to us, because they all turn on the theory that the thing concerned is a dangerous thing, whereas a man is not liable for damage done by his dog unless the dog is of a particular character and he knows it. Any suggestion that you could make the owner of a dog liable for damage which he does when the dog was within the owner's property, seems to me to lead to ludicrous results. You keep a watch dog, a burglar enters the house, the dog bites him. Are you liable? It may be that you know that the dog will bite, that is why you keep him there, but are you liable to the burglar whom the dog bites because you know that the dog is of a dangerous character, and you put him there to protect your property from the person who brings the bite of the dog upon himself through entering?

Counsel for the plaintiff has addressed much argument to us on the children's cases. No doubt the English law as to children, as LORD SUMNER said in *Latham* v. *Johnson* (4), is difficult to justify and explain. I am content, without referring to the children's cases to which counsel has referred, to say that I entirely agree with and adopt the judgment of HAMILTON, L.J., in *Latham* v. *Johnson* (4) on that subject, and that adopting that statement of the law, I cannot see any reason for removing the dog cases from the ordinary law with regard to them as it has been laid down in a long line of cases since *Cox* v. *Burbidge* (1). There is a further fact which seems to me to be of considerable importance—that the father of the child, the next friend, said: "I had told this child not to go near the car." There is a little doubt as to the evidence. The judge's note is: "Not to go near the car"; the note taken by counsel is: "Not to go near the dog." Therefore, you have the child treated by her father as old enough to be about in the street without protection and told by her father not to go near the car, but she goes near the car, and leans over it. In my view, such a child brings herself within the language of LORD ESHER, in *Filburn* v. *People's Palace and Aquarium Co.* (2); she brings the damage on herself.

In those circumstances I do not think that the owner of the dog can possibly be held liable. I only wish to say one thing more. We were told that the Automobile Association, or some powerful body, desired this case fought to raise the question whether a man might keep a dog which he knew to be dangerous in a car in order to protect the car from theft; and we were told that the police took the same view. I am not going to lay down any such proposition. As counsel for the plaintiff said, each case depends on its own facts. When a case comes before me which does raise the question whether you may keep a dog which you know to be dangerous in a car in order to prevent theft I will endeavour to deal with it according to the authorities. The point is not raised in this case, and, therefore, the Automobile Association and the police must get a case with other facts than those here before they can get that point decided. For these reasons I think that the learned judge should have entered judgment for the defendant. We must enter judgment for the defendant with costs here and below.

LAWRENCE, L.J.—I agree.

GREER, L.J.—I also think that there was no evidence which would justify a jury coming to the conclusion that the damage to the plaintiff was occasioned by any breach of duty by the defendant. That is sufficient to dispose of this case without deciding any of the questions which have been referred to in the argument, and without resolving the many difficulties which I see in reconciling what has been said in the various cases which have arisen with regard to the liability of a defendant towards young children who have been injured by reason of something that belongs to the defendant. The ground on which I desire to put this case is that the facts proved afforded no evidence of any breach of duty by the defendant to the plaintiff. I say that for the reason that, in my judgment, the defendant was entitled to have his dog in his car for the reasonable protection of his car when, according to the ordinary needs of his profession, he had to be absent from his car, provided he took reasonable steps to protect those who were entitled to use the highway as he was entitled to use the highway.

Liability for damage caused by the bite of a dog is not, in my judgment, confined to the cases where it has to be made out that a dog had, by reason of its ferocious character known to the defendant, to be taken out of the class of tame animals and put into the class of wild animals. A dog ordinarily is presumed to be a tame animal, and its owner is not responsible for what it may do in the way of biting, but if it has proved itself to his knowledge not to be of the presumed tame character which the law attributes to dogs, then he is liable absolutely if it escapes from his control and causes damage by way of biting a human being. It does not matter whether he has taken the strongest and the greatest precaution that might be taken to keep it under control, his liability is absolute, just like the liability of the defendant in *Rylands* v. *Fletcher* (5).

But that is not the end of his liability. He may, in my judgment, be liable for the conduct of a dog which has not been taken out of the category of tame animals if he puts it in such a position and in such circumstances as render it likely that the dog will get excited, will lose its temper, and will cause injury to people lawfully passing along the highway; and if this were a case where there was any evidence of that kind—that the dog was at that time likely in the events that happened in Bermondsey on the occasion in question to lose its temper and bite somebody lawfully passing along the road, and had done so, and there was no further evidence in the case—I should have thought that it would be enough to enable the case to be taken to the jury. But what precautions did the defendant take? The first precaution he took was that he tied up the dog securely in his car so that the most that it could do would be to get its nose 3 in. above the top of the doorway, it being an open car. It would not have been much use as a protection to his car if he had tied it up so securely that it could not have had any effect in frightening an evilly disposed person who wanted to open the door of the car and take something which was in the car. It does not seem to me that it could be said that he was other than careful in the way in which he tied up the dog in the car. But his precautions did not end there, because he recognised that he had at times to leave the car in a place where there were numbers of children who might approach near enough to the car to be injured by the dog. As far as he could, he warned the children in that neighbourhood, where he frequently had to go, not to go near the car because there was a danger that they might be bitten. I do not know what view I might have come to if the child who had been bitten had not heard that warning or had not had that warning passed on to her, but we are dealing here with a child to whom that warning had been communicated by her own father, and it is not suggested that she was not of such an age that she could not understand the words said to her.

It seems to me in those circumstances that it is not possible to say that the defendant had not taken reasonable precautions to see that in the lawful use he was making of his car he was not causing unreasonable damage to people rightly using the highway or to children who might be expected to be near the car. The only other way in which the situation could be met would be by his leaving the dog at home, but a man is not bound to refuse to use his own property because there may be children who insist on trespassing on it and thereby bring themselves into danger. In support of the views I put forward as to the possibility of the defendant being liable where the dog is not in the class of ferocious animals I just refer to the judgment of LORD DUNEDIN and the judgment of LORD ATKIN, in *Excelsior Wire Rope Co.* v. *Callan* (6), who both laid it down that there may be not merely liability for the bite of a dog who has become one of the ferocious class, a wild animal, but there may be liability if the dog is so negligently treated that the result may be damage to somebody lawfully using the highway, or what I think amounts to the same thing, damage to a child who has not been warned and who may be likely to interfere with the dangerous object. Both those judgments involve the two propositions, and I agree that there may be cases in which a defendant may be liable for the bite of a dog even if the dog does not belong to the class of ferocious animals, if it be proved that the dog is put in such a position that a reasonable man would know that it was likely to cause danger, and, therefore, he ought to regard himself as under an obligation to do something by way of precaution. I think he has sufficiently performed his obligation if he gives notice to those likely to be in danger.

For these reasons I think that the judgment in the court below ought to be varied and judgment entered for the defendant.

Appeal allowed.

Solicitors: *Amery-Parkes & Co.*; *J. Nixon Watts & Co.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

BAKER *v.* E. LONGHURST & SONS, LTD.

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.JJ.), June 21, 1932]

[Reported [1933] 2 K.B. 461; 102 L.J.K.B. 573; 149 L.T. 264]

Highway—Negligence—Night-driving—Need for driver to be able to pull up within limit of vision.

A person driving a motor vehicle at night must drive at such a pace that he can pull up within his limits of vision; accordingly, in the absence of some other factor causative of the collision, if he collides with something, either he was driving unduly fast or he was not keeping a good look out.

The plaintiff, motor cycling at night, ran into a horse tip-cart proceeding in the same direction in front of him on its near-side of the road. The cart was without a light. The plaintiff in his evidence said that his speed was 15–20 m.p.h., and he could stop easily within ten yards. The beam of his lamp showed thirty yards ahead. He said that he never actually saw the cart; he saw a dark object loom up and swerved to avoid it. In an action by him against the owners of the cart for negligence inasmuch as the cart was on the road without a light,

Held: on the plaintiff's evidence, contributory negligence by him was established, and judgment must be entered for the defendants.

Notes. The common law defence to an action for negligence of contributory negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provides for apportionment of the loss according to the share in the responsibility for the damage.

A Distinguished: *Tidy* v. *Battman*, [1934] All E.R.Rep. 259. Not followed: *Morris* v. *Luton Corpn.*, [1946] 1 All E.R. 1.

As to the negligent use of vehicles on a highway, see 23 HALSBURY'S LAWS (2nd Edn.) 636 et seq., and for cases, see 36 DIGEST (Repl.) 89 et seq. For Law Reform (Contributory Negligence) Act, 1945, see 17 HALSBURY'S STATUTES (2nd Edn.) 12.

Cases referred to:

B (1) *Sharpe* v. *Southern Rail. Co.*, [1925] 2 K.B. 311; 94 L.J.K.B. 913; 133 L.T. 693; 69 Sol. Jo. 775, C.A.; 8 Digest (Repl.) 87, *588*.

(2) *Dublin, Wicklow and Wexford Rail. Co.* v. *Slattery* (1878), 3 App. Cas. 1155; 39 L.T. 365; 43 J.P. 68; 27 W.R. 191, H.L.; 8 Digest (Repl.) 97, *645*.

(3) *Tart* v. *G. W. Chitty & Co., Ltd.*, [1933] 2 K.B. 453; 102 L.J.K.B. 568; 149 L.T. 261, D.C.; 36 Digest (Repl.) 93, *504*.

C **Appeal** from a decision of the Divisional Court.

The plaintiff brought an action in the county court alleging negligence on the part of the defendants in respect of a collision between his motor cycle and the defendants' horse tip-cart just after lighting-up time. The negligence alleged was that the cart was without a light. The place was Ashcombe Road, Dorking, and it was a dark night, D although there was an electric light twenty yards ahead of, and another sixty yards behind, the place of the accident. The cart was proceeding upon its near-side of the road, when the motor cycle from behind ran into it.

The plaintiff's evidence, as appeared from the notes of the county court judge, was as follows:

> "Driving from Ranmore Road to London Road and along Ashcombe Road. Proper E lights; acetylene headlamp. Speed about 15–20 m.p.h. It was a very dark night. I did not actually see it was a cart. Saw a dark object loom up, and swerved to avoid it."

In cross-examination he said:

> "I could pull up easily in ten yards. Beam of my lamp shows thirty yards. I never applied my brake at all. It was too late."

F The county court judge, holding that the defendants had not satisfied him that the driver of the motor cycle was guilty of contributory negligence, gave judgment for the plaintiff. The defendants appealed to the Divisional Court. ACTON, J., was of opinion that the appeal should be allowed on the ground that there was no evidence that the plaintiff had not been guilty of contributory negligence; but TALBOT, J., refusing to interfere with the findings of the county court judge, the appeal was disallowed. The G defendants appealed to the Court of Appeal.

T. Eastham, K.C., and *Armstrong-Jones* for the defendants.

L. R. Miller for the plaintiff.

SCRUTTON, L.J.—In this case there was an appeal from the county court to the Divisional Court about a decision as to a collision between a motor cyclist and a cart. There is no dispute that the owners of the cart were negligent because they were driving H after lighting-up time without a light. The question is whether the driver of the motor cycle was guilty of contributory negligence. The county court judge has, in his notes, said that he was not satisfied, or, rather that the defendants had not satisfied him, that the driver of the motor cycle was negligent. The appeal is on the ground that the facts were such that there is no room for any other finding than the one that the motor cyclist was negligent. That it is a case of some little doubt and difficulty is manifest I in that the Divisional Court were divided in opinion. ACTON, J., was in favour of allowing the appeal on the ground that the evidence was all one way on the subject of contributory negligence, but TALBOT, J., thinking the case was very near the line, felt that he could not take the same view. The case is rendered a little more difficult by the fact that it is an appeal from a county court judge, from whose findings of fact there is no appeal. A county court judge must err in law before one can interfere with his judgment, and this involves the proposition that the defendants the appellants, must satisfy us that, as a matter of law, the evidence was such that the finding that there was no contributory negligence cannot stand.

This is a class of case which is obviously very common, because while counsel for the A
defendants has read to us two similar judgments of Divisional Courts against motor cyclists, this court has had two more cases in the last few years on almost exactly the same sort of facts, one a case of a stationary vehicle in a dark road at Winchester, where a motor cyclist ran into a very large motor lorry, and another a case which had this slightly different feature, that the lorry driver desiring to get water, had pulled over to the wrong side of the road to get to a stream, and so was run into by the motor cycle. B
Every case must depend upon its own facts, and, therefore, it is not much good citing the fact that in another case a certain conclusion has been arrived at by different judges.

The question of law here is this: In *Sharpe* v. *Southern Rail. Co.* (1), the headnote in the LAW REPORTS is as follows:

> "The plaintiff was a passenger on the defendants' railway to Guildford by a train C
> which arrived at that station while it was still daylight. Owing to the train being too long at the platform at Guildford upon its arrival there the hindmost carriage, in which the plaintiff was, stopped short of the platform. A porter shouted to the passengers to keep their seats, but the plaintiff, who was asleep, did not hear him. On waking, the plaintiff realised that he was at Guildford Station, and, fearing that he might be carried on, got out in a hurry without looking to see what he was D
> stepping on. There being a drop of 5 ft. from the carriage floor to the ground, he fell and was injured."

The jury found that the plaintiff was not negligent, and this court set the verdict aside on the ground that, on the facts as stated, he was clearly guilty of negligence in getting out, and not looking where he was going. If he had looked he would have seen that there was no platform, and that the nearest solid ground was 5 ft. below him. He did E
not look, and he got out as if he was getting out to a platform, and fell, and broke his leg. BANKES, L.J., and ATKIN, L.J., and I gave judgment, and I see in the judgment of ATKIN, L.J., this passage ([1925] 2 K.B. at p. 319):

> "The plaintiff in his own evidence conclusively proves that, even if the defendants were negligent, their negligence was not the cause of the accident, but that it was brought about by his own lack of care in not looking to see where he was going." F

That merely refers one to the statement of LORD HATHERLEY, in *Dublin, &c., Rail. Co.* v. *Slattery* (2) (3 App. Cas. at p. 1169):

> "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact." G

The facts in this case are these. Just after lighting-up time a horse and tip-cart were going along a dark road in Dorking—when I say "a dark road," there was an electric light within twenty yards of the accident ahead, and one within sixty yards of the accident behind—but still the evidence was that it was very dark. As the cart was going along on its near-side of the road without a light, there ran into it from behind a H
motor cycle. The evidence of the driver of the motor cycle was this:

> "At the pace I was going, which I say was 15–20 m.p.h., I can pull up in ten yards. I have an acetylene lamp which will show thirty yards ahead. I was not able to avoid the cart because I was too late."

On that evidence, which is not contradicted in any way—it is the evidence of the plaintiff I
himself—he was in this difficulty, either he was going at a pace at which he could not stop within the limits of his vision, or, if he could stop within the limits of his vision, he was not looking out. In either case he was guilty of negligence. That is merely a statement of the principle on which we acted in *Sharpe* v. *Southern Rail. Co.* (1) and in other cases, and on which the Divisional Court acted in *Tart* v. *G. W. Chitty & Co.* (3). I suppose anybody who knows anything about the roads knows that a motor cycle is one of the fastest vehicles on the road, and if people who ride motor cycles will go at such a pace on dark nights that they cannot pull up when they see something they must

take the consequences, and not be able to recover damages through their own foolishness or negligence. It is no good saying that this cart had not a light. It might have been a foot-passenger in the road, who is not obliged to carry a light, or the accident might have occurred in the New Forest, where cattle are frequently crossing the road, and they, again, are not obliged to carry lights. If you ride in the dark you must ride at such a pace that you can pull up within your limits of vision, and if, in those circumstances, you strike something, either you are going too fast or you have not been looking out.

While I am only deciding this case on its facts, because there is no doubt about the principles applicable. I doubt whether it is much use saying that some other judge on some other facts came to another decision. It is clear in this case that the county court judge had no grounds upon which he could decline to find that the plaintiff was guilty of contributory negligence. The appeal must, therefore, be allowed, and judgment entered for the defendants, with costs here and below.

LAWRENCE, L.J.—I agree. The evidence given in this case by the plaintiff is consistent only with negligence on his part. Putting this into other words, there is no evidence upon which a judgment could be founded that the plaintiff was not guilty of contributory negligence. The appeal must be allowed.

GREER, L.J.—I agree. The question whether a judge is ever entitled to enter judgment for the defendants on the ground that, by the plaintiff's own admissions, or by the undisputed facts, contributory negligence is conclusively proved has been a moot question on which differences of opinion have been expressed by very high authorities. But it is now settled beyond question that there may be circumstances under which, though the onus be on the defendants to prove contributory negligence, the judge may, at the end of the case, say upon the admissions of the plaintiff's own witnesses, or upon the undisputed facts of the case, that contributory negligence was so proved that no jury, acting reasonably, could possibly find any other verdict except a verdict that the accident was due to the contributory negligence of the plaintiff. That was finally determined, at any rate so far as this court is concerned, in the case to which my Lord has referred of *Sharpe* v. *Southern Rail. Co.* (1). That is the only matter of law which we have to consider in this case.

The other question is whether or not, on the facts admitted by the plaintiff, there was conclusive evidence of contributory negligence. This is what the plaintiff said:

> "Driving from Ranmore-road to London-road along Ashcombe-road. Proper lights, acetylene head lamp. Speed about 15–20 m.p.h. It was a very dark night. I did not actually see it was a cart. Saw a dark object loom up, and swerved to avoid it."

Then in cross-examination he admitted:

> "I could pull up easily in ten yards. Beam of my lamp shows thirty yards. I never applied my brake at all. It was too late."

The meaning of this is that with the beam of his lights showing thirty yards, if he was keeping a look out, he could see whether there was some object with regard to which he had to exercise the care due from a reasonable driver to avoid doing damage to that object, or to himself. As my Lord has pointed out, if he did see the cart thirty yards away then it is obvious that if he had taken reasonable care in driving, and slowed down, or stopped, or started to try to avoid the obstacle in front by swerving to the right in time, he could have avoided the accident; but the fact that he did not do so indicates that he was driving so fast that he could not exercise his judgment in time to swerve, or to put his brakes on in time. If so, he was guilty of negligence. On the other hand, it may be that he was not keeping a good look out, and therefore if he saw the object at some time he did not see it as soon as he ought to have seen it, or would have seen it if he had been keeping a proper look out. There is no escape from that dilemma, and, in my judgment, he himself conclusively proved that the accident could not have happened if he had acted with reasonable care.

For these reasons I think the learned judge ought to have entered judgment for the defendants. There was no jury in this case, but it would have been exactly the same if there had been; it was the judge's duty to enter judgment for the defendants. The appeal should be allowed and in the terms my Lord has stated.

Appeal allowed.

Solicitors: *L. Bingham & Co.*; *Rising & Ravenscroft*, for *Triggs, Turner & Co.*, Guildford.

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

LLOYDS BANK, LTD. *v.* E. B. SAVORY & CO.

[House of Lords (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Russell and Lord Wright), October 28, 31, November 1, 3, December 8, 1932]

[Reported [1933] A.C. 201; 102 L.J.K.B. 224; 49 T.L.R. 116; 38 Com. Cas. 115; 148 L.T. 291]

Bank—Negligence—Stolen cheques paid into customer's account—Cheques drawn in favour of third persons—Lack of care when opening account for new customer—Cheques paid into branch other than customer's branch—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 82.

A business practice which is inconsistent with provident precautions against a known risk is not, because it is a common practice and one long-established, a sufficient justification for an act which would otherwise be negligent.

Observations as to safeguards against fraud which banks should provide (a) where the cheque of a customer is paid in at one branch to the credit of his account at another branch; (b) in opening an account for a new customer, by way of making inquiries as to the position and the employers of the new customer; and (c) in accepting for payment into a customer's account a cheque drawn in favour of a third person.

The respondents, who were members of the London Stock Exchange, had in their employ two clerks, P. and S., who stole a number of crossed cheques made payable to jobbers or bearer. P. had an account at a country branch of the appellant bank, and he paid the stolen cheques, with two exceptions, into one of the London offices of the appellant bank to be credited to him in his account at the country branch. The wife of S. had an account at a branch office, and S. paid cheques stolen by him into the appellants' head office to be credited to his wife's account at the branch office. In an action for conversion of the cheques the appellants relied on s. 82 of the Bills of Exchange Act, 1882, and pleaded that they had acted in good faith and without negligence. At the trial evidence was given that it was usual for a bearer cheque to be paid into a branch with directions that it should be credited at another branch to the credit of a person other than the payee.

Held (per Lord Buckmaster, Lord Warrington and Lord Wright; Lord Blanesburgh and Lord Russell dissenting): the appellants had failed to prove that they had dealt with the cheques in question without negligence; in the case of P., whom they knew to be a stockbroker's clerk, they did not inquire who his employers were, and in the case of S. no sufficient inquiries were made as to the means and circumstances of his wife.

Notes. Considered: *Baker* v. *Barclay's Bank, Ltd.*, [1955] 2 All E.R. 571. Referred to: *Carpenters' Co.* v. *British Mutual Banking Co.*, [1937] 3 All E.R. 811; *Marquess of Bute* v. *Barclay's Bank, Ltd.*, [1954] 3 All E.R. 365.

As to negligence by bankers, see 2 HALSBURY'S LAWS (3rd Edn.) 180 et seq., and for cases see 3 DIGEST 240 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *Bissell & Co.* v. *Fox Brothers & Co.* (1885), 53 L.T. 193; 1 T.L.R. 452, C.A.; 3 Digest 238, *666*.

(2) *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia, and China*, [1929] 1 K.B. 40; 97 L.J.K.B. 609; 139 L.T. 126; 44 T.L.R. 534; 33 Com. Cas. 306, C.A.; Digest Supp.

(3) *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins, A. L. Underwood, Ltd.* v. *Barclays Bank*, [1924] 1 K.B. 775; 93 L.J.K.B. 690; 131 L.T. 271; 40 T.L.R. 302; 68 Sol. Jo. 716; 29 Com. Cas. 182, C.A.; Digest Supp.

(4) *Morison* v. *London County and Westminster Bank, Ltd.*, [1914] 3 K.B. 356; 83 L.J.K.B. 1202; 111 L.T. 114; 30 T.L.R. 481; 58 Sol. Jo. 453; 19 Com. Cas. 273, C.A.; Digest Supp.

(5) *Taxation Comrs.* v. *English, Scottish, and Australian Bank*, [1920] A.C. 683; 89 L.J.P.C. 181; 123 L.T. 34; 36 T.L.R. 305, P.C.; Digest Supp.

(6) *Ladbroke & Co.* v. *Todd* (1914), 111 L.T. 43; 30 T.L.R. 433; 19 Com. Cas. 256; 3 Digest 239, *674*.

Appeal from an order of the Court of Appeal (SCRUTTON, LAWRENCE and GREER, L.JJ.) reported [1932] 2 K.B. 122.

The plaintiffs, who were a firm of stockbrokers in the City of London, claimed to recover damages from the defendant bank in respect of the alleged conversion of a number of cheques or their proceeds. In the alternative they claimed the value of the cheques as money had and received. In the course of their business the plaintiffs, as was usual in transactions on the Stock Exchange, drew from time to time in favour of certain jobbers bearer cheques which were crossed. The plaintiffs had had in their employment two clerks, P. and S., who, between 1924 and 1930, stole a number of those cheques and paid them into accounts with the defendants. P., who had an account with a branch of the defendant bank, paid the stolen cheques, with the exception of two which he paid into his own account, either into the defendant bank's head office or into a different branch, to be credited to his own account at the branch at which he kept his account. S. paid the cheques he had stolen into the defendant bank's head office, to be credited to his wife's account at the branch at which she kept her account. In the case of P. the account was opened without making inquiries who his employers were, and no inquiry was made when the wife of S. opened the account who her husband's employers were. The defendants pleaded that they had acted in good faith and without negligence, and were protected by s. 82 of the Bills of Exchange Act, 1882, which provides:

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

The Court of Appeal held, reversing the decision of ROCHE, J., that the bank had not discharged the burden of proving that they had dealt with these cheques without negligence. The branch managers had not made sufficient inquiries in opening the two customers' accounts, and the bank receiving the cheques had not passed on sufficient information to the customer's branch, as they easily could have done. The bank appealed.

Wilfrid Greene, K.C., and *James Wylie* for the appellants.

F. P. M. Schiller, K.C., and *Philip Vos* for the respondents.

The House took time for consideration.

Dec. 8. The following opinions were read.

LORD BUCKMASTER.—The facts of this case are simple, but the problem to which they give rise is not easy of solution.

Two men, W. H. Perkins and D. C. Smith, were clerks of the respondents, who are a firm of stockbrokers. Perkins had a banking account which he had opened at a branch of the appellants' bank at Wallington on Sept. 6, 1923, and Smith's wife had an account, which had been opened on Nov. 27, 1926, with a branch at Redhill, and transferred to Weybridge in February, 1927. Between March, 1924, and November, 1926, Perkins stole from the respondents forty-three cheques, totalling in value £2,295. These cheques were all crossed bearer cheques in accordance with Rule No. 104 of the Stock Exchange, and were drawn by the respondents in favour, as to one, of a man named Sly, and, as to another, of a man named Frost, and, as to the rest, of a man named Davis. They were consequently negotiable instruments which needed no endorsement and passed from hand to hand. The one in favour of Sly was sent by Perkins by post to the credit of his account at the Wallington branch; the rest of the cheques were paid in either to the appellants' Monument branch in London, or to their Threadneedle Street office to the credit of Perkins' account at Wallington. The paying-in slip in each case purported to be signed by Davis, excepting the one in favour of Frost and the one in favour of Sly, in which case the paying-in slip was signed by Perkins.

The claim in respect of the first nineteen of these cheques, amounting to £780 11s. 10d., was admittedly barred by the Statute of Limitations, and the judgment appealed from has excluded the claim to this extent.

Smith, between November, 1926, and March, 1930, stole forty-six similar cheques totalling £3,717. One was in favour of Davis, and was paid into the appellants' Threadneedle Street office on a paying-in slip signed in the name of Davis; the rest were all payable in favour of one, F. H. Gibbes, and these were all paid into the appellants' head office, and in each a paying-in slip was prepared in the name of Gibbes. All the cheques were duly collected by the appellants, and their proceeds placed as to the first set to the credit of Perkins at Wallington, and as to the others to the credit of Mrs. Smith at Redhill or Weybridge. The first of these cheques for £78 15s. was received before Mrs. Smith in fact became a customer and in respect of this there was no defence.

The appellants claim repayment of the amounts of these cheques from the bank, who rely in answer upon s. 82 of the Bills of Exchange Act, 1882, which is in the following terms:

> "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Apart from the section the appellants' liability is clear, for they have converted the cheques which were stolen from the respondents, and of which the respondents were the true owners. The question, therefore, is whether, in the circumstances, the appellants received payment of the cheques without negligence, and the proof lies upon them. Roche, J., held that the appellants had discharged this burden, but his judgment was reversed by the Court of Appeal.

The risk of banking accounts being used for dishonest purposes is well known and realised by the banks. The appellants have a book of rules designed to afford protection against this misuse of their facilities. Rules 29 and 36 are as follows:

> "29. No new current account shall be opened without knowledge of, or full inquiry into, the circumstances whether employed or not and character of the customer.
>
> "36. No cheques or other documents made payable to a firm, company, or anyone in the capacity of a principal, should be accepted for credit of the private account of a partner, agent or clerk, or other person closely connected with the principal, or negotiated for such person, without the principal's written authority."

There is also a rule, not reduced into writing but said to be a well-known banking understanding, familiar to cashiers from their ordinary experience, which is stated by the learned judge who tried the case in terms, accepted by the appellants, as follows:

> "Banks do not take payments in, without inquiry, of cheques drawn by a firm in favour of a third party, and paid in by a person, other than the payee, who is known to be an employee of the drawing firm."

These rules and statements are not a legal measure of the liability of a bank. They may fall short, or they may exceed what the courts may regard as their duty in a particular case, but they afford a very valuable criterion of obvious risks against which the banks think it is their duty to guard.

It appears that for many years there has been a practice among banks to receive cheques at one branch, which collects and transmits the proceeds to any defined credit at another branch. It was this practice of which Perkins and Smith availed themselves. The evidence of the appellants is that at their London branches they did not know Perkins or Smith, that they did not know the payees or the people who signed the paying-in slips, and the appellants' accountant at first said that he did not know Savory and Co., but this may have been due to a misunderstanding of the question, for he modified this statement in subsequent answers.

Dealing for the moment with Perkins alone, it is obvious that, if the Wallington branch had known that Perkins was in the employment of Savory and Co., and that he was producing cheques for his own credit drawn by Savory and Co. in favour of third persons, they would at once have become suspicious and have made inquiries before they carried the proceeds of the cheque to the credit of his account. It is, indeed, because this happened in regard to just such a transaction with regard to Barclays Bank that the whole fraud was exposed. With regard to the cheque paid in direct, the very situation contemplated by their own rule arose, to which the only suggested answer is that the signature of Savory and Co. might have been, though there is no proof whatever that it was, illegible. If this be so, it follows that the system of receiving payments in by an unknown hand at another branch completely defeated the whole protection which the unwritten rule is designed to afford, for the branch that ultimately received the proceeds was only informed from the branch which collected the cheque by a slip that gives no information whatever as to the drawer's name or that of the payee of the cheque. In other words, if the unwritten rule represents, as I think it does, some measure of the prudent course in conducting business, then that prudence is completely neglected and ignored in cases where a branch, to which the customer is entirely strange, is used as a means of collecting the cheque.

That this arrangement of business is of great convenience both to the customers and the banks may be accepted, but, conducted as it was in the present case, it neglects the necessity for that care which I think the banks have themselves formulated in their unwritten rule. It is, however, urged that even at the Wallington branch no one would have known that Perkins was in fact an employee of Savory and Co., for, when the account was opened, though it was known that he was a stockbroker's clerk, no question had been asked as to what was the firm with which he was employed. Mr. Trotter, the appellants' witness, says that if a man were introduced to a bank manager as a stockbroker's clerk, the bank would get very little information without further inquiry. The following statement makes this plain.

Mr. Schiller.—Would it tell the bank manager much if a man was introduced and he said: "I am a stockbrokers' clerk"?—(A.) No, it would not.

(Q.) He would want to know the firm of stockbrokers he was clerk of?—(A.) Possibly he would not ask the clerk, but the individual introducing may say: "He is with so and so."

(Q.) But he would want to know?—(A.) Yes.

The same proposition is expressed by Mr. Butler, the manager of the branch at Wallington, in a similar form, and I regard the result of this evidence as meaning that a prudent bank manager, obtaining an account with a stockbrokers' clerk, would ascertain who his employers were, unless the character of the reference was satisfactory, or given by a highly valued customer, in which case the quality of the reference might be taken as dispensing with the need for the inquiry. The evidence given upon that point seems to me plain. Mr. Trotter gave in answer to the judge the following statement:

(Q.) What do you mean by that? You have just told me that he would find it out and you meant he would, or ought to ask?—*(A.)* We should ask, in the ordinary course, if he is a stockbrokers' clerk, whom he is with, but if he is introduced by a respectable customer we should not bother any further.

(Q.) "I can understand a careful manager not finding out if the rest of the reference was so satisfactory as to dispense with the necessity of making inquiries." That is your answer?—(A.) That would be the sum of it.

Mr. Butler again in answer to the judge says:

"If I was told a person was a stockbrokers' clerk I should not ask whom he was with if he was brought in by a customer whom I valued highly"?—(A.) That is so.

(Q.) "But otherwise you would?"—(A.) Otherwise I should.

In the present case the reference that was taken was that of a customer who had banked with them for nearly four years, who was also a stockbrokers' clerk. His account was subsequently closed, but when, the manager could not say, and it was not known with what firm he was a clerk. He played football, and his name was constantly in the local papers as a football player. There is no evidence whatever as to what he was asked or what information he gave. That was the whole of the reference which was taken as a substitute for inquiring with what firm Perkins was working. I cannot regard it as proved to be a reference of such value as to dispense with the primary necessity of making the inquiry.

Had all these cheques, therefore, as one of them was, been paid direct into the Wallington branch, I cannot think that the bank would have acted prudently if they had received the cheques without inquiries. And if obedience to their own rules is necessary for the careful conduct of business, then, by their own conduct they have made obedience impossible, and cannot escape from the consequences merely by saying that such conduct is in accordance with a convenient method of business.

The position with regard to Mrs. Smith stands on a different footing. It is not clear what are the customary inquiries that are made when a married woman opens an account. Assuming that she is treated in that respect in exactly the same position as a man, some information ought to be obtained from her or from her reference as to her occupation, unless the character of the reference is such as to dispense with the necessity for such inquiry. She also may be an employee of a firm, and again in the absence of special conditions the name of the firm should be known. If there is nothing whatever in the reference, or in the information afforded, the bank ought, in my opinion, to inquire as to the occupation of her husband, for it is obvious that the rules of the bank, dictated by common prudence in the conduct of their business, can be entirely avoided if such knowledge is not obtained. In the present case no information whatever was forthcoming. The manager of the Redhill branch knew nothing except that the landlady of the house which she occupied said that the references given to her had proved sufficient to accept Mrs. Smith as a tenant, and I think there was a warning note in the statement made by the manager of the Redhill branch to the manager of the Weybridge branch stating "she is known to you." This was inaccurate; she was not known at Weybridge, and no information whatever was at any time obtained about her. Had it been known that her husband was a clerk in the employment of Savory and Co., and had the cheques which were paid into the London branch been paid into Weybridge, I think it would only be in compliance with the bank's rules to have made inquiry before acceptance.

I appreciate the force of the argument that similar conditions may exist in regard to a daughter or a housekeeper, but that again must depend upon all the circumstances associated with their opening an account. We have to deal with the special case before us, and I do not think that proper care was exercised when this account was opened, and the lack of that care, coupled with the method of business adopted by the bank has led to a loss arising from the very class of transaction that the banks themselves recognise as full of risk, and one against which safeguards are necessary. I therefore think that this appeal should be dismissed.

LORD BLANESBURGH.—It has become clear, as the facts of this case disclose, that all unconsciously to the appellant bank its branch credits system as hitherto worked may have offered facilities to a dishonest customer to enlist the services of the bank in obtaining for the credit of his account the proceeds of cheques which in fact he has stolen. Doubtless the disclosure of these facilities now made will lead the appellants and other multiple bankers to adopt for the future in relation to this system—one as convenient for their customers as it is doubtless advantageous to themselves—all further possible precautions and safeguards calculated to make the path of dishonesty in such matters less smooth and the wrongdoing success more precarious. But it is remarkable after an experience of over forty years that these frauds are the first in which for his own ends the system has been utilised by a thief. And much might be made of this if the appellants were to be held entitled to invoke their system as an excuse for the fact that they were not put on any inquiry and for their consequential failure to detect the frauds which have here been perpetrated.

But in accord, I believe, with all your Lordships, I decline to put the appellants in that favoured position. In my judgment, their liability in these proceedings must be determined altogether apart from the working of their system. From that system as such in its every detail their own handiwork can claim no protection whatever.

So regarding the case, the critical question much reduced as a result of the argument at your Lordships' Bar is now, I think, no more than this: Whether in the case of Perkins the appellants were negligent in that their manager at Wallington when informed, on his application to open an account, that he was a stockbrokers' clerk made no inquiry as to the name of his employer, and whether in the case of Mrs. Smith they were negligent in that their manager at Redhill before receiving her as a customer refrained from inquiring, so that, in the result, both he and the appellants remained in ignorance, even as to the occupation of her husband, in fact also a stockbrokers' clerk. Was the failure of the appellants, through their respective representatives, to obtain the information specified sufficient to deprive them in both cases, or in one, of the benefit of s. 82 of the Bills of Exchange Act, 1882?

As the matter presents itself to my mind, it is very necessary not to place this failure outside its proper perspective by dwelling upon the accident, for it is, I think, little more, that the employment as it was, when each account was opened remained unchanged throughout its continuance. That circumstance in its relation to such frauds as those now in question is calculated to emphasise the relevance and to enhance the importance of the unasked question to an extent not admissible. For it is not suggested that the appellants would here have exposed themselves to any imputation of negligence if, having been given their name, they had refrained from making any inquiry of the employers as to the respectability of their clerk, or if later they had omitted to keep any record or otherwise to inform themselves of his employment for the time being. This being understood, and the admission was most candidly made by counsel for the respondents, it becomes, to my mind, clear that at least before the wider wisdom disclosed by these successful frauds had been acquired, inquiry as to the name of a customer's employer when in fact it was made, had no reference to the possible perpetration of frauds within the reach of a clerk as such. It was neither designed nor in its imperfect range was it calculated to be a check upon these. Made, as according to the evidence the inquiry was made, only where the other references seemed to call for confirmation, its only purpose, I am satisfied, was to test the proposing customer's respectability by reference to the status and position of the employer who had so far trusted him as to receive him into his service—information whose value for that purpose was in no way lessened by a mere change in that employment subsequently effected—information, therefore, which called for no later inquiries on the subject, its end, when it was given, being fully obtained.

Now as to Perkins no real reflection was made at the trial upon the character and quality of his introduction, and in these circumstances it is not, I think, fair to the individual concerned to question in an appellate court his complete responsibility. I prefer to accept the evidence of the banking experts that the bank manager in relation to his acceptance of Perkins as a customer acted as a prudent banker. I do not see why, in this instance, the law should require more from the appellants. I can here see no reason why the omission to make the inquiry of which so much has been made should be the touchstone of the appellants' duty in his case.

As to Mrs. Smith, the case is a fortiori. I find it difficult to see any negligence in relation to this matter in the bank's failure to inform itself by inquiry as to the occupation of Mrs. Smith's husband so that, in an appropriate case, it might be followed by a further inquiry as to the name of his employer. In these days of emancipation, when female clerks, married as well as single, abound, a decision to the contrary is in danger of being invoked as authority for the proposition that when a man known to be married applies to a bank to open an account, the bank is negligent if it refrains from making similar inquiry with reference to his wife—a proposition which still strikes me as extravagant.

With these additional reasons in support of it—if, indeed, they are additional—I find myself in accord with my noble and learned friend, LORD RUSSELL OF KILLOWEN, whose opinion about to be given I have had the advantage of reading. With him, I would allow the appeal.

LORD WARRINGTON.—The question in this appeal is whether the appellants, who had primâ facie become liable in damages for the conversion of certain cheques the property of and stolen from the respondents and payment of which had been received by the appellants for customers, have proved that they received such payment without negligence so as to entitle them to the benefit of s. 82 of the Bills of Exchange Act, 1882. The judge (ROCHE, J.) who tried the action decided the question in favour of the appellants, but his judgment was reversed by the Court of Appeal (SCRUTTON, LAWRENCE, and GREER, L.JJ.).

I have read and considered the opinions of my noble and learned friend on the Woolsack and that about to be read by LORD WRIGHT, and I do not propose to state over again the detailed facts, but to express as shortly as I can the conclusion at which I arrive and the reasons for it. The cheques in question were, in accordance with the rules of the Stock Exchange, made payable to a payee or bearer and crossed generally. The payee in each case was a person with whom the respondents had dealings on the Stock Exchange. The cheques were signed in blank, the name of the payee and the amount being filled in afterwards. The appellants, in common with many other banking companies, have adopted the practice—a very convenient one for their country customers—of receiving at any of their offices in the city cheques for the credit of customers at country branches and collecting the amounts through the Clearing House and then transmitting them to the country branch for the credit of the customers concerned.

The cheques in question were stolen from the respondents by two of their clerks, one named Perkins and the other named Smith. Perkins had an account at the appellants' branch at Wallington, to which the amounts of forty-three of the stolen cheques were credited between March 26, 1924, and Nov. 16, 1926. These cheques, with one exception, were collected, some at the Monument branch and the rest (the great majority) at Threadneedle Street, in accordance with the above practice. The one exception was a cheque sent by Perkins himself to Wallington. The paying-in slip in each case purported to be signed by the drawee and stated in effect that the amount of the cheque was for the credit of the account of Perkins at Wallington. In Smith's case the facts differed from those in the case of Perkins, in that the amounts were collected for the credit of his wife's account, first at Redhill and afterwards at Weybridge. In other respects the method adopted was substantially the same as in the other case. The number collected for the credit of Mrs. Smith's account was forty-five, and they were collected between Nov. 27, 1926, and July 3, 1929. Thus the transactions in Mrs. Smith's case began shortly after those in Perkins's case came to an end.

Perkins was in the employ of the respondents and was known by the appellants to be a stockbrokers' clerk, but they did not inquire and did not know the name of his employers. The account in the case of Mrs. Smith was opened in her own name. She was described in the appellants' records as the wife of David Smith, but the appellants did not inquire as to, and did not know, the nature of his employment. Except so far, if at all, as there was anything in the nature of the credits above mentioned to arouse the suspicions of the appellants, there was nothing in the way in which the accounts were used to indicate any impropriety on the part either of Perkins or of Mrs. Smith or her husband.

in favour of a third party he is paying in to his own credit, they should make inquiries before receiving payment of it, therefore banks are bound at the outset to ascertain the names of their customers' employers and are guilty of negligence if they do not.

I know of no authority before the present case, justifying that proposition, and I can conceive no logical basis on which one can rest an obligation on A. to make an inquiry (for the purpose of regulating and guiding his future action during an indefinite period of time) the answer to which may cease to be correct immediately after it is given.

There are many cases in the books where a bank has converted and has not escaped liability under the provisions of s. 82, the cheque in question being a cheque drawn either by a firm or in favour of a firm and paid into his own account by an employee, but in all such cases the bank either in fact knew of the relationship beforehand, or the relationship was apparent upon the face of the cheque. I know of no case, and none was cited to us, in which it has been held that a bank which did not in fact know, was liable upon the footing of negligence in not making the initial inquiry. In my opinion, such a duty is not, and ought not to be, imposed upon banks. They must make sufficient inquiries to satisfy themselves of the integrity of the proposed customer and of the desirability of having his account on their books, but I see no justification for adding to this the burden of making inquiries as to the names of his employers, and I presume verifying the answers.

I agree with the view that, apart from this alleged negligence by omission to inquire the name of Perkins's employers there were no circumstances calculated to arouse suspicion in the bank's mind, so as to found a charge of negligence by the omission to make other and subsequent inquiries, and I fail to see that his references were otherwise than sufficient and satisfactory. He was introduced by a householder at Wallington, an old customer of the bank, whose account, transferred from another branch to Wallington, had been in the Wallington books some four years. I would emphasise these features of his introducer rather than (as did SCRUTTON, L.J.) his skill on the football field.

My opinion, therefore, is that as regards the Perkins cheques this appeal should succeed upon the ground that the appellants are relieved from liability by s. 82. In the case of the Mrs. Smith cheques, the same result should follow. As to the alleged negligence in not inquiring the names of her husband's employers, this is an a fortiori case. Nor do I find here any reason for imputing negligence to the bank based upon other grounds.

LORD WRIGHT.—The appellants, Lloyds Bank, Ltd., who were defendants in the action, are appealing from a decision of the Court of Appeal, reversing a judgment of ROCHE, J., in their favour and holding them liable in damages for the conversion of certain cheques the property of the respondents, the plaintiffs, who are a firm of stockbrokers in the City of London. The respondents had at all material time in their employment as clerks two men, named Perkins and Smith, who stole cheques drawn by the respondents; these cheques were collected by the appellants. The frauds fall under two main classes, those connected with the name of Perkins and those connected with the name of Smith. It is necessary to consider the two classes separately.

In 1923 William Harry Perkins was in the respondents' employment as a stockbrokers' clerk; he resided at Wallington. On Sept. 6, 1923, he opened an account at the Wallington branch of the appellants. In the introduction book his address is given, he is described as stockbrokers' clerk, and as having been introduced by Mr. A. S. Sitch, who was a customer of the same branch, was also a stockbrokers' clerk, was considered respectable, and was known locally as a football player. Perkins was not asked and did not state the name of his employers. Into that account there were paid in for collection forty-three cheques stolen from the respondents, of an aggregate value of £2,295 12s. 8d. All the cheques were crossed and, in accordance with the Stock Exchange rule, were drawn to a named payee or bearer. The first was paid in March, 1924, the last on Nov. 16, 1926; the account was seldom in debit, and then only for a few pounds or shillings for a day or so, though occasionally the credit balances were small. About £200 had been paid in and drawn out before the first of the stolen

Smith, as well as in the case of Perkins, the appellants have failed to prove that they dealt with the cheques in question without negligence, and I agree that the appeal ought to be dismissed, with costs.

I only wish to add this. The practice of receiving cheques for collection at a branch other than that of the customer does, I think, tend to make the commission of such frauds as those here in question easier owing to the division of knowledge between the two branches. The customer's branch has, or ought to have, some knowledge of the circumstances of the customer. The receiving branch has no such knowledge. On the other hand, the customer's branch does not see the cheque and has no knowledge as to the drawer, whereas the receiving branch sees and deals with the cheque and has, or ought to have, such knowledge. I think it is desirable in the interests of the banks generally, and of the appellants in particular, that they should carefully consider how, if at all, they can amend their procedure with a view to meeting the risk disclosed in the present case. This is a matter proper to be dealt with by the banks themselves, and I do not venture to make any concrete suggestions on the subject.

LORD RUSSELL.—In receiving payment of the cheques in question for their customers who had no title thereto the bank incurred a liability to the respondents, the true owners of the cheques, unless they can show that they received such payment in good faith and without negligence. That, as I read it, is the purport and effect of s. 82 of the Bills of Exchange Act, 1882. It is not suggested that the payments were received otherwise than in good faith. The sole question is whether they were received without negligence.

I will deal with the cases of the customers, Perkins and Mrs. Smith, separately, but before doing so I would state that I agree with the view that if the bank were negligent in that the manager of the branch at which the relevant account was opened did not ascertain the name of the employers of Perkins or Mrs. Smith's husband, as the case may be, the bank can gain no protection from what has been called the branch credits system, under which (as operated) the customer's branch knows nothing of the name of either the drawer or the payee of the cheque, the proceeds of which are there placed to the customer's credit. If it was the duty of the manager of the customer's branch to know the name of the customer's employer and of the employer of the customer's husband, it would be negligence in the bank to receive payment of the employer's cheque under a system which kept from the manager of the customer's branch knowledge of the fact that the cheque credited was a cheque of the employer drawn in favour of someone other than the customer.

I will, therefore, deal with the case upon the footing that the cheques were paid directly into the customer's branch, without the intervention of the branch credits system. I need not go through the facts as to Perkins, save to state that with three exceptions all the cheques were paid in on paying-in slips purporting to be signed by the payee of the cheque. The three exceptions are two cheques which were paid in on paying-in slips on which the name of the payer-in was stated to be Perkins, and one cheque which Perkins enclosed in a letter to the manager of the Wallington branch requesting that it be credited to his account.

The evidence in the case establishes clearly to my mind that in fact no one in the bank knew that Perkins was in the employ of Savory and Co. Wallington knew that he was a stockbrokers' clerk; they knew nothing of Savory and Co. How in these circumstances is the bank said to be negligent in collecting the amount of these cheques? It is said that the bank, knowing that their proposed customer was a stockbrokers' clerk, were bound to ask for the name of his employers. This obligation is said to arise from the knowledge that a risk exists of servants' stealing the cheques of their employers and paying them into their own accounts. That such a risk exists no one can deny, and it appears from the evidence that banks make it a rule not to take payments in, without inquiry, of cheques drawn by a firm in favour of a third party and paid in by a person, other than the payee, who is known to be an employee of the drawing firm. This has been referred to as the "unwritten rule." It seems, however, a very long step to take to say that, because, if banks know that a customer is employed by a firm whose cheque

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LORD WRIGHT.—The appellants, Lloyds Bank, Ltd., who were defendants in the G action, are appealing from a decision of the Court of Appeal, reversing a judgment of ROCHE, J., in their favour and holding them liable in damages for the conversion of certain cheques the property of the respondents, the plaintiffs, who are a firm of stockbrokers in the City of London. The respondents had at all material time in their employment as clerks two men, named Perkins and Smith, who stole cheques drawn by the respondents; these cheques were collected by the appellants. The frauds fall under H two main classes, those connected with the name of Perkins and those connected with the name of Smith. It is necessary to consider the two classes separately.

In 1923 William Harry Perkins was in the respondents' employment as a stockbrokers' clerk; he resided at Wallington. On Sept. 6, 1923, he opened an account at the Wallington branch of the appellants. In the introduction book his address is given, he is described as stockbrokers' clerk, and as having been introduced by Mr. A. S. Sitch, who I was a customer of the same branch, was also a stockbrokers' clerk, was considered respectable, and was known locally as a football player. Perkins was not asked and did not state the name of his employers. Into that account there were paid in for collection forty-three cheques stolen from the respondents, of an aggregate value of £2,295 12s. 8d. All the cheques were crossed and, in accordance with the Stock Exchange rule, were drawn to a named payee or bearer. The first was paid in March, 1924, the last on Nov. 16, 1926; the account was seldom in debit, and then only for a few pounds or shillings for a day or so, though occasionally the credit balances were small. About £200 had been paid in and drawn out before the first of the stolen cheques, and from time to time afterwards other credits often comparable in amount to the stolen cheques were paid in. On Aug. 11, 1924, a cheque was sent by Perkins direct to the Wallington branch for collection; it was drawn by the respondents payable to A. H. Sly (a stock jobber) or bearer and was for £45 17s. 6d. The cheque was collected in the ordinary course and credited to Perkins. Of the remainder two were paid in by Perkins into the appellants' Monument branch in the City on a paying-in slip signed by himself, the one being in favour of Nevill or N. Frost or bearer, the other in favour of W. P. Davis or bearer. The remainder were made payable to W. P. Davis or bearer, and with the exception of five were paid into the appellants' Threadneedle office; of the five, four were paid into the appellants' Monument branch and one into their City office. Sly, N. Frost, and W. P. Davis were stockbrokers or jobbers, but though in each case, except the three first mentioned, the paying-in slip bore on its face what purported to be the signature of the named payees, it is admitted that these parties had no concern and quoad the cheques were fictitious. There is no evidence who personally presented at the appellants' branches the cheques and paying-in slips. The cheques being Town cheques drawn on the Threadneedle office of the Midland Bank were cleared in each case on the same day as paid in, and on the same day the respective City branches transmitted to the Wallington branch the paying-in slip, which in accordance with usual practice gave no information of the drawer's name, nor did the appellants keep any record of that. That the documents in question were cheques and were when handled by the appellants the property of the respondents, was rightly not disputed by the appellants on the facts of the case: it was also rightly conceded by the appellants that what they did constituted a conversion by them of the cheques, for which the appellants, in the absence of special defences, were liable in damages in the amounts of the face values of the cheques. As to certain of the earlier cheques, the Statute of Limitations has been successfully pleaded by the appellants and no question arises as to that before this House. As to the residue, save one cheque which was collected for Mrs. Smith before she became a customer, the appellants claim that they are freed from liability under s. 82 of the Bills of Exchange Act, 1882, as amended by the Bills of Exchange (Crossed Cheques) Act, 1906. The appellants are not claiming to be holders in due course, which would raise a different issue from the issue under s. 82; their position is that they were collecting the cheques for customers. The good faith of the appellants is not impugned. The only question is whether they establish that they handled the cheques without negligence. Unless the appellants can establish that they acted without negligence, they, like other bankers in a similar position, are responsible in damages for conversion if their customers had no title or a defective title. In an action in conversion, once the true owner proves his title and the act of taking by the defendants, absence of negligence or of intention or knowledge are alike immaterial as defences. Section 82 is, therefore, not the imposition of a new burden or duty on the collecting bank, but is a concession affording him the means of avoiding a liability in conversion to which otherwise there would be no defence. As it is for the banker to show that he is entitled to this defence, the onus is on him to disprove negligence. And just as in an action in conversion, it is an immaterial averment that the conversion was only possible because of want of ordinary prudence on the part of the true owner, so that averment is equally immaterial if the issue arises under s. 82.

As the defence of the section is invoked against the true owner, it is as against him that the absence of negligence is to be proved, and hence the case is put as a duty towards the true owner. But in the vast majority of cases the true owner is the customer. That the true owner is someone else is generally not apparent until the act of conversion has been done and the claim is made. A banker can safely assume that most cheques which he receives for collection are honestly come by, but as the risk of converting cheques in the course of collection cannot be eliminated there are certain well-recognised circumstances which should put the banker on his guard and there are certain well-known precautions which a banker should adopt in connection with a customer's account. The most obvious circumstances which should put the banker on his guard (apart from manifest irregularities in the indorsement and such like) are where a cheque is presented for collection which bears on its face a warning that the customer may have misappropriated it, as, for instance, where a customer known to be a servant or agent pays in for collection a cheque drawn by third parties in favour of his employer or principal. Such a case carries even a clearer warning if the cheque is endorsed per pro the employer or principal by the servant or agent. Such cases are illustrated by *Bissell & Co.* v. *Fox Bros. & Co.* (1), and other authorities, of which I may refer to *Lloyds Bank, Ltd.* v. *Chartered Bank of India, Australia and China* (2). Similarly, if a cheque payable to a one-man company is paid in by the "one man," who is also managing director to his private account, *A. L. Underwood, Ltd.* v. *Bank of Liverpool and Martins* (3). A second type of case is where a servant steals cheques drawn by his employers and pays them or procures their payment into his own account. Such a case is illustrated by *Morison* v. *London County and Westminster Bank, Ltd.* (4). In all these cases the cheque in itself, apart from knowledge possessed of the customer's position, indicates a possibility or even probability that the servant or agent may have misappropriated it and hence the bank may be converting it. Both these risks are well known to bankers, as the evidence in this case shows: the former class is the subject of a special printed rule of the appellants addressed to their employees, warning them not to take without the principal's written authority cheques or other documents payable to a firm, company, or anyone in the capacity of a principal, to the credit of the private account of a partner, agent, clerk, or other person closely connected with the principal. And as to the latter class the evidence was that the risk was so well and indeed intuitively understood by the appellants' employees as not to need a written rule, that they must not take without inquiry cheques drawn by a firm in favour of a third party and paid in by or for the credit of a person other than the payee who is known or ought to be known to be an employee of the drawing firm. These words "ought to be known" have reference to another aspect of the care that should be taken by the collecting banker, that is to acquaint himself with his customer's position, so as, in proper cases, to be able to guard against the risk. It is true that the question of absence of negligence must be considered separately in regard to each cheque, but it is also true that the matter must be considered, as LORD DUNEDIN says, in *Taxation Comrs.* v. *English, Scottish, and Australian Bank, Ltd.* (5), in view also of all the circumstances antecedent and present. There may thus be relevant negligence in connection with the opening of the customer's account by the banker. It is now recognised to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under s. 82 if a cheque were converted subsequently in the history of the account; this rule was applied by BAILHACHE, J., in *Ladbroke & Co.* v. *Todd* (6), who on that ground held that the banker had not made out his defence under s. 82. The matter is now so well appreciated by bankers that the appellants have a printed rule saying that no new current account is to be opened without knowledge of or full inquiry into the circumstances and character of the customer. The crucial question which arises in connection with that part of this action which deals with the cheques collected for Perkins, is whether on opening his account the appellants did not neglect a proper precaution—that knowing him to be a stockbrokers' clerk, they did not inquire who his employers were, and are therefore guilty of negligence within the meaning of s. 82. In my judgment they were.

I think, agreeing herein with the unanimous opinion of the lords justices, and I think also of ROCHE, J., on this point, that at least where the new customer is employed in some position which involves his handling, and having the opportunity of stealing, his employers' cheques, the bankers fail in taking adequate precautions if they do not ask the name of his employers, and fail even in carrying out the rule which I have just quoted, because they fail to ascertain a most relevant fact as to the intending customer's circumstances. This is specially true of a stockbrokers' clerk; it may be different in the case of an employee whose work does not involve such opportunities, as, for instance, a technical employee in a factory. But in the case of a stockbrokers' clerk or other similar employment, the bank are dealing with something which involves a risk fully known to them. That rule of the bank gives, in my judgment, the measure of what the bank in opening such an account ought to do; it points the meaning of the phrase, "who is known or ought to be known to be an employee of the drawing firm." It is clear that they ask information as to the man's occupation, and if they find that he is (for instance) a stockbrokers' clerk, they surely should go on and ask who his employers are, since otherwise they cannot guard against the danger fully known to them of his paying in cheques stolen from his employers. It is argued that this is not the ordinary practice of bankers and that a bank is not negligent if it takes all precautions usually taken by bankers. I do not accept that latter proposition as true in cases where the ordinary practice of bankers fails in making due provision for a risk fully known to those experienced in the business of banking. But as to the actual practice of banks in such cases, I am far from satisfied from the evidence in this case that it is not the usual practice. One of the banking experts, Mr. McGibney, of Barclays Bank, said in the case supposed they would not always ask the employer's name, "but it is usual to ask that question for what it is worth," though he adds, "We always have an introduction." Mr. Butler, of the National Provincial Bank, said they would not "necessarily ask the employer's name," if there was an introduction sufficiently strong, "if the surrounding circumstances made him appear to be quite a substantial man." Mr. Trott, of the appellant bank, after apparently conceding that the manager would want to know the firm with whom the stockbrokers' clerk was with, said:

> "We should ask in the ordinary course, if he is a stockbrokers' clerk, whom he is with, but if he is introduced by a respectable customer we should not bother any further."

The inference I draw from the evidence is that bankers do recognise the importance of ascertaining when opening an account for a stockbrokers' clerk (or one in similar employment) who his employers are, simply in order to be on guard against the known risk in such a case of their converting stolen cheques. The onus throughout in these cases is on the banker to establish that he was not negligent, and in so far as reliance is placed on it being the usual practice of bankers not to ask the name of the employer, I do not think the appellants have here established that allegation. This very obvious piece of information, which could be obtained easily and without reflecting in any way on the customer, enables them to avoid the danger; all the cashier, with this information, has to do is in the case of each cheque to look at the drawer's name. The idea that the bank can justify under s. 82 their failure to do this, simply because they have a good reference—if indeed that idea be really held—appears to me to involve a confusion of ideas. Such a reference or introduction merely speaks to the general reputation of the man; knowledge of who are his employers is aimed at an entirely different purpose—that is, to arm the bank against the known, even if problematical risk; it is unfortunately common knowledge that persons of respectability, well introduced, may still commit frauds. The reference may be fairly regarded as very sketchy in this case, and I think it was far from enough to dispense the manager from "bothering" any further. Nor is it any reason why this information should not be obtained that the man may give a false answer or may thereafter change his employment. The former is not likely; as to the latter, in the present case there was no change in Perkins's employment, and it is useless to consider what might be the position if something had happened which did not happen. Nor is it any answer to a charge under s. 82 of neglecting a proper precaution, that if it had been taken, it might have been fruitless. Nor does a precaution cease to be proper for purposes of s. 82 merely because though generally effective it may in special circumstances be ineffectual.

In each case negligence must be a question of fact in the particular circumstances, which may modify the general rule. In such a case, however, as that of Perkins I do not find any special circumstances to modify the rule, or justify the appellants in not seeking the information obviously proper. If I am right in my conclusion that the bank were at fault in not asking and noting the name of Perkins's employers when they opened his account, then liability follows in regard to the Perkins's cheques, except in so far as the appellants are saved by the Statute of Limitations, and subject to my considering a further point which now calls for consideration.

Before I deal with that, I may observe that one of the cheques, that paid in on Aug. 11, 1924, was sent to the Wallington branch direct by post and therefore if the manager or cashier had known, as I think he ought, the name of his customer's employers, he would on the face of the cheque have had all the information which, according to the admitted practice of the bank and the clear law, would have put him on inquiry and led to the fraud being detected at that early stage. The only answer to such a position which is attempted is that the respondents' signature might have been indecipherable, but it is for the appellants to make out their defence and to prove that they could not read the signature. They cannot do so, and it follows, in my judgment, in view of my conclusion that the employers' name ought to have been known to them, that the appellants fail on that cheque, and in consequence on all the Perkins's cheques that follow, because the appellants if they had made proper inquiries about the cheque would in all human probability have stopped the fraud. The least they could have done would have been to inquire of the respondents about the correctness of the cheque. It is, however, necessary to deal with a further point as to the remainder of the cheques; there is a complication by reason that they were paid in at City offices of the bank for immediate clearance as Town cheques; all the information then sent to the Wallington branch was the name of the account to be credited, of the payer-in and the amount. Banks keep no record of drawers' names. Under that system the fraud would not have been detected even if the Wallington branch had known the name of Perkins's employers, because they would never have known who drew the cheque. The system involves a division of knowledge, which in fact necessarily prevents the bank from detecting any such fraud as the present. This system has been invoked by both sides, by the respondents as constituting a separate head of negligence, by the appellants as excusing them for failure to be put on inquiry or to detect the fraud. In my judgment, as a matter of law the system ought to be disregarded, because I hold that the bank cannot in virtue of that system which it voluntarily adopts, no doubt for general convenience and in the general interests of its customers, put itself in any better position than if the cheques had all been paid into the one branch; the bank cannot in that way claim to have split up its knowledge. The appellants, however, strenuously contended that the system is very convenient, as it clearly is because it enables cheques to be cleared and credited without delays of post; they also contended that it has been in use for forty years or more and, so far as the three witnesses called as experts in banking know, had never involved trouble; and they claimed that they were free from liability simply on the ground that even if the name of Perkins's employers had been known at the Wallington branch the fraud could not have been detected because the branch which knew the drawer's name did not know the customer's name, and equally the branch which knew the customer's name did not know the drawer's name, and they claim that this regrettable consequence resulted from their following the ordinary practice of bankers, sanctified by long and successful usage. I do not think this is a sound argument. The practice, on its very face, is inconsistent with provident precautions against a known risk, and the mere fact that it is usual and long established is not a sufficient justification. It cannot be justified as an excuse simply because in the past by good fortune no harm seems to have happened. But for reasons already stated, I regard it as not material in this case; otherwise I should regard it as a separate head of negligence.

I may add that the number of the stolen cheques, and the period of time over which they were spread, afford no justification to the appellants. Each time they collected one of these cheques they were converting it unless they could bring themselves within s. 82; each time the original fault in not knowing the name of Perkins's employers operated to deprive them of the protection of the section. The appellants have claimed that the repetition of cheques, all of which were dealt with before any objection was raised by the appellants, "lulled them to sleep"; and they rely on *Morison's Case* (4). I find it difficult to appreciate on what principle that case was decided in regard to this point; it can only be justified, if at all, on its special facts. In any case, no one from the bank came to say he was "lulled to sleep," or indeed had given his mind to the question at all, if, contrary to my opinion, such questions are relevant.

In my judgment on this part of the case, for the reasons I have given, I think the appeal fails.

The case of the forty-six cheques collected by the appellants for the account of Mrs. Smith now calls for separate consideration. These cheques were all drawn by the respondents, they were crossed, they purported to be in favour of F. H. Gibbes or bearer, except the first, which was in favour of W. P. Davis, according to its tenor; they were Town cheques, and were all paid in for collection at the appellants' Threadneedle Street office under paying-in slips signed apparently as to the first by W. P. Davis, and as to the remainder by F. H. Gibbes, and were to be collected for the credit of Mrs. Dorothy Cowie Smith, and were dealt with by the appellants in accordance with the same general system. As to the first five, they were credited to the appellants' Redhill branch, and as to the remainder at the appellants' Weybridge branch. The last of the Perkins's cheques was paid in on Nov. 11, 1926, and the first of the Smith cheques on Nov. 28, 1926. It seems a fair inference that Perkins and Smith were confederates in the fraud, but there is no direct evidence of their association. Nor is there any evidence why the change was made. What I have said about the general system of paying in at a City branch for clearance there and crediting at the customer's country branch applies equally to this part of the case, but there is the distinguishing feature that the customer here was not the stockbrokers' clerk, Smith, but his wife, Mrs. D. Cowie Smith. Obviously neither the Redhill branch nor the Weybridge branch knew anything about the Perkins's transactions. On Nov. 26, 1926, the first of these cheques was paid in by someone unknown at the branch in the City along with a paying-in slip purporting to be signed by W. P. Davis. According to instruction it was cleared the same day and the paying-in slip sent to the Redhill branch, where it was received on Nov. 27, 1926. On that same day Mrs. Smith came to the Redhill branch, saw the manager, asked to open an account and gave as reference a Miss Stewart, who had been a customer of the branch for ten or twelve years. Miss Stewart was Mrs. Smith's landlady; the house in question was quite small. Miss Stewart was not asked what means Mrs. Smith had; all the information she could or did give was that Mrs. Smith had given satisfactory references when she took the house. The manager was satisfied; he took her signature and address and entered her as wife of David Smith under the head of occupation. It appeared that she had had no banking account previously. The manager made no further inquiries about her circumstances or character. He said in evidence that she looked respectable. As to this first cheque, it is clear that it was collected on Nov. 26, 1926, the day before she became a customer, and therefore, the appellants admittedly cannot claim to be protected by s. 82. Four further cheques were collected and credited to the Redhill branch. Then on Feb. 8, 1927, the account was transferred to the Weybridge branch of the appellants; the manager, without any inquiries of his own, accepted the transfer of the account, although the notice from the Redhill manager of the transfer stated that Mrs. Smith was known to the Weybridge manager. He, though he knew nothing about her and indeed never saw her, asked no questions of anybody. The account continued till March 19, 1930, the last cheque being credited on March 7, 1930. Except the forty-six cheques there were no other payments into her account.

In my opinion, the appellants were guilty of negligence within s. 82, or at least have not proved that they were not negligent, and cannot claim the protection of the section in regard to the cheques collected for Mrs. Smith. For the reasons I have already discussed I shall treat the case as if the whole of the transaction in regard to the opening of the account had taken place at the Redhill branch. On that assumption, the position would be that a stranger came to the branch with the cheque payable to W. P. Davis or bearer, signed a paying-in slip as W. P. Davis, as for the account of Mrs. Smith, who was not a customer; the appellant bank knew nothing about W. P. Davis or whether the man who came was W. P. Davis or about Mrs. Smith. The cheque was obviously a business cheque. It was, however, collected without any inquiries, and when Mrs. Smith in due course appeared, was put to her account under the circumstances I have stated. I cannot hold that this was the conduct of "a careful banker," if I may adopt the phrase of GREER, L.J. The appellants, in one of their emphatic warnings to their officials about the importance of guarding against the risk of converting cheques, say: "That what goes into an account calls for as much careful scrutiny as what goes out." I do not press this statement too far, but it has significance. It is true that in any case the appellants are admittedly liable on this cheque as they collected it before Mrs. Smith was their customer. But I am dealing with it as in connection with the opening of the account. Even apart from the peculiar nature of the cheque paid in and the manner in which it was paid in, I think the appellants' manager opened the account "without knowledge of or full inquiry into the circumstances and character of the customer" to quote again the appellants' own rule—and simply on that ground the appellants cannot be acquitted of negligence in opening the account, a fortiori, when regard is had to the peculiar circumstances here. So to hold is not to impose on the appellants the duty of being amateur detectives, or of making unnecessary or impertinent inquiries, nor to judge their acts in the light of what has since become known. If it is said that the Redhill manager cannot fairly be treated as knowing what had happened at the Threadneedle Street office where the cheque was actually paid in, then though it is true he cannot to that extent be blamed, what is in question is not whether he was personally negligent, but whether the bank, the appellants, were negligent. I do not repeat what I have already said on the question of the general system of receiving cheques for clearance in the city to be credited at country branches. Their knowledge must, I think, be treated notionally as single and undivided for present purposes. I do not wish to lay down any general rules as to what inquiries a manager ought to make when opening the account of a married woman. The evidence indicates to me that he would generally inquire or somehow learn about her means and circumstances, and if she was living with her husband, something about him and his occupation or position in life. At no stage of this account was anything known or ascertained about Mrs. Smith or her husband, either at Redhill or Weybridge. It does not appear that anyone in the different branches even noticed all through the long course of the account how peculiar the account was, or troubled at all in the matter, in some degree no doubt because of the dual system of crediting. Proper inquiries at Redhill might or might not have led to the fraud being nipped in the bud. But in any case no such inquiries were made, and there also by a somewhat different route I reach the same conclusion as in regard to the Perkins's cheques, namely, that the defence under s. 82 is not made out.

I think the appeal fails on all points.

Appeal dismissed.

Solicitors: *Gregory, Rowcliffe & Co.*; *William Charles Crocker.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

RUSSIAN AND ENGLISH BANK *v.* BARING BROS. & CO., LTD.

[CHANCERY DIVISION (Eve, J.), December 3, 4, 8, 1931, January 12, 1932]

[Reported [1932] 1 Ch. 435; 101 L.J.Ch. 157; 146 L.T. 424;
48 T.L.R. 193; 76 Sol. Jo. 68]

Company—Foreign company—Dissolution in country of incorporation—Action by branch in England for recovery of property—Competency—Powers of liquidator in winding-up.

In 1911 the plaintiff bank was incorporated in Russia under Russian law. In 1915 it established a branch in London. In 1917 the revolution in Russia took place, and subsequently, as a result of laws passed by the Soviet government, the bank was dissolved or otherwise ceased to exist. In 1921 the English branch of the bank claimed certain sums from the defendants as being money belonging to the bank in the hands of the defendants.

Held: the existence or non-existence of the bank depended on the law of Russia where it was incorporated; under Russian law the bank had ceased to exist; and, therefore, applying English law, the lex fori, it was incapable of maintaining the action, which must be stayed.

Observations of LORD FINLAY in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1), [1925] A.C. 112 at p. 141, criticised and not applied.

Per EVE, J.: Difficulties regarding rights and liabilities relating to the property of the English branch of a foreign company which has ceased to exist under the law of the country of its incorporation can be met by the liquidator in winding-up proceedings under the Companies Acts: see now Companies Act, 1948, s. 400.

Notes. Considered: *Re Russian and English Bank*, [1932] 1 Ch. 663; *Russian and English Bank* v. *Baring Bros. & Co.*, [1935] Ch. 120.

As to the application of the lex fori, see 7 HALSBURY'S LAWS (3rd Edn.) 166 et seq., and for cases see 10 DIGEST (Repl.) 1297 et seq.

Cases referred to:

(1) *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; Digest Supp.

(2) *Banque Internationale de Commerce de Petrograd* v. *Goukassow*, [1925] A.C. 150; 93 L.J.K.B. 1084; 132 L.T. 116; 40 T.L.R. 837; 68 Sol. Jo. 841, H.L.; Digest Supp.

Summons.

The action was brought to recover two sums of £100,000 and £80,000 alleged to be moneys of the plaintiff bank in the hands of Baring Bros. & Co., Ltd., with interest at 6 per cent. per annum from Oct. 31 and Nov. 5, 1917, respectively. The pleadings were closed in April, 1929, and on June 18, 1931, the defendants issued the present summons seeking an order that all further proceedings in the action may be stayed on the ground that it was commenced without the authority of the plaintiff bank, and that the solicitors by whom the writ was issued, and who were joined as respondents to the summons, might be ordered to pay to the defendants their costs of the action down to and including the summons and any order made thereon. The plaintiff bank was incorporated under Russian law in April, 1911, and in November, 1915, it established a branch in London, whereat an ordinary banking business was being carried on when in November, 1917, the Bolshevist revolution broke out. At that date the bank's capital was fifteen million roubles divided into sixty thousand shares of 250 roubles each, whereof, according to the evidence, some forty-five thousand were held by or in trust for British subjects domiciled in Great Britain, but the documents of title relating to all but a few thousand of these shares were in the possession of the bank in Russia. The last general meeting of shareholders was held in Petrograd in June, 1917, and at

A some date considerably before the issue of this summons, the plaintiff bank was dissolved or otherwise ceased to exist as a company under or by virtue of the laws of Russia, the country in which it was incorporated.

The question raised by the summons was whether, on the happening of that event, the corporators interested in the administration of the assets pertaining to the English branch of the bank or any survivors of those to whom the bank had committed the B supervision or management of the affairs of the English branch could continue to use the name of the bank as plaintiffs in an action for the recovery of moneys alleged to form part of such assets.

Gavin Simonds, K.C., and *Tillard* for the applicants.

Goddard, K.C., and *Sir A. Richardson, K.C.*, for the respondents.

C *Stafford Crossman* for the Attorney-General.

Cur. adv. vult.

Jan. 12. **EVE, J.,** read a judgment in which he stated the facts and continued: But for a passage in Lord Finlay's speech in *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (1) I should have thought that the question was incapable of any but a negative answer. In that case, as in *Banque Internationale* D *de Commerce de Petrograd* v. *Goukassow* (2), the House of Lords were considering and determining the question whether, upon the construction of the decrees of the Soviet government there put in evidence, the respondents had proved that the Russian bank was in fact dissolved, and, having come to the conclusion that the respondents had not established their plea, it became unnecessary to decide what would have been the position had the question of construction been otherwise decided. But Lord Finlay E did add at the conclusion of his speech this paragraph ([1925] A.C. at p. 141):

> "It must never be forgotten that here we have to deal with a branch of the bank established and carrying on business in this country. Even if it had been demontrated that the Russian bank had, so far as Russia was concerned, ceased to exist, I should not treat that as decisive in this case. The London branch had existed for a long time, it has carried on business here, there are many English share-F holders, liabilities to British subjects have come into existence. It carries on business here now just as the French branch does in Paris. To affirm the defence set up by the defendants in the present case would be to make it impossible for the branch to get in its assets and discharge its liabilities. In all fairness the branch must have the right to use the name of the bank for the purpose of getting in its assets. If there is any other body or person having a preferential right to these G securities a claim may be made in the winding-up in this country. But it is clear that the Comptoir d'Escompte de Mulhouse, having been paid the 1,090,000 marks, has no right to retain the securities too; the securities should be returned to the London branch by which they were lodged and which is suing in this action for their recovery, having paid off the debt."

I cannot find that statement or any similar one in any of the other speeches, and I H do not think there is any authority to support it. Lord Sumner, who read Lord Finlay's speech, did not express any endorsement of it, but entirely agreed with the Lord Chancellor's opinion, in which there was no mention of this sort made. Lord Wrenbury, after stating that had he thought the Soviet decrees effective to extinguish and determine altogether the existence of the Russian corporation there would have emerged another question upon which he should have desired to hear argument, then I went on to suggest that notwithstanding the death of the foreign corporation there might possibly survive an association or partnership of natural persons whose relations inter se are to be found in the articles of association of the company and are to be ascertained no doubt with reference to the lex loci contractus continuing for the purpose of winding-up the company's affairs so far as this country had control over the persons and the assets within its jurisdiction. I venture to think these suggestions would hardly have been necessary had he shared Lord Finlay's view that an action to recover assets could be established and maintained in the name of the defunct foreign corporation.

I have dealt with this at length because Lord Finlay's observations are directly in point in this case where we have a defunct Russian corporation for some years prior to and at the date of its decease carrying on by means of authorised agents an important branch in this country with many English shareholders, large assets and considerable liabilities. In such circumstances the extinction of the Russian corporation no doubt gives rise to a serious question as to what is proper to be done to collect and protect the assets of the branch, to discharge its liabilities, and to distribute any surplus which may remain after the creditors have been satisfied.

But with all deference to Lord Finlay's opinion I do not think those difficulties are to be solved in the manner he indicated without disregarding some important principles. In primis what is the effect of the dissolution and destruction by the law of Russia of an incorporated body, the existence of which depends on the law of the same country? That question appears to me to have been completely answered by Scrutton, L.J., in his judgment in *Banque Internationale de Commerce de Petrograd* v. *Goukassow* (2), where he says ([1923] 2 K.B. 682 at p. 691):

> "So in the case of artificial persons, the existence of such a person depends on the law of the country under whose law it is incorporated, recognised in other countries by international comity, though its incorporation is not in accordance with their law. If the artificial person is destroyed in its country of origin, the country whose law creates it as a person, it appears to me it is destroyed everywhere as a person. I cannot conceive a company, whose existence and attributes arise solely from the law of Russia, continuing to exist when the law of Russia says it is dissolved. With what body and attributes does it survive, and what law constitutes it? It does not comply with the requisites of English companies and is dissolved by the law of Russia."

A little later on the same page, he adds:

> "But the English courts do know and recognise a law which has destroyed it, and, in my opinion, must apply their own lex fori to determine what person can or cannot sue in their courts. In my opinion, therefore, English courts are bound to treat this plaintiff bank as dissolved and incapable of suit in English courts."

To the same effect is what Atkin, L.J., says ([1923] 2 K.B. at p. 693):

> "We are considering whether the alleged actor exists, and in determining that issue, it appears to me that the court must apply its own law, the lex fori. Whether the plaintiff in an English court is alive or dead would be determined on an issue of fact by English evidence and procedure. . . . In the case of an artificial person, such as a foreign corporation, our law would look to the law of the country which created the corporation, and finding the corporation dissolved by that law, our court must also treat the corporation as dissolved."

What, then, results from these conclusions? That a defunct corporation seeking to maintain an action is, as Bankes, L.J., describes it, "in the eye of our law no party at all, but a mere name only with no legal existence." A non-existent person cannot sue, and when I have the admission that the plaintiff bank has long since ceased to exist in Russia I should be disregarding the emphatic opinions expressed by all the members of the Court of Appeal as to the result brought about thereby were I to allow this action to be further prosecuted. When once the court is made aware that the plaintiff is non-existent, and, therefore, quite incapable of maintaining the action it is bound to put an end to it.

I appreciate, as have all who have had to deal with similar applications, that this judgment may involve questions as to the ownership of property belonging to the defunct corporation. Bankes, L.J., in *Mulhouse's Case* (1), expressed the opinion that it did not appear to him at all necessary to decide what was the exact legal position of the persons carrying on the business of the branches after the parent bank had been abolished; and in the same case Atkin, L.J., pointed out that the result of holding that the parent bank was in fact dissolved was to make it impossible for the branch to enforce any of its rights or liabilities and to leave in considerable peril all those who in the course of banking business in the City of London had in any way at any time after the dissolution taken any part in disposing of or handling its assets; "for," he added, "obviously a non-existent person can give no title to anything." But I cannot help thinking that these difficulties can be mitigated and the acts of those who have intermeddled with the affairs and assets of the branch after the destruction of the parent company be regularised by adoption and ratification by a liquidator in a winding-up constituted under s. 338 of Part X of the Companies Act, 1929. Subsection (2) of that section would appear to fit the circumstances. It enacts that

> "where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound-up as an unregistered company under Part X of the Act notwithstanding that it has been dissolved or otherwise ceases to exist as a company under or by virtue of the laws of the country under which it was incorporated."

In view of the question whether there are or can be any continuing members of a dissolved company the petition, I assume, would have to be presented by a creditor.

At the Bar the defendants limited their claim to recover their costs from the solicitors who issued the writ to the costs of this summons; but, having regard to the difficulties involved in ascertaining the effect of the Soviet legislation and to the length of time the defendants allowed to elapse before making this application, I think justice will be satisfied if I make an order to stay the action. The costs of all parties down to and including this order to be taxed as between solicitor and client and paid out of the fund in question.

Solicitors: *Bischoff, Coxe, Bischoff, & Thompson*; *Guedalla, Jacobson, & Spyer*; *Treasury Solicitor.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

PENRIKYBER NAVIGATION COLLIERY CO., LTD. *v.* EDWARDS

[House of Lords (Lord Warrington, Lord Dunedin, Lord Atkin, Lord Thankerton, and Lord Macmillan), March 15, 17, 18, May 10, June 28, 1932]

[Reported [1933] A.C. 28; 101 L.J.K.B. 744; 147 L.T. 421; 25 B.W.C.C. 303]

Workmen's Compensation—Industrial disease—Recovery—Susceptibility to second attack—Cause of resultant disablement.

A miner who had been disabled from working underground by miners' nystagmus was certified as having recovered from the disease, but as likely to develop a second attack if he again went underground, and to do so in much shorter time than it took to produce the first attack.

Held: the fact that a second attack would develop quicker than a first was a natural concomitant to susceptibility, and was compatible with complete recovery from the original development having taken place, and, therefore, disablement from the second attack would be caused thereby and not by the first.

Wilsons and Clyde Coal Co., Ltd. v. *Burrows* (1), [1929] A.C. 651, and *Connor* v. *Cadzow Coal Co., Ltd.* (2), [1932] A.C. 1 applied.

Notes. The Workmen's Compensation Acts were repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents. Section 55 (1) of the Act provides for insurance against industrial disease.

Applied: *Monaghan* v. *Elswick Coal Co.* (1933), 26 B.W.C.C. 432. Considered: *Hamilton* v. *Kinneil Cannel and Coking Coal Co.* (1932), 25 B.W.C.C. Supp. 81; *Morton* v. *South Kirkby, Featherstone and Hemsworth Collieries, Ltd.* (1933), 26 B.W.C.C. 180; *United National Collieries, Ltd.* v. *Treorchy* v. *Jones* (1934), 27 B.W.C.C. 94; *Weeks* v. *Powell Dyffryn Steam Coal Co.* (1935), 28 B.W.C.C. 396; *Richards* v. *Goskar*, [1936] 3 All E.R. 839. Distinguished: *Williams* v. *Lancaster Steam Coal Collieries* (1940), 33 B.W.C.C. 75. Considered: *Lissenden* v. *Bosch* (*C.A.V.*), *Ltd.* (*No. 2*) (1940), 33 B.W.C.C. 289. Referred to: *McNicholas* v. *West Leigh Colliery Co.* (1933), 26 B.W.C.C. 29; *Timmins* v. *Brodsworth Main Colliery Co.*, [1934] 2 K.B. 361; *Astbury* v. *William Harrison, Ltd.* (1942), 35 B.W.C.C. 85.

As to industrial diseases, see 34 HALSBURY'S LAWS (2nd Edn.) 969 et seq., and for cases see 34 DIGEST 463 et seq. For National Insurance (Industrial Injuries) Act, 1946, see 16 HALSBURY'S STATUTES (2nd Edn.) 797.

Cases referred to:

(1) *Wilsons and Clyde Coal Co.* v. *Burrows*, [1929] A.C. 651; 98 L.J.P.C. 151; 141 L.T. 594; 45 T.L.R. 615; 22 B.W.C.C. 430, H.L.; Digest Supp.

(2) *Connor* v. *Cadzow Coal Co., Ltd.*, [1932] A.C. 1; 101 L.J.P.C. 59; 146 L.T. 97; 48 T.L.R. 10; 75 Sol. Jo. 763; 24 B.W.C.C. 396, H.L.; Digest Supp.

(3) *Lewis* v. *Tredegar Iron and Coal Co.* (1929), 22 B.W.C.C. 268, C.A.; W.C. & Ins. Rep. 369; Digest Supp.

(4) *Wilsons and Clyde Coal Co., Ltd.* v. *Flynn*, [1930] A.C. 516; 99 L.J.P.C. 139; 143 L.T. 362; 46 T.L.R. 441; 74 Sol. Jo. 437; 23 B.W.C.C. 159, H.L.; Digest Supp.

(5) *Richard Evans & Co., Ltd.* v. *Scahill* (1927), 137 L.T. 161; 20 B.W.C.C. 348, H.L.; Digest Supp.

(6) *Prendergast* v. *Lancaster's Steam Coal Collieries, Ltd.* (1925), 134 L.T. 166; 18 B.W.C.C. 494, C.A.; 34 Digest 378, *3061*.

(7) *Starkey* v. *Clayton & Sons* (1925), 133 L.T. 612; 18 B.W.C.C. 346, C.A.; 34 Digest 470, *3842*.

(8) *M'Dougall* v. *Summerlee Iron Co., Ltd.* (1927), 20 B.W.C.C. 419, H.L.; W.C. & Ins. Rep. 338; Digest Supp.

Appeal by the employers from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.), setting aside an award made by HIS HONOUR JUDGE ROWLAND ROWLANDS at Aberdare and Mountain Ash, County Court. The question involved in this appeal was whether a workman who had been certified by the medical referee as not suffering from the disease known as miners' nystagmus at the date of the medical referee's report was debarred from recovering compensation for incapacity for work due to the said disease upon a recurrence of the disease from which he was certified to be suffering by a certifying surgeon at a date after the medical referee's report.

The county court judge held that the certificate of the certifying surgeon contradicted the certificate of the medical referee and was of no effect, and, further, that the certificate of the medical referee precluded the respondent from calling any medical evidence as to the condition of the respondent and precluded the respondent from recovering any compensation from the appellants. He, accordingly, made an award in favour of the appellants. The Court of Appeal set aside the award of the county court judge and ordered the matter to be remitted to the county court judge for rehearing. The employers appealed.

Sir Walter Greaves-Lord, K.C., and *Edgar Dale* for the appellants.

Upjohn, K.C., G. Kirkhouse Jenkins, K.C., and Joshua Davies for the respondent.

A question having been raised in the course of the argument as to the meaning of the certificate of the medical referee, the House of Lords remitted the cause to obtain from the medical referee an answer to the following question:

> "Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it."

To that the medical referee gave the following answer:

> "My certificate means that he has now recovered from miners' nystagmus, but he is likely to develop a second attack sooner or later if he goes underground, and in much shorter time than it took to produce the first attack."

The House took time for consideration.

June 28. The following opinions were read.

LORD DUNEDIN.—The history of this case is as follows. The respondent is a miner. In 1920 he was in the employment of the appellants and worked underground in a colliery belonging to them. On Oct. 17, 1920, he obtained a certificate from the certifying surgeon that he was suffering from miners' nystagmus. That certificate has been lost, but no question is raised as to the truth of the fact that it was so granted. The date of disablement was stated to be Oct. 17, 1920. The respondent was then paid compensation on the basis of total incapacity up to June, 1924. On that date he was given work above ground at a lower wage, and was, therefore, paid compensation on the basis of partial incapacity.

On Sept. 26, 1926, the appellants served on him a medical certificate that he had entirely recovered from the accident. The examination on which this certificate proceeded was made in terms of para. 14 of Sched. I to the Workmen's Compensation Act, 1906. This was met, on Sept. 30, 1926, by a certificate to the contrary effect by the workman's doctor. The matter was then referred to Mr. Cresswell, a medical referee, and he, on Oct. 20, 1926, certified that the respondent was still suffering from miners' nystagmus. The appellants then continued to pay partial compensation. This state of affairs continued until Jan. 14, 1930, when the appellants served on the respondent a notice that, in ten days' time, they would cease to pay compensation, and they enclosed a certificate from a doctor that he had wholly recovered, and that his incapacity was no longer due to the accident. This was met by a counter certificate which, though so badly worded—"He has not partially recovered"—obviously meant that he had not fully recovered.

Upon this, the appellants lodged an application to the county court for a reference to a medical referee—"pursuant to s. 12 (3) and s. 19 of the Workmen's Compensation Act, 1925." and prayed that:

> "The said Penrikyber Navigation Colliery Co. request that an order may be made referring the matter to a medical referee for his certificate upon the following questions: (a) Whether the said Evan Edwards has wholly recovered from his said nystagmus; (b) Whether the said Evan Edwards is fit for his ordinary, and if not what other work; (c) Whether and to what extent—if any—the incapacity of the said Evan Edwards is due in whole or in part to his said nystagmus."

Upon this, an order of reference was made, the order being in the words of form 50 of the Workmen's Compensation Rules, 1926. I think it necessary to set out the order at length. It did not tally with the request as made by the appellants, and it did not do so because it followed the form settled by the Secretary of State. It was as follows:

> "On the application of the Penrikyber Navigation Colliery Co. of Penrhiwceiber (a copy of which is hereto annexed), I hereby appoint Mr. F. P. S. Cresswell, of 24, Windsor Place, Cardiff, one of the medical referees appointed by the Secretary of State for the purposes of the Workmen's Compensation Act, 1925, to examine the said Evan Edwards (hereinafter called 'the said workman') and to give his certificate as to the condition of the said workman and his fitness for employment, specifying, if necessary, the kind of employment for which he is fit (or his certificate whether (or to what extent) the incapacity of the said workman is due to the accident, or his certificate as to the condition of the said workman and his fitness for employment, specifying if necessary the kind of employment for which he is fit, and as to whether (or to what extent) the incapacity of the said workman is due to the accident)."

I think it must be pointed out to the proper authority that the form is not adequate for all cases, as it does not put specifically the question of recovery from the accident. In other words, it obviously follows the provisions of s. 19 without noticing that there may be an application which is based, not on s. 19 alone, but also on s. 12 (3), proviso 1. This omission is apt to cause, as it has caused here, questions of difficulty to arise which might not have arisen had the form been adequate.

On Feb. 15, 1930, the medical referee, being the same gentleman—Mr. Cresswell—who had made the report in 1926, gave his report to the following effect:

> "(i) the said Evan Edwards is not now suffering from miners' nystagmus, but from defective vision due to cataract and old inflammation of the eyes, and his condition is such that his sight is not good enough for underground work, but only for work on the surface; (ii) the incapacity of the said Evan Edwards is not due to miners' nystagmus, but to other defects mentioned above."

The appellants, accordingly, discontinued the payments. On March 27, 1930, the respondent obtained a report from the certifying surgeon for the district that he was suffering from miners' nystagmus and was disabled from earning full wages, and that the disablement occurred on Oct. 17, 1920. Upon this report the respondent applied for arbitration. Arbitration was held. The arbitrator examined the respondent, but refused to hear other witnesses. The appellants pleaded that the matter was concluded by the certificate of the medical referee. The arbitrator decided in favour of the appellants and refused to award compensation. Appeal was taken to the Court of Appeal, who reversed the judgment of the arbitrator and remitted to him to proceed with the case.

Appeal has now been taken from that judgment to your Lordships' House. The Court of Appeal proceeded on the view that the case was ruled by their own judgment in *Lewis* v. *Tredegar Iron and Coal Co.* (3) and that that decision was not affected, as the county court judge as arbitrator had held, by *Wilsons and Clyde Coal Co., Ltd.* v. *Flynn* (4). It is much to be regretted that neither the county court judge nor the Court of Appeal had their attention directed by the Bar before them to two more recent cases in this House—*Wilsons and Clyde Coal Co., Ltd.* v. *Burrows* (1), and *Connor* v. *Cadzow Coal Co., Ltd.* (2)—without a consideration of which it is impossible to determine the present question. Indeed, this omission is so grave as to make it useless to canvass the judgment of the Court of Appeal as it stands. Had these cases been before the Court of Appeal I am quite unable to say what their judgment would have been.

When the case was first heard before your Lordships, it seemed to your Lordships desirable that there should be no doubt possible as to what conclusion the medical referee had come to as to recovery. It is here that the inadequacy of the form shows itself. They therefore remitted to the county court judge to ask the medical referee the following question:

> "Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it."

To that he gave the following answer:

> "The fact that Evan Edwards has had an attack of miners' nystagmus proves that he is a man who is predisposed to this disease, or is more susceptible to it, than his fellow-workers, who do not get it; and when put under similar conditions again (i.e., at his work underground), he is likely sooner or later to develop a second attack. A second attack is more easily induced (i.e., develops in quicker time) than the first attack, and so with subsequent attacks. In this case there is also an added factor to induce nystagmus, namely, his very defective vision due to old inflammation of the eyes and incipient cataract. My certificate means that he has now recovered from miners' nystagmus, but he is likely to develop a second attack sooner or later if he goes underground, and in much shorter time than it took to produce the first attack."

Before examining the cases which have been decided on the subject, it would be well to see exactly how the matter is dealt with in the statutes. It must be remembered that the old Workmen's Compensation Acts, 1897 and 1900, only dealt with accidents in the ordinary sense of the word. The application of the Act to industrial diseases made its appearance in 1906. That Act was a consolidation Act and repealed the older Acts. What was declared to be an accident was not the industrial disease, that is, a disease mentioned in the schedule or which might be added to the schedule by an order of the Secretary of State, but the disablement entailed by the disease. In that Act the provisions as to what might happen if the disablement owing to the accident was no longer present, or had become less in character, were to be found not in the body of the Act, but in the schedule. In the schedule there is a provision that the workman should, at the request of the employer, submit himself from time to time for medical examination. The report is to be as to the workman's condition and fitness for employment. In the event of the workman not agreeing with the report, provision is made for the reference to the medical referee. The medical referee is to report as to the workman's condition and fitness for employment, and also whether, or to what extent, the incapacity is due to the accident. On all these matters the decision of the medical referee is to be final. It will be noticed that here, so far, there is no provision allowing the employer to stop paying the compensation. That could be done by an application to the arbitrator to end the compensation—para. 16 of Sched. I to the Act of 1906. There is no mention in the schedule of the word "recover." In the Act of 1923, under the heading "Miscellaneous Amendments to the Principal Act" we get s. 14, which was copied verbatim and became s. 12 of the 1925 Act. Here it is that the word "recover" first appears. The Act of 1925 repealed the Act of 1906 and the Act of 1923, except some sections which are not in point.

The matter is now dealt with, not in the schedule, but in the body of the Act and in several sections. There is s. 11, which provides for a review by the arbitrator upon which the payment may be ended. Section 18 provides that the workman must submit himself periodically for medical examination. Section 19 repeats totidem verbis what was in the schedule of the Act of 1906, but then there is also s. 12, which provides another method of discontinuing the payment of the compensation. It is as follows:

> "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment except in the following cases: (1) where a workman in receipt of a weekly payment in respect of total incapacity has actually returned to work; (2) where the weekly earnings of a workman in receipt of a weekly payment in respect of partial incapacity have actually been increased; (3) where the medical practitioner who has examined the workman under s. 18 of this Act has certified that the workman has wholly or partially recovered, or that the incapacity is no longer due in whole or in part to the accident, and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with notice of the intention of the employer at the expiration of ten clear days from the date of the service of the notice to end the weekly payment, or to diminish it by such amount as is stated in the notice, has been served by the employer upon the workman: Provided that—(i) in the last-mentioned case, if before the expiration of the said ten clear days the workman sends to the employer the report of a duly qualified medical practitioner (which report shall set out the grounds of his opinion) disagreeing with the certificate so served by the employer, the weekly payment shall not be ended or diminished, except in accordance with such report, or if and so far as the employer disputes such report, except in accordance with the certificate given by the medical referee in pursuance of s. 19 of this Act; and (ii) where an application has been made in pursuance of the said s. 19 to refer the dispute to a medical referee, it shall be lawful for the employer, pending the settlement of the dispute, to pay into court—(a) where the notice was a notice to end the weekly payment, the whole of each weekly payment becoming payable in the meantime; (b) where the notice was a notice to diminish the weekly payment, so much of each weekly payment so payable as is in dispute;

> and the sums so paid into court shall, on the settlement of the dispute, be paid to the employer or to the workman according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed, as in default of agreement may be determined by the registrar, or, on appeal, the judge; (iii) nothing in this section shall be construed as authorising an employer to end or diminish a weekly payment in any case in which, or to an extent to which, apart from this section, he would not be entitled to do so."

Here it is that the word "recovered" appears, and it is on the reading of this section and its application to the certificate given that the present case depends.

I will now examine the cases. I may go at once to *Richard Evans & Co., Ltd.* v. *Patrick Scahill* (5), because it was in your Lordships' House. In that case Scahill contracted nystagmus in 1923, and again in 1924, and he was paid compensation. In January, 1925, the employers applied for a reference to a medical referee. This was done under the provisions of the schedule to the Act of 1906. In the order of reference the medical referee was asked specifically to report whether he, Scahill, had fully recovered from miners' nystagmus. The medical referee gave a certificate in which he said that the workman was

> "not suffering from miners' nystagmus, but from hyperopia, and that his incapacity is not due to the accident."

In July, 1925, he was again, on his own initiative, examined by a certifying surgeon, who certified that he was suffering from nystagmus. The employers asked for a remittal to a medical referee, and it was referred to the same medical referee as had reported on the former time, and he confirmed the view of the certifying surgeon that the workman was suffering from nystagmus. It was argued that the first certificate barred the way to all future proceedings in respect of the original attack. The House, confirming the judgment of the Court of Appeal, held that it did not. I quote the words of LORD SUMNER, who delivered the leading opinion (137 L.T. at p. 163):

> "My Lords, the provision of Sched. I to the Act of 1906, namely, para. 15, which makes the certificate of a medical referee conclusive evidence adds the words: 'as to the matters so certified.' I think that a provision which gives this effect to a certificate of a person who is not before the court, and makes it conclusive against the evidence of competent witnesses who are, is, if any provision ever is, one which must be applied strictly and must be limited to an exact compliance with its terms. Now, as the learned arbitrator justly pointed out, not only did the certificate not certify that the applicant had recovered from the original attack of the disease, but this question was submitted to him and was left unanswered."

I think this opinion makes it clear that a certificate may be such as to preclude further inquiry, but that it must be strictly looked at to see whether it is so. But there is another observation which must needs be made on this case. LORD SUMNER went on to say that this made it unnecessary to consider whether *Prendergast* v. *Lancaster's Steam Collieries, Ltd.* (6) was rightly decided, but that that did not mean that he was casting doubts on it. It is, however, fair to say that LORD ATKINSON said he thought it was rightly decided. The result of that is that *Prendergast's Case* (6) is not made binding, though not discredited, by the judgment in *Scahill's Case* (5). *Prendergast's Case* (6) does, I think, warrant the judgment now appealed against. Prendergast suffered from nystagmus and received compensation from 1917. The employers considered he had recovered in 1924, proceeding under s. 24 of the Act of 1923. A reference was made to a medical referee, who gave a certificate to the effect that Prendergast

> "is not now suffering from nystagmus, but from pain in the head and eyes due to astigmatism and neurasthenia and is not fit to work underground."

The employers stopped the compensation. The workman, three months afterwards, applied for arbitration. The parties agreed to ask for a reference to a medical referee. In this new reference, for it was to a different man from the first medical referee, it was

A certified that he was suffering from nystagmus and that the nystagmus was a continuation of the old attack in 1917. The employer then pleaded that the original certificate ended the matter. It would have been possible to decide the case on the view that the parties, by agreeing to remit to a new medical referee, had really so to speak taken the case out of the statute, and ATKIN, L.J., was prepared to decide the case on that ground. But it was not so decided, and it was decided on the ground that B the first certificate had only dealt with the present condition of the man, and had not barred the way to a second certificate, which ascribed the existing nystagmus to a proneness to recur arising from the first attack. The curious part of the case is that there was no evidence as to proneness to recur. On the contrary, the second referee framed his second finding thus:

> "The present condition is a continuation of his attack of September, 1917, and so C the question of increased susceptibility does not appear to me to arise in this case."

The view as to proneness to recur was therefore evolved from the fact that the referee said the present attack was a continuation of the old attack.

Starkey v. *Clayton & Sons* (7) was relied on. That case, however, was much complicated by the particular conditions in which alone dermatitis becomes an industrial D disease. It is, I think, worthy of notice that WARRINGTON, L.J., in the concluding sentence of his opinion, certainly adumbrates the distinction between natural proneness to disease and proneness induced by an attack of disease, a matter which will be more fully dealt with hereafter. It is the failure to observe this distinction which to me vitiates *Prendergast* v. *Lancaster's Steam Collieries, Ltd.* (6), as a helpful authority, quite apart from the fact that it does not bind me, though it did the Court of Appeal.

E I now pass to the two cases which were, unfortunately, not mentioned to either of the courts below. The first of these is *Wilsons and Clyde Coal Co., Ltd.* v. *Burrows* (1). In this case the workman, who had sustained an injury to his back, was paid compensation. Then the employers, conceiving that he had recovered, applied to end compensation. A remit was made to a medical referee, who reported:

> "He has, in my opinion, completely recovered from the accident, and his condition F is such that he is fit for his ordinary work."

Upon that the employers applied to the arbitrator to end the compensation. The workman lodged a minute saying that there was a probability of a recurrence of inability, and asked for proof of that with a view to obtaining a suspensory award. The Sheriff-Substitute, as arbitrator, ended the compensation. On appeal, the Second Division of the Court of Session recalled the finding of the arbitrator and remitted to him to allow G proof of the averments in the minute. The ground of judgment was clearly put by the Lord Justice-Clerk:

> "The certificate of the medical referee speaks only at its date and affirms recovery at that date. It has no concern with the future. It has no concern with the reasonable probability, therefore, of the recurrence of incapacity."

H On appeal to this House that judgment was reversed. I quote a few sentences from my judgment ([1929] A.C. at p. 658):

> "It is quite clear that, under the word 'condition' it would be a perfectly relevant inquiry, not only whether the man was fit for employment at the moment—which really comes under the succeeding words—but whether the injury was of such a character that there was, owing to the injury, some more or less latent disability I at the time but which at any time might break out, and which, therefore, would give a reasonable probability of unfitness for employment supervening. That would be a perfectly relevant inquiry before the medical referee, and I have no doubt that, if there is anything in the case of that sort it is the workman's duty to submit it to the medical referee, but when the medical referee has given his certificate that certificate is to be final. I search in vain for any idea in the statute that, notwithstanding the certificate of the medical referee, it is still within the power of the arbitrator or, if he does not do so, in the power of the Court of Appeal, to order a general inquiry into the matter. That idea, I think, would simply upset

> the whole scheme of the Act as to medical referees. I have no doubt whatsoever that, on the report of the medical referee, it is perfectly competent for the arbitrator to say: 'Your report is ambiguous and I send it back to you that you may explain clearly what you mean.' But if the report is not ambiguous, then it is for the arbitrator to take that report and to take it as final. In the present case the report is not ambiguous. It says that he has completely recovered."

LORD SUMNER is equally explicit. He says ([1929] A.C. at p. 660):

> "It seems to me not only that he [the arbitrator] had the materials before him upon which he could express his opinion as to the reasonable probability of a recurrence of incapacity, but that his certificate would have spoken of any such reasonable probability, had it existed at its date, as well as of the past symptoms with which he had been familiar. With great respect to the decision of the Lord Justice-Clerk, his certificate had concern with the future and with the reasonable probability of an appearance of some further consequences of the accident, just as much as it had to do with the symptoms from which the man had been suffering, and I take it, therefore, that, having both these matters before him, his mind was directed to them and he expressed the conclusion in the statement that there was a complete recovery."

The second of these cases was *Connor* v. *Cadzow Coal Co., Ltd.* (2). That was a case of nystagmus. The case is very accurately stated in the headnote to the report, which is as follows:

> "A miner who had been disabled by miners' nystagmus and was receiving compensation was certified by the medical referee to have recovered and to be fit for his ordinary work. His employers lodged a minute craving the sheriff-substitute to end the compensation. In reply, the workman lodged a minute in which he averred that he had not completely recovered from the disablement in respect that that attack of the disease left him less immune from a further attack and that the risk of recurrence so engendered was wholly or mainly responsible for his failure to obtain work and asked to be allowed a proof of these averments. The sheriff-substitute, founding on s. 9 (4), refused to end compensation and allowed the workman a proof of his averments. The Second Division of the Court of Session, treating the certificate of the medical referee as a certificate of complete recovery, held that the compensation fell to be ended. The workman appealed and, after his case had been opened, the House remitted the matter to the Court of Session to ascertain from the medical referee whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after, and in consequence of the attack, more susceptible to the disease than he had been before it. The medical referee, having answered this question in the negative, held that s. 9 (4) of the Act applied to industrial diseases and that the appellant was entitled to have his averments admitted to probation."

The ratio decidendi is stated by LORD BUCKMASTER as follows ([1932] A.C. at p. 5):

> "If a man has once been attacked, and has completely recovered, recurrence of the disease would be due to his original susceptibility, but if the recovery be not complete, there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away."

There is one other sentence in LORD BUCKMASTER's opinion which seems to me to go beyond what he has already laid down and also to go outside the question. It is this:

> "This answer . . . leaves open the question whether after the original symptoms have passed away and recovery appears to have taken place, it might not still be the fact that exposure to the same conditions would cause the illness immediately to recur. In these circumstances complete recovery cannot be asserted."

The question was as to susceptibility arising out of the disease, whereas exposure to the same conditions causing the disease to recur may be entirely owing to natural susceptibility.

A LORD THANKERTON clearly puts the case on the distinction drawn in the first part of LORD BUCKMASTER's opinion. He says ([1932] A.C. at p. 11):

> "The averments . . . which the appellant asks to be remitted to probation, are not well drawn, but, in my opinion, they sufficiently aver that the appellant has not completely recovered from the disablement of Feb. 14, 1928, in respect that B that attack of the disease has left him less immune from a further attack, and that the risk of recurrence so engendered is wholly or mainly responsible for his failure to obtain work. On the other hand, if the said attack now merely affords evidence of constitutional susceptibility to the disease, any recurrence would be due to the latter and not to the attack of February, 1928, and would constitute a fresh disablement."

C It ought to be said that the present case is in a somewhat different position from *Connor's Case* (2). *Connor's Case* (2) was based on the averment that the case fell within s. 9 (4). Whether it did or not would depend on what came to be proved. The present case is a case where the man is being employed, but at a lower wage than what he could get for underground work, and the question is whether he is entitled to compensation payment on the ground of partial disablement. Nevertheless, D undoubtedly the question as to the finality of the report of a medical referee is fairly raised in both cases.

The outcome of all this seems to me to be simply whether the medical referee's report amounts to a certificate of complete recovery or not. In *Connor's Case* (2) the answer to the question put being a simple negative, it was held that the report did not amount to a certificate of complete recovery, but the answer in this case is much more explicit, E and the point is: Is it a certificate of complete recovery or not? Undoubtedly, it is a difficult and narrow question and opinions on it might well differ. I keep steadily in view the real question, and it is this: Assuming that the man is suffering from nystagmus on March 27, 1930, is it competent, in face of the report of the medical referee, to say that the attack is due to the original attack of Oct. 17, 1920, or is it a fresh attack? I take the report paragraph by paragraph. The first paragraph asserts the predisposi- F tion of the subject to the disease and the consequent probability of a second attack when subjected to the same conditions as brought on the first attack. That is constitutional susceptibility, and nothing else, and is compatible with complete recovery. The next paragraph says a second attack is more easily induced, that is, develops in quicker time, than the first attack, and so with subsequent attacks; and, along with this, the last paragraph:

> G "My certificate means that he has now recovered from miners' nystagmus, but he is likely to develop a second attack sooner or later if he goes underground, and in much shorter time than it took to produce the first attack."

I am of opinion that the mere fact that a second attack will develop quicker than a first is a natural concomitant to susceptibility and is compatible with complete recovery H from the original disablement having taken place. After all, why cannot the man go back to underground work? It is not because he has had nystagmus, but because he is constitutionally susceptible to nystagmus. That has been certiorated by the fact of the old attack. It is quite in consonance with the scheme of making disability arising from an industrial disease equivalent to an accident that the employer should pay compensation while the disability lasts. But that disability has gone, and a dis- I ability which ensues because he is subjected to the same conditions is a new disability due to an old constitutional susceptibility. If this is not so, then complete recovery from nystagmus is an impossibility. That seems to be a result which is opposed to the scheme of the Act, which looks upon the ending of the disability as a possible occurrence. I, therefore, come to the conclusion that the certificate here was one of complete recovery, and, that being so, it cannot be contradicted by a finding by someone else which is incompatible with complete recovery.

LORD WARRINGTON.—The workman in this case (the respondent) for several years prior to and in 1920 was employed by the appellants as a miner. On Oct. 17, 1920, he was certified by the certifying surgeon to be incapacitated by miners' nystagmus. The date of disablement was the date of the certificate, namely, Oct. 17, 1920. The respondent received compensation as for total incapacity until January, 1924, after which date he received 18s. 6d. a week on the footing of partial incapacity until it was stopped on Jan. 24, 1930. On Jan. 14, 1930, the appellants, pursuant to s. 12 (3) of the Act, served upon the respondent a ten days' notice to terminate compensation accompanied by a medical certificate to the effect that he had wholly recovered from any incapacity due to miners' nystagmus. On Jan. 24, 1930, payment of compensation was stopped. A counter certificate having been filed by the respondent the matter was, pursuant to s. 19 (2), referred to Dr. F. P. S. Cresswell, a duly appointed medical referee, who, after examination of the respondent, gave a certificate dated Feb. 15, 1930, pursuant to s. 19 (3). This certificate was in the following terms:

> "(i) The said Evan Edwards is not now suffering from miners' nystagmus, but from defective vision due to cataract and old inflammation of the eyes, and his condition is such that his sight is not good enough for underground work, but only for work on the surface; (2) the incapacity of the said Evan Edwards is not due to miners' nystagmus, but to other defects mentioned above."

Thereupon the appellants refused to pay further compensation. The respondent then obtained another certificate from the certifying surgeon to the effect that he was on March 27, 1930, suffering from miners' nystagmus and was thereby disabled from earning full wages at the work at which he had been employed, and that the disablement commenced on Oct. 17, 1920.

This certificate seems to me to be directly contrary to that of the medical referee, which under the statute is final and conclusive. The difference in dates is really immaterial, because there is no suggestion that there was any alteration in the man's condition physically or otherwise between Feb. 15, 1930, the date of the medical referee's certificate, and March 27, 1930, that of the certificate of the certifying surgeon. The difference between them seems to me to be purely one of diagnosis, and in that case the certificate of the medical referee must prevail. The respondent, however, commenced the present proceedings, claiming compensation at the rate of 18s. 6d. per week from Jan. 24, 1930, on the footing of partial incapacity. The appellants denied liability, relying on the certificate of the medical referee as final and conclusive. The respondent before the arbitrator admitted that his condition was then—on July 7, 1930—the same as it had been when he was examined by the medical referee. The arbitrator made an award in favour of the appellants, but this was on April 28, 1931, set aside by the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.JJ.). Hence the present appeal.

The appeal came before this House on March 18, 1932, when your Lordships determined to refer the matter to the arbitrator for the purpose of obtaining from the medical referee an answer to the following question, namely,

> "Whether or not he intended by his certificate to certify that the workman had completely recovered from the attack in the sense that he was not after and in consequence of the attack more susceptible to the disease than he had been before it."

The answer of the medical referee was as follows:

> "The fact that Evan Edwards has had an attack of miners' nystagmus proves that he is a man who is predisposed to this disease, or is more susceptible to it, than his fellow-workers, who do not get it; and when put under similar conditions again (i.e., at his work underground), he is likely sooner or later to develop a second attack. A second attack is more easily induced (i.e., develops in quicker time) than the first attack and so with subsequent attacks. In this case there is also an added factor to induce nystagmus, namely, his defective vision due to old inflammation of the eyes and incipient cataract. My certificate means that he has now recovered from miners' nystagmus, but he is likely to develop a second attack sooner or later if he goes underground, and in much shorter time than it took to produce the first attack."

A I have carefully considered the certificate and the supplementary statement supplied at your Lordships' request in the light of the material provisions of the statute, and have arrived at the conclusion that the appeal ought to be allowed and the award in favour of the appellants restored.

There are two conditions specified in s. 43 as essential to a right to compensation: (i) that the workman is suffering from the disease; and (ii) that he is thereby disabled B from earning full wages at the work at which he was employed; and it is the disablement which is to be treated as the happening of the accident. The original certificate of the medical referee stated that the appellant "is not now suffering from miners' nystagmus," but from the other defects of vision therein mentioned; and further that his incapacity "is not due to miners' nystagmus" but to the other defects mentioned. I think on consideration I should have been prepared to say that the certificate by itself C directly negatived the existence of one of the conditions mentioned above, namely, that he was by the disease disabled from earning full wages, and that treating it as final and conclusive as to the matters certified the Court of Appeal ought to have given effect to it, and to have affirmed the award of the arbitrator. But I am glad that the further statement was obtained, for I think this removes any doubt I may have felt. It is, in my judgment, clear that in the view of the referee the original attack was due to the D man's constitutional predisposition to the disease and his greater susceptibility to it than his fellow-workers. He further finds that he has now recovered from the disease. He would be likely sooner or later to develop a second attack, obviously, as I understand, by reason of the constitutional predisposition above referred to helped by the defective vision arising from other causes than nystagmus. It is important to notice that the referee is careful always to refer to a second attack, not to a recrudescence of the E first. I cannot find in either the certificate or in the further statement any trace of the idea that the first attack is, so to speak, only suspended, or that the second attack could be treated as a continuance of the first. The fact that the second attack is "more easily induced, namely, develops in quicker time than the first attack," is not, in my judgment, inconsistent with the view I have above expressed. The attack would still be a second attack, and disablement, if it occurred, would be caused thereby and F not by the first.

So far I have not discussed the authorities, for the reason that I prefer to consider first the construction and effect of the statute in reference to the circumstances of the particular case, and then to examine whether the view so arrived at is supported by or is inconsistent with authority by which I am bound. The latest and perhaps the most important case, because the ultimate decision of this House was in favour of the work- G man, is *Connor* v. *Cadzow Coal Co., Ltd.* (2). In that case the question turned on the effect of a medical referee's certificate that the man had "recovered" from the attack. This certificate left it in doubt whether he had completely recovered or was after and in consequence of the attack more susceptible to the disease than he had been before it. In answer to an inquiry directed by this House as to the intention of the referee, he H replied that he had not intended to certify that the man had completely recovered in the sense above mentioned. It was because so explained the certificate was not one of complete recovery that this House decided in favour of the workman. See, particularly the opinion of LORD BUCKMASTER. He says ([1932] A.C. at p. 5):

> "If a man has once been attacked, and has completely recovered, recurrence of the disease would be due to his original susceptibility, but if the recovery be not com- I plete, there is the added probability of a recurrence owing to the fact that the original conditions caused by the first attack have not completely passed away."

It was because he regarded the certificate as not one of complete recovery, but left open the question whether after the ordinary symptoms have passed away, and recovery appears to have taken place, it might not still be the fact that exposure to the same conditions would cause the illness immediately to recur, that he concurred in the decision of the House. In the present case that question is, in my opinion, not left open. The recurrence would be due to constitutional susceptibility and not to the previous attack. In LORD THANKERTON's opinion there is a passage which indicates that in his view such a case as the present would be treated as one of complete recovery. He says ([1932] A.C. at p. 11):

> "If the said attack now merely affords evidence of a constitutional susceptibility to the disease, any recurrence would be due to the latter and not to the attack of February, 1928, and would constitute a fresh disablement."

This case, therefore, is not an authority inconsistent with the views I have expressed above, but I think tends to support it. In *M'Dougall* v. *Summerlee Iron Co.* (8) the man had been certified to have completely recovered from a first attack. He was again attacked and obtained a fresh certificate of disablement, and it was decided by this House that this fresh disablement was a fresh injury by accident. This case, so far as it goes, supports the view I have expressed. I have referred to the other cases cited and do not find in them anything contrary to the view I have expressed on the circumstances of this case.

In my opinion the appeal succeeds, and the award of the arbitrator should be restored with costs here and in the Court of Appeal.

LORD ATKIN, LORD THANKERTON and **LORD MACMILLAN** concurred.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray,* for *Kensholes & Prosser,* Aberdare; *Smith, Rundell, Dods, & Bockett* for *Morgan, Bruce, & Nicholas,* Pontypridd.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WHITE SEA TIMBER TRUST, LTD. *v.* W. W. NORTH, LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), December 20, 1932]

[Reported 148 L.T. 263; 49 T.L.R. 142; 77 Sol. Jo. 30;
18 Asp.M.L.C. 367]

Sale of Goods—Rejection—Condition that goods specified in contract not to be rejected—Provision that goods be shipped under deck—Part of goods shipped on deck—Buyer's right to reject.

By a written contract sellers sold to buyers a quantity of timber for shipment from Archangel to Hull. It was a term of the contract that the whole of the goods were to be shipped under deck. About one-quarter of the whole quantity were in fact shipped as deck cargo, in breach of the above term. The contract further provided that "the buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of the contract against shipping documents."

Held: the words "herein specified" meant "herein described"; part of the description of the goods was that they were to be carried under deck; a portion of them had been carried as deck cargo; and, therefore, they did not tally with the description, and the buyers were entitled to reject the whole shipment.

Notes. Considered: *Vsesojwzoje Objedinenije "Exportles"* v. *Allen & Sons, Ltd.,* [1938] 3 All E.R. 375; *Messers, Ltd.* v. *Morrison's Export Co.,* [1939] 1 All E.R. 92. Referred to: *Raahe Oly Osakeytio* v. *Goddard,* [1935] All E.R. Rep. 277.

As to conditions in contracts for the sale of goods, see 29 HALSBURY'S LAWS (2nd Edn.) 52 et seq., and for cases see 39 DIGEST 414 et seq.

Cases referred to:

(1) *Montague L. Meyer, Ltd.* v. *Kivisto* (1929), 142 L.T. 480; 46 T.L.R. 162; 74 Sol. Jo. 58, C.A.; Digest Supp.

(2) *Montague L. Meyer, Ltd.* v. *Travaru A./B. H. Cornelius of Gamleby* (1930), 46 T.L.R. 553; 74 Sol. Jo. 466; Digest Supp.

Special Case stated by an umpire.

By a written contract dated June 17, 1932, White Sea Timber Trust, Ltd., sold to W. W. North, Ltd., a quantity of timber for shipment from Archangel. It was a term of the contract that the whole of the timber should be shipped "under deck." The contract contained an arbitration clause (cl. 15) which, after providing that all disputes should be settled by arbitration, continued:

> "Buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of contract against shipping documents."

The timber was shipped in due course from Archangel to Hull, part of it being carried as deck cargo in breach of the above-mentioned condition. The sellers tendered four separate bills of lading, three for the goods carried under deck and one for the goods carried as deck cargo. The buyers refused to accept any of the bills of lading and claimed to reject the whole shipment. They contended that goods carried on deck were not of the contract description, and that, as part of the goods tendered were not of the description of the goods sold, they were entitled to reject the whole. The sellers contended that under the terms of the contract the buyers were not entitled to reject, but could only claim damages for any loss which they could prove they had suffered.

Van den Berg, K.C., and *Knight* for the sellers.
Le Quesne, K.C., and *McNair* for the buyers.

MACKINNON, J.—In this case White Sea Timber Trust, Ltd., sold certain goods on a contract of sale in c.i.f. terms to W. W. North, Ltd., of Hull. In pursuance of that contract the sellers tendered to the buyers four bills of lading for four separate parcels shipped from Archangel in the steamship *Horden*. The buyers refused to accept these bills of lading on the ground that one of the four parcels, specified in one of the bills of lading, was expressed to be shipped as deck cargo. It was part of the terms of the contract between the parties—not written out in the form of contract, but contained in a contemporaneous letter addressed by the sellers to the buyers and admittedly forming part of the contract—that the goods sold were to be shipped from Archangel under deck. The sellers contested the right of the buyers to reject the goods, and the matter comes before me on a Special Case stated by an umpire.

Under the ordinary law of the sale of goods the buyers would clearly be entitled to reject these bills of lading, because they were not in accordance with the contract which calls for shipment under deck, and one of the bills tendered was for shipment on deck. But the sellers contended that that common law right of the buyers is taken away from them by reason of the provisions of cl. 15, which reads as follows:

> "Buyers shall not reject the goods herein specified, but shall accept or pay for them in terms of contract against shipping documents."

The real question here is whether these goods, tendered on these documents, were goods "herein specified." In the first place I think the suggestion of counsel for the sellers that "herein specified" refers to that part of the written matter which is put in the form of contract under the word "specification" and that part only, is too narrow. I do not think "herein specified" refers as a matter of location to that printed word "specification" in the contract form. I think it has an adequate and wider meaning. "The goods herein specified" can be described as specified not only in the specification, but also in other parts of the contract, and I think that in this case they were described in the attached letter and not upon any part of the form of contract. If in the upper part of this form of contract there had been written in "to be shipped under deck," then I think that would become part of the description of the goods which were to be sold.

In the result, inasmuch as one part of these goods—one-quarter of the whole parcel—were on deck and were shipped under a bill of lading specifying that they were on deck, I think they were not in accordance with the contract, that they were not the goods "herein specified" and that the buyers had the right to reject. It is not necessary to say any more than that. In so deciding I am following the principles laid down by the Court of Appeal in *Meyer, Ltd.* v. *Kivisto* (1), and the case cannot be distinguished from *Meyer, Ltd.* v. *Travaru A./B.H. Cornelius of Gamleby* (2). There was a possible point for argument in the latter case which does not arise here, because in that case, although the goods were on deck, the bill of lading described them as under deck, and from that I conceive an argument might have been put forward (which I am told was not) that, as a bill of lading for goods under deck had been tendered, the contract had been fulfilled, and that the buyers had under a c.i.f. contract a right of action for the non-delivery of goods under deck by the shipowners. That does not arise in this case because, as appears in the award, the bill of lading for this one parcel out of four expressly specified that the goods were on deck.

The result is that the award must be upheld in the terms of the special case, and the sellers must pay the costs of the arbitration and of the hearing in this court.

Solicitors: *Wynne-Baxter & Keeble*; *Pritchard & Sons* for *Andrew M. Jackson & Co.*, Hull.

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

NORTHUMBRIAN SHIPPING CO., LTD. *v.* McCULLUM

[HOUSE OF LORDS (Lord Atkin, Lord Warrington, Lord Tomlin, Lord Thankerton and Lord Macmillan), May 30, 31, June 2, 28, 1932]

[Reported 101 L.J.K.B. 664; 147 L.T. 361; 48 T.L.R. 568; 76 Sol. Jo. 494; 25 B.W.C.C. 284]

Workmen's Compensation—Accident "arising out of and in the course of employment"—Risk incidental to employment—Seaman—Accident while on dock premises returning to ship.

An accident, to be an accident arising out of and in the course of employment within the Workmen's Compensation Act, 1925, s. 1 (1), must have some relation to the employment and must be due to a risk incidental to that employment as distinguished from a risk to which all members of the public are alike exposed. Beyond this the decision in each case must turn on its own circumstances.

The right of a seaman to compensation is the same as that of any other workman, and, therefore, where a seaman had left the public highway with its risks common to all wayfarers and had entered the private premises of the dock where his ship lay with its special risks to which only those who had business were exposed, and, after so doing, met his death by accident,

Held: his widow was entitled to compensation under the Workmen's Compensation Acts.

Notes. The Workmen's Compensation Acts were repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the words of s. 1 (1) of the Act of 1925.

Applied: *Clark* v. *Stephens, Sutton, Ltd.* (1937), 30 B.W.C.C. 340. Considered: *Weaver* v. *Tredegar Iron and Coal Co.*, [1940] 3 All E.R. 157. Applied: *Berry* v. *John Deheer, Ltd.* (1943), 36 B.W.C.C. 1. Considered: *Jenkins* v. *Elder Dempster Lines, Ltd.*, [1953] 2 All E.R. 1133.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq., and for cases see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202, and for the National Insurance (Industrial Injuries) Act, 1946, see ibid., 797.

A Cases referred to:

(1) *John Stewart & Son (1912), Ltd.* v. *Longhurst*, [1917] A.C. 249; 86 L.J.K.B. 729; 116 L.T. 763; 33 T.L.R. 285; 61 Sol. Jo. 414; 10 B.W.C.C. 266, H.L.; 34 Digest 279, *2357*.

(2) *Charles R. Davidson & Co.* v. *M'Robb or Officer*, [1918] A.C. 304; 87 L.J.P.C. 58; 118 L.T. 451; 34 T.L.R. 213; 62 Sol. Jo. 347; 10 B.W.C.C. 673, H.L.; 34 Digest B 276, *2339*.

(3) *Simpson* v. *London, Midland and Scottish Rail. Co.*, [1931] A.C. 351; 100 L.J.P.C. 98; 144 L.T. 730; 47 T.L.R. 266; 75 Sol. Jo. 155; 24 B.W.C.C. 1, H.L.; Digest Supp.

(4) *Webber* v. *Wansborough Paper Co., Ltd.*, [1915] A.C. 51; 84 L.J.K.B. 127; 111 L.T. 658; 30 T.L.R. 615; 58 Sol. Jo. 685; 7 B.W.C.C. 795, H.L.; 34 Digest 279, C *2356*.

(5) *Kitchenham* v. *Johannesburg (Owners)*, [1911] A.C. 417; 80 L.J.K.B. 1102; 105 L.T. 118; 27 T.L.R. 504; 55 Sol. Jo. 599; 4 B.W.C.C. 311, H.L.; 34 Digest 309, *2548*.

Appeal from an order of the Court of Appeal affirming an award under the Workmen's D Compensation Acts made by HIS HONOUR JUDGE ROWLANDS at Swansea County Court.

The workman, William McCullum, signed articles for a voyage in a ship then berthed in his home port. Under the articles he agreed to serve as boatswain, and there was an added term that, if called on, he should act as watchman while the ship was in port with extra wages. He went home each day, and on the evening of Oct. 4, 1930, he set out E to return to the ship for duty as watchman. Three days afterwards his body was found in the water a thousand yards from the ship, the spot being one which was on his way within the dock premises to the ship. His widow, as his dependant, claimed compensation from his employers under the Workmen's Compensation Acts, 1925.

The county court judge, sitting as arbitrator under the Act, made the following award: Having regard to the fact that McCullum was at his home port when he was signed on, F and that it is admittedly the practice for seamen signed on at their home port to sleep at home and to go to and from the ship while it is being got ready for sea as if they were ordinary workmen going to their daily work, and that this is a practice which is recognised and agreed to by shipowners, I am of opinion (a) that McCullum must be treated as if he had been an ordinary workman going to his day's work when he went to the dock premises on the evening of Oct. 4, 1930, and particularly so as he went to the ship on G that occasion, not for the purpose of carrying out the duties of his own office as boatswain, but for the purpose of carrying out the extra duties of the post of watchman offered to him for that night by his employers, and (b) that under these circumstances the case must be treated as falling within the principles that prevailed in *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1) rather than within those that prevailed in *Davidson & Co.* v. *M'Robb or Officer* (2) and cases of that class. The accident H took place before the voyage had really commenced; in fact, all the crew had not been signed on, and the practice of the parties must be taken as the governing factor in ascertaining the position of the workman. This view of the situation is more in accordance with the realities of the case than the view that McCullum should be treated as if he had been in the position of a man living on the ship returning from leave; in other words, he cannot be looked upon as a man who was doing something I that was merely the completion of a proceeding carried out solely for his own purposes and not a proceeding in any way connected with or a part of his work. *Davidson & Co.* v. *M'Robb or Officer* (2) and the other cases of the same type have gone as far as they can in extending the doctrine of the suspension or curtailment of the period of employment or period of actual service for the employer, and I think I should be doing violence to the true facts of this case if I were to postpone the time of the commencement of the workman's employment, or of the recommencement of his employment, beyond the moment when he entered the dock premises at the Burrows Inn, and held that the employment only started for the night when he reached the ship or the immediate means of access to the ship from the quay. It is too late now to argue that a man cannot be treated as being within the course of his employment till he reaches his actual place of work. *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1) and other cases show that under particular conditions the workman is in the course of his employment before he reaches his place of work and indeed while he is not even on his employers' premises. In this case McCullum was bound to cross the dock, which was the property of the Great Western Railway and not open to the public, in order to get to the ship, and in my view of the circumstances the man was employed as an incident of his work as a watchman on the night of the accident. Going across the dock was a necessary part of what he had to do on that night, and going across the dock made him subject to special risks, and on the facts established in evidence I feel bound to draw the inference that McCullum in fact went on the dock premises to get to the ship for the purpose of carrying out his duties as watchman, and that he met his death when going across the dock to the ship; but it was not directly proved to my satisfaction, nor can I draw the inference that he fell against the quay or into the water when he was actually trying to get on board. It was difficult on the evidence to come to a definite conclusion as to exactly how he lost his life, but with the consent of the parties I visited the docks and examined the route along which the man would naturally travel from the Burrows Inn entrance to the ship. On this route I saw two points near the place where the ship was moored where the man could easily slip and knock his head, and then fall into the water on a dark night when it was raining hard and blowing half a gale. The night of Oct. 4 was just such a night, and although I cannot come to a clear conclusion as to exactly what happened to McCullum, the risks to which he was subject when crossing the dock were just such risks as might result in his falling off or on the quay, and eventually getting into the dock, and the only fair inference I can draw is that when he was near the ship on his way to work he fell and got into the dock by accident, and that this was the cause of his death. The rule as to what is a proper inference to be drawn in cases of unexplained accident is stated by LORD DUNEDIN in *Simpson* v. *London, Midland and Scottish Rail. Co.* (3), and it is sufficiently set out in the head note of that case. The rule as there stated applies, in my opinion, exactly to this case, and it is a definite approval of a method of dealing with such cases that I have often applied. In the circumstances I see no reasonable course open to me but to draw the inference I have already mentioned, namely, that McCullum fell into the dock and was killed as the result of an accident arising from the risks he ran while crossing the dock premises in order to get to his ship; and having regard to the view I have taken that he was in the course of his employment or in the course of doing something for his employers and not for himself while crossing these premises for that purpose, it follows that, in my opinion, he was killed as the result of an accident arising out of and in the course of his employment. There is no suggestion that McCullum was guilty of any conduct that might displace the right to compensation, and accordingly there will be an award in favour of the applicant.

The Court of Appeal held that there was evidence on which the county court judge could find that the workman ought to be treated as an ordinary workman, who went to and from his work each day, and that he had rightly applied the principles in the cases referred to; further, the matter being a question of fact, this court had no power to interfere.

The employers appealed.

Sir Walter Greaves-Lord, K.C., *A. Trevor Harries*, and *H. P. Levy* for the appellants.
E. W. Cave, K.C., and *G. Clark Williams* for the respondent.

The House took time for consideration.

June 28. The following opinions were read.

LORD MACMILLAN.—According to the award of the arbitrator, the deceased, William McCullum, on Oct. 4, 1930, sustained personal injury resulting in his death by an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, 1925. The Court of Appeal has affirmed the award. Your Lordships are now called upon to determine whether this finding, so far as it is a finding of fact, is one which, on the evidence, the arbitrator was entitled to pronounce and, so far as it is a finding of law, is based upon a sound construction of the statute. The question must always have both these aspects. The arbitrator's finding of facts must be justified in the sense that there was evidence adduced before him on which he could so find; his application of the law to the facts so found must be in accord with a sound interpretation of the terms of the Act as these have been authoritatively expounded.

The essential facts of the occurrence are simple. The deceased, on Sept. 27, 1930, signed on as a member of the crew of the steamship *Newbrough*, then lying alongside a berth in the King's Dock at Swansea Harbour. His engagement was in the capacity of bosun, and he was due to join his ship at five minutes after midnight on Monday, Sept. 29. He duly reported for duty, and during the week, from Monday, Sept. 29, to Saturday, Oct. 4, when the ship was loading her cargo, he performed his duties as bosun on board the ship every night, being off duty during the day. The deceased was a married man whose home was in Swansea, and each morning when his duties were over he went to his home and spent the remainder of the day there, returning to the ship at night. He was entitled to remain on board when off work if he pleased, and to be fed there, but when not on duty it was recognised that he was entitled to go to his home, and he preferred to do so. As there was no loading during the week-end, and consequently no duties for him to perform as bosun on Saturday night, he would have been free after knocking off work on the Saturday morning to have spent the week-end at home. He was, however, offered the job of night watchman on the ship for the Saturday night, and he agreed to undertake this duty. The hours of duty for members of the crew performing the duty of a night watchman were prescribed as from 6 p.m. to 6 a.m. in additional clauses appended to the deceased's service agreement, which also provided for extra pay for this duty when performed on Saturday night.

On Oct. 4, accordingly, the deceased was due on board at 6 p.m. to take up his duty as night watchman, and shortly before that hour he left his home, where he had spent the day, in order to go to the harbour. He called in at a public-house just outside the entrance to the dock premises and had a glass of beer, and then proceeded on his way. He was never thereafter seen alive, and his body was recovered on Oct. 18 from the King's Dock, about a thousand yards from the *Newbrough's* berth, at a place to which it might have been carried by the tide from the proximity of the ship's berth. Death was not due to drowning, but to fracture of the skull, hæmorrhage and shock, the nature of the injuries found on the body being consistent with the deceased having fallen and struck his head against something and then fallen into the water. It was a stormy night of heavy rain and strong wind. A gangway ladder which was used as a communication between the ship and the shore was at 8.40 p.m. found to have fallen into the dock, but there was no evidence connecting this incident with the deceased's death. From these facts the arbitrator states that he felt

> "bound to draw the inference that McCullum in fact went on to the dock premises to get to the ship for the purpose of carrying out his duties as watchman, and that he met his death when going across the dock to the ship. But, [he proceeds] it was not directly proved to my satisfaction nor can I draw the inference that he fell against the quay or into the water when he was actually trying to get on board. . . . The only fair inference I can draw is that when he was near the ship on his way to work he fell and got into the dock by accident, and this was the cause of his death."

I am of opinion that the arbitrator was entitled from the evidence adduced to draw the inferences which he did, and I accept his account of how the accident occurred. Such then being the circumstances of the accident which befell the deceased, the question is whether it can be said to have arisen "out of and in the course of his employment." Few words in the English language have been subjected to more microscopic judicial analysis than those I have just quoted, and in the effort to expound them many criteria have been proposed and many paraphrases suggested. But it is manifestly impossible to exhaust their content by definition, for the circumstances and incidents of employment are of almost infinite variety. This at least, however, can be said, that the accident in order to give rise to a claim for compensation must have some relation to the workman's employment and must be due to a risk incidental to that employment as distinguished from a risk to which all members of the public are alike exposed. Beyond this, the decision in each case must turn upon its own circumstances.

In the present case it was conceded by the appellants that if the deceased had not been a seaman serving on the ship, but had been what has been rather unhappily termed an "ordinary workman" from the shore engaged in some job on the ship, the accident would rightly have been held to have arisen out of and in the course of his employment, for his passage across the dock premises in going to and coming from the ship would have been in the course of his employment, and as such passage exposed him to special risks an accident befalling him through encountering these risks would have arisen out of his employment. This concession was justified by *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1). There compensation was held to be payable to the widow of a carpenter who was employed in repairing a barge lying in a private dock not open to the public, and who, while on his way home after his day's work but while still on the dock premises, fell into the water and was drowned. Implicit in the present case is the recognition that the premises of Swansea Harbour are private property not open to the general public. I do not find that there was any evidence on this point, but the arbitrator expressly states that "the dock was the property of the Great Western Railway Co. and not open to the public," and as the fact was not disputed at the Bar of this House your Lordships may safely proceed upon it. As will appear later, I regard this as a fact of the first importance in the case.

Both the arbitrator, and, more markedly, the lords justices in the Court of Appeal, have reached their decision in the respondent's favour by assimilating the position of the deceased on the occasion in question to that of the carpenter in *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1), apparently assuming that on the existing authorities compensation could not in the circumstances have been awarded if the deceased had been returning to the ship to take up his ordinary duties as bosun. They have found that for the time being the deceased was not a seaman engaged to perform the duties of that employment, but an "ordinary workman" engaged to perform special duty as a night watchman on the ship. They have thus brought the case within the appellants' concession and the precedent of *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1).

I cannot regard this as a satisfactory ground of judgment. In my opinion, the deceased, by undertaking the special duty of night watchman on the ship, did not divest himself of the character of a seaman. He remained throughout the ship's bosun, although on the occasion in question the special duty of acting as night watchman on the ship had been assigned to him. The agreement which he signed on joining the ship expressly contemplated that members of the crew might be called upon to act as night watchmen, and provided that hours worked between 6 a.m. and 6 p.m. on a day preceding or following a night's watching should be paid for as "overtime," while night watchmen actually on duty for any period between midnight on Saturday and midnight on Sunday should be paid 9d. per hour "in addition to their wages." Night watching is thus treated as part of the work which a seaman on the ship might be called upon to perform in return for his wages, and it is only in certain circumstances that the performance of this duty entitles the seaman to extra remuneration. If the deceased had been acting as night watchman on some night in the middle of the week I do not see how he could have been regarded as other than a seaman working for his wages while performing that duty, although, if he had worked also during the following day, he would have been entitled to overtime pay. In my opinion, therefore, the decision below was based on an unfounded distinction, and the case must be determined on the footing that the deceased was on the occasion in question in the position of a seaman returning to duty on his ship after leave.

I rather deprecate, although after reading some of the cases decided in this House I quite understand, the discrimination emphasised in the judgments of the lords justices between "seamen" and "ordinary workmen." The Act in truth draws no such distinction. Compensation is accorded for accidents to workmen generally as defined in

s. 3 (1). No doubt, s. 35, in applying the Act to persons employed on ships, makes certain special provisions for their case, but these relate to the circumstances of their calling, which render it necessary to adapt the procedure prescribed by the Act to these circumstances. The substantive right of a seaman to compensation is the same as that of any other workman. If no more is meant by the distinction drawn than that in dealing with compensation claims by seamen regard must be had to the nature of their employment in deciding whether an accident has arisen out of and in the course of that employment, I, of course, agree with the distinction, but the same may be said of every other kind of workman. In each case the character of the employment must necessarily be a vital element in determining whether a particular accident has arisen out of and in the course of it.

Treating the deceased, therefore, as a workman who on his way from his home to his work met his death by an accident which befell him after he had entered on certain private premises within which his actual place of work lay, which he had to traverse in order to reach that place, which but for his employment he would have had no right to traverse, and which were of such a character as to expose him to special risks to which his death is attributable, I should primâ facie have thought that his case fell precisely within the principle of the decision in *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1), as thus enunciated by LORD DUNEDIN in language borrowed from PICKFORD, L.J., who was a party to the judgment in the Court of Appeal ([1917] A.C. at p. 257):

> "The workman in this case in order to get to the actual place of work had to enter and leave premises on which he had no right to be and no reason for being, except by the conditions of his employment, and in crossing them to encounter dangers which he would not have encountered but for that employment."

The passage I have just quoted would seem most apposite to the case under consideration. But it is said that previous decisions on the interpretation of the Act render it inapplicable to the case of a seaman who on returning from leave crosses dock premises on his way back to his ship. There are, undoubtedly, passages in some of the decided cases which appear to lend support to this assertion, but it is nowhere laid down as an absolute rule, and it is necessary to see precisely what has been decided. What I find is that where a ship is lying in a public harbour the cases quite properly emphasise that the sphere of a seaman's employment is his ship, in which is included not only the premises within the ship's rail, but also her appurtenances such as shore gangways communicating between the ship and the quay. Till he has reached the ship or her appurtenances a seaman who has been on shore on leave is deemed not to have re-entered the sphere of his employment. Unless and until he has reached what has been described as a "provided access" to his ship, that is, an access provided by his employers, the seaman returning from leave is regarded as still in a public place outside the area of his work. The rigidity of this doctrine has been so far relaxed. Thus, compensation has been held payable where the accident happened to a seaman on a vertical ladder on the side of the quay which was considered as part of the means of access to the ship although the ladder was not provided by the owners and was no part the ship's apparel: *Webber* v. *Wansbrough Paper Co., Ltd.* (4). On examination it will be found that in all these cases of a seaman returning from shore leave to his ship in a public harbour, the courts, in delimiting so narrowly the frontier of the seaman's employment, have really been trying to find the dividing line separating risks incidental to the seaman's employment from those which he shares with all the public. An accident happening to a seaman who is on shore on leave cannot be said to arise out of his employment if it is an accident which might just as well have happened to him if he had not been employed as a seaman, for example, if he is run down on the public highway by a motor 'bus. The case of a seaman who has been sent ashore to do an errand on the ship's business is, of course, in a different position, for in his case it is to his employment and not to his own concerns that his exposure to the perils of the highway is due. So long as the seaman on leave, whether quitting or returning to his ship, is in a public place where he might equally well be although he was not employed as a seaman, an accident befalling him there is not identifiable with his employment; it has not befallen him within the sphere of his employment, and it is not due to risks not shared by him with every member of the public. Where the harbour in which a vessel is lying is a public place, it thus becomes highly relevant to inquire whether the seaman at the time of the accident has passed from the public place, namely, the quay, to the private place of his employment, namely, the ship, or vice versa. The line of demarcation in such cases must obviously be finely drawn, and I quite appreciate the necessity of so drawing it. But, so far as I am aware, there has been no case in which this House has decided in terms that a seaman who on his way to rejoin his ship meets with an accident while traversing private dock premises is disentitled to compensation.

This brings me to the consideration of *Davidson & Co.* v. *M'Robb or Officer* (2), which I think is the last case in which the authorities on the position of the seaman returning to his ship were exhaustively considered by your Lordships. There the chief engineer of a ship lying in a public harbour, which had been taken over temporarily by the Admiralty and closed to the public and to which access was granted only on an Admiralty pass, went ashore on leave for his own purposes. On returning to the ship after dark he fell from the quay and was drowned. It was held that the accident did not arise out of his employment. This case has been treated below as contrasting with *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1), and the issue in the present case is stated by the arbitrator to be whether it falls within the principle of *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1) or the principle of *Davidson & Co.* v. *M'Robb or Officer* (2).

I venture to think that on closer examination it will be found that, though the decision in the former case was in favour of the workman and in the latter case against him, the principle of judgment was the same in each case, and it was the facts that differed. In *Davidson & Co.* v. *M'Robb or Officer* (2), the discussion largely centred on the question whether the Admiralty control had or had not converted the harbour where the accident occurred from a public to a private place. This question was irrelevant if an accident to a seaman returning on leave to his ship cannot in law arise out of his employment unless it occurs as he is actually in the act of boarding or endeavouring to board the ship, for the seaman was not proved to have got near the ship when he fell into the water. The importance of deciding whether the harbour was or was not at the time of the accident a public place is clearly shown, in the speeches of the noble and learned lords who took part in the judgment, to have lain in this, that, if the harbour was a public place, the seaman while traversing it was encountering only such risks as members of the public are exposed to and not risks special to his employment. The Lord Chancellor (LORD FINLAY) who was in a minority of one, held that in consequence of the Admiralty control the harbour was not at the time a public place, and that *John Stewart & Son (1912), Ltd.* v. *Longhurst* (1) was an indistinguishable authority for the admission of the compensation claim. But all the other noble and learned lords were of opinion that the harbour, notwithstanding the Admiralty control, retained its character as a public place, and that, as the accident occurred to the seaman while he was still in a place of public resort, it had not arisen out of his employment, for he had not yet reached his place of employment. Thus, LORD HALDANE says ([1918] A.C. at p. 317):

> "If the employee had reached the ship or the ladders by which the ship was to be boarded he might properly be taken to have been directed to use them as being part of the vessel on which he was living as an incident of his employment. But was the quay by which he was actually approaching when the accident happened a place where he was directed to be, or a place for which the employers had any responsibility at all? It seems to me that this question ought on broad principles to be answered in the negative. Surely a street in Ramsgate would not have been such a place in the absence of special circumstances. That is clear from principles which have been firmly laid down. In order to make it such a place it would be necessary to prove as a special fact that the engineer was directed to use it for some object in which he was employed. Here there was no such direction. He was allowed leave for his own purposes. Was the quay, then, different in this respect from such a

A street? It is said that it was, inasmuch as it was the natural way of proceeding towards the place where the ship was berthed. But a street might also have been part of such a natural way."

LORD DUNEDIN says ([1918] A.C. at p. 323):

> "If, therefore, the place at which the accident happened was in any fair sense the B access to the ship, then the accident would be in the course of his employment. Now, admittedly it is not shown that he was on the gangway or on anything that served as a gangway. The only ground for holding that he was within what might be termed the access to the ship lies in the fact that he was in the harbour, and that the harbour on the occasion was not open to the public. I cannot think that the action of the military authorities in drawing a cordon round certain places turns C what is a public place into an access to the ship. In *Stewart's Case* (1) the dock was the theatre of the man's employment, because he was sent there, and he had to traverse the place. The point of the dock being a private dock was that it prevented the presence of the man there being the presence of a man in a public street going to his work, but that work not yet begun."

LORD ATKINSON discusses a number of previous cases. He quotes ([1918] A.C. at D p. 327) the following passage from the judgment of FLETCHER MOULTON, L.J., in *Kitchenham* v. *Johannesburg* (*Owners*) (5) ([1911] 1 K.B. at p. 527):

> "In the cases before us the accident occurred on the return of the seaman to the ship immediately prior to his actually getting on board. This is the critical moment when the dangers to which he is exposed change from being of one class to being of the other class."

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and adds by way of comment:

> "By this, as appears from the context, the Lord Justice means the dangers to which he would be exposed as a member of the public, as distinguished from those to which he would be exposed as one of the crew of the ship."

Further on LORD ATKINSON says ([1918] A.C. at p. 330):

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> "In the face of these authorities it is, I think, impossible to hold that the risk to which the deceased in the present case was exposed as he walked along these quays had, before the accident, changed from that to which an ordinary wayfarer on the pier would be exposed to that to which the deceased became exposed by virtue of his being a member of the crew of his ship."

G It is true that in a passage towards the close of his speech LORD ATKINSON indicates that even if the dock had been a private one he would still have been

> "of opinion that this case is as different from the *Longhurst Case* (1) as would be the case of a servant who was run over in the street while he was walking there for his own business or pleasure from the case of such a servant who was run over in the street while walking there on some errand on which he had been sent by his H master,"

but none of the other noble and learned Lords so expressed themselves.

I think it is clear that the real ratio decidendi of the majority of their Lordships in *Davidson & Co.* v. *M'Robb or Officer* (2) is that the workman there having fallen into the water in a public harbour on his way back to his ship from leave was in the same position I as if he had suffered an accident in the public street while returning to his ship, that as he had not re-entered the sphere of his employment by leaving this public place to step on to the ship's gangway or other provided access to the ship, the accident did not arise out of or in the course of his employment, and that the risk which he fatally encountered was a risk to which any member of the public was exposed and in no way special to his employment.

While it is pointed out in certain passages of the speeches in *Davidson & Co.* v. *M'Robb or Officer* (2) that there were no cases in the books where a seaman injured by accident while returning to his ship from leave had been held entitled to compensation unless he met with his accident on or about the actual appliances provided for access to the ship—which may well be so if in previous cases the ship was lying in a public harbour or attention was not drawn to the fact that it was lying in a private harbour—there are equally passages—and I have quoted them—which suggest that another criterion is not of less validity, namely, whether the accident was due to risks to which the public in general are exposed or to risks special to the employment. I prefer the latter criterion, and I am not sure that it is not in reality only another aspect of the physical access test, for it is only important to show that the seaman has actually reached the ship's gangway in the case of a public harbour in order to bring him into the sphere of risks special to his employment, and take him out of the sphere of risks common to all the public. However that may be, I do not find myself precluded by *Davidson & Co.* v. *M'Robb or Officer* (2) from considering on its merits the present case where the accident to the deceased occurred as he was traversing a private dock on his way to his ship.

It has been recognised time and again that the sphere of a workman's employment is not necessarily limited to the actual place where he does his work. If in going to or coming from his work he has to use an access which is part of his employer's premises or which he is only entitled to traverse because he is going to or coming from his work, he is held to be on his master's business while he is using that access. Take the analogy of a domestic servant, which is peculiarly in point, for a domestic servant, like a seaman, "lives in," and the scene of a domestic servant's employment is the master's house just as the ship is the scene of the seaman's employment. I imagine no one would doubt that a maidservant returning home from her night out and meeting with an accident in the private avenue of her master's house, though at a point a quarter of a mile from the house, would be entitled to compensation. And equally so if she suffered an accident on a private access to the house which, although not the property of her master, she had permission to traverse only as one of the household servants. In the case of a town house in a street it would doubtless be necessary to draw the line between the public highway and the master's house with just the same precision as the line is drawn between the public harbour and the ship. If the maidservant fell on the area steps she would presumably be within the Act, but if she fell on the pavement a few feet away she would presumably be outside the Act, always, of course, assuming that she was not on some errand for her master at the time.

The seaman who on his way back to his ship has left the public highway with its risks common to all wayfarers and has entered the private premises of the harbour in which his ship lies with its special risks, to which only those who have business at the harbour are exposed, seems to me to have come within the protection of the Act, for if he sustains an accident while using this access he sustains it by reason of risks incidental to his employment, which he would not have encountered but for his employment. That is exactly the position of the deceased in the present case on the facts found by the arbitrator, and in moving your Lordships on this ground to affirm the award of compensation to the deceased's widow I do not think that I am transgressing any principle of interpretation of the statute which is binding upon your Lordships. If in the apparently endless task of construing this remedial measure judicial pronouncements are to be found which are not in complete harmony, this is not to be wondered at, and apparent inconsistencies will often be found to have their origin in the diversity of facts. Your Lordships are entitled, as the process of interpretation proceeds, to select and lend your authority to those principles which are shown to be most consonant with the language and purpose of the Act. I venture to say that the principle on which I propose that your Lordships should decide the present case answers that test. I, accordingly, move your Lordships to dismiss the appeal with costs.

LORD ATKIN, LORD WARRINGTON, LORD TOMLIN and **LORD THANKERTON** concurred.

Appeal dismissed.

Solicitors: *Botterell & Roche* for *Crawfords*, Swansea; *Alexander Smith* for *Andrew & Thompson*, Swansea.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* BRITISH COLUMBIA FIR AND CEDAR LUMBER CO., LTD.

[Privy Council (Lord Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russell and Sir Lancelot Sanderson), December 3, 4, 1931, March 8, 1932]

[Reported [1932] A.C. 441; 101 L.J.P.C. 113; 147 L.T. 1;
48 T.L.R. 284; [1932] 2 D.L.R. 241; [1932] 2 W.W.R. 153]

Canada—British Columbia—Income Tax—Income—Sum received in respect of insurance against loss of profits—British Columbia Taxation Act, 1924 (*R.S.B.C., c.* 254), *s.* 44 (1).

The plant and premises of a company incorporated under the Companies Act of British Columbia and carrying on business at Vancouver as manufacturers and dealers in lumber products were destroyed by fire. The company had taken out policies with several insurance companies insuring them against the loss of "net profits" which would be sustained in such an event, the net profits payable under such policies being defined as "the net profits which would have accrued had there been no interruption of business caused by fire."

Held: the sum received in respect of the loss of net profits could fairly be said to arise from the business of the company; it was the product of a revenue payment made by the company to secure the replacement of an estimated loss of profit, and it must be brought into the company's revenue account so as to enter into the calculation necessary to determine the profit available for dividend; and, therefore, it was a revenue receipt of the business of the company and income received from that business, and so chargeable to tax.

Notes. The provisions of Sched. D, Case I, of the Income Tax Act, 1953, which deals with liability to income tax of profits or gains arising or accruing in respect of trade, will be found at 31 Halsbury's Statutes (2nd Edn.) 116 et seq.

Referred to: *Wardle* v. *Manitoba Farm Loans Assn.* (1953), 9 W.W.R. (N.S.) 529.

As to trade receipts of a revenue nature, see 20 Halsbury's Laws (3rd Edn.) 149 et seq., and for cases see 28 Digest 17 et seq.

Cases referred to:

(1) *Newcastle Breweries, Ltd.* v. *I.R.Comrs.* (1927), 96 L.J.K.B. 735; 137 L.T. 426; 43 T.L.R. 476; 12 Tax Cas. 927, H.L.; Digest Supp.

(2) *J. Gliksten & Son, Ltd.* v. *Green*, [1928] 2 K.B. 193; 97 L.J.K.B. 433; 139 L.T. 12; 31 Ll.L.R. 1; 44 T.L.R. 418; 72 Sol. Jo. 239, C.A.; affirmed, [1929] A.C. 381; 98 L.J.K.B. 363; 140 L.T. 625; 45 T.L.R. 274; 14 Tax Cas. 364, H.L.; Digest Supp.

(3) *Dilworth* v. *Stamp Comrs.*, *Dilworth* v. *Land and Income Tax Comrs.*, [1899] A.C. 99; 79 L.T. 473; 47 W.R. 337; 15 T.L.R. 61, P.C.; sub nom. *Dilworth* v. *New Zealand Stamp Comrs.*, 68 L.J.P.C. 1; 19 Digest 586, *182*.

Appeal by special leave from an order of the Supreme Court of Canada (Anglin, C.J., Newcombe, Lamont, Smith, and Cannon, JJ.), allowing the respondents' appeal from a judgment of the Court of Appeal of British Columbia (J. A. Macdonald, C.J. (B.C.), Galliher, McPhillips, and M. A. Macdonald, JJ.A.; Martin, J.A., dissenting) affirming the judgment in the appellant's favour of W. A. Macdonald, J., in the Supreme Court of British Columbia.

The questions for decision were whether certain moneys received by the respondents, who were manufacturers and traders in lumber in British Columbia, under fire policies insuring them against loss of net profits resulting from the cessation of business consequential upon fire were liable to income tax under the British Columbia Taxation Act (R.S.B.C., 1924, c. 254), and whether, if they were not so taxable, the premiums paid in respect of such policies were permissible deductions in arriving at taxable income. The Supreme Court of Canada held that the moneys so received did not constitute taxable income under s. 2 of the British Columbia Taxation Act, 1924, and the Crown appealed.

Geoffrey Lawrence, K.C., and *Wilfrid Barton* for the Crown.

W. N. Tilley, K.C. (of the Ontario Bar), and *J. W. Scobell Armstrong* for the taxpayers (respondents).

March 8. **LORD BLANESBURGH.**—This, by special leave, is an appeal from a judgment of the Supreme Court of Canada of May 13, 1931, whereby, in effect, judgment in favour of the plaintiff-appellant, pronounced at the trial by the Supreme Court of British Columbia and affirmed on Oct. 7, 1930, by the Court of Appeal of the same province, was discharged. The appellant now seeks to have these two earlier judgments restored.

The broad question for decision is whether certain moneys received by the respondents under use and occupancy policies insuring them against loss of profit resulting from the cessation of business consequential upon fire are liable, under the British Columbia Taxation Act, 1924, to be brought into account by them for assessment to income tax. This question has led, in these proceedings, to an acute difference of judicial opinion. The learned judges of the Supreme Court unanimously favoured a negative answer to the question, and their view had the support of MARTIN, J., in the Court of Appeal of the province. On the other hand, the four remaining learned judges of that court, supporting the learned trial judge, were all in favour of the view that the moneys in question must be brought into account by the respondents for taxation purposes.

The respondents are a company incorporated under the Companies Act of British Columbia. Since 1921 they have been carrying on business at the city of Vancouver as manufacturers of and dealers in lumber and lumber products. On Aug. 21, 1923, their plant and premises were destroyed in a conflagration. These subjects were insured against loss and damage by fire under annual policies, taken out or renewed in the previous March with some seventeen insurance companies. The respondents were also insured by the same companies against the further loss or damage they might sustain in the event of their plant either in whole or in part and for a period long or short being shut down or its working suspended in consequence of fire. These policies, the use and occupancy insurances already referred to, were separate from, but complementary to, the main policies. They insured the respondents in the total sum of 84,000 dollars in respect of loss of "fixed charges" and 60,000 dollars in respect of loss on "net profits." The nature of the liability so assumed by the insuring companies, with the character and quality of the payments made to the respondents in its discharge, is made sufficiently apparent by the definitions of the expressions, "fixed charges" and "net profits," contained in the policies themselves. "Fixed charges" are there defined to mean:

> "All the standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the said plant shall be inoperative."

"Net profits" are defined to mean "the net profits that would have accrued had there been no interruption of business caused by fire."

The annual premium upon the use and occupancy insurances amounted to 3,828.29 dollars. This premium had, in ordinary course, been brought into the accounts of the respondents as a revenue charge, and it is stated to have been allowed by the taxation authorities as a permissible deduction in the computation of the net income of the respondents for the purpose of income tax under the Taxation Act. This payment of premium out of revenue and its allowance as a disbursement are circumstances of importance in the case.

The loss payable under the main fire policies was, it would appear, separately adjusted with the companies, and was received by the respondents, and as to that receipt, admittedly a receipt on capital account, no question is raised. As to the claims of the respondents under the use and occupancy policies, the respondents and the adjuster of the insuring companies agreed that the period of interruption of the respondents' business was 215 business days, this being the length of time estimated to be required for the re-building of the plant, and the loss was adjusted on the following basis:

	Dollars.
Loss of net profits, estimated for 317.23 dollars per day, and allowed at 200 dollars per day	43,000
Payment of fixed charges, estimated and allowed at 234.80 dollars per day	52,427.90
Total	95,427.90

A It is not disputed that as between the tax years 1923 and 1924 this sum, if assessable to tax at all, is properly apportionable as follows:

	Dollars.
1923—113 business days:	
Net profits	22,600.00
B Fixed charges	27,555.05
1924—102 business days:	
Net profits	20,400.00
Fixed charges	24,872.85

The sum of 95,427.90 dollars having been duly received, the respondents in their C income tax returns to the province for the year 1923 included the sum of 41,293.20 dollars as an income receipt, and in their return for the year 1924 they included as a similar receipt the sum of 33,706.80 dollars. In the result, provincial income tax for the years 1923 and 1924 was in fact paid in respect of these sums aggregating 75,000 dollars out of the total sum of 95,427.90 dollars received as already stated. The respondents did not bring into account for either year the balance—20,427.90 dollars. D Their view even then was that that sum was exempt from liability to tax for the reason that it represented moneys received from the insurance companies in excess of the actual loss sustained, the re-building of the plant having in fact taken a less number of days than that estimated for and allowed by the adjusters.

With reference to these matters two things can at once be said. On the one hand, the 75,000 dollars were brought in before any advice was taken, and it is agreed between E the parties that the mere fact that income tax was inadvertently paid by the respondents thereon is not to prejudice them to the extent to which in these proceedings it is not established that these moneys were liable to be brought into charge. On the other hand, it has not been contended by the respondents that any distinction in the matter of liability to tax can really be drawn between the 75,000 dollars in respect of which its existence was originally assumed by them, and the balance of 20,427.90 dollars in F respect of which exemption was always claimed.

On Nov. 28, 1927, the action out of which this appeal arises was commenced. There was a claim for arrears of personal property tax for interest and for penalties. But it soon emerged that there was no dispute between the parties with reference to the personal property tax. The claim which remained—not, it must be agreed, very clearly alleged—was originally, in effect, one for income tax, upon the balance figure of G 20,427.90 dollars, already mentioned. At the trial, however, as a result of preliminary admissions of fact between the parties, it was found that, for special reasons which for the moment their Lordships pass by, the accountability of the respondents to income tax in respect of the receipts representing fixed charges need not be further disputed, and that the real question, effective in result, was confined to the alleged liability of the respondents for income tax in respect of "the loss of net profits" receipt, and it was H agreed that, if it were held that the respondents were liable to income tax on that receipt, the sum remaining recoverable in the action, after all adjustments, was 3,922.86 dollars, any question of liability to penalties being held over. Thus it was that the learned trial judge who held the respondents to be so accountable, entered judgment for the Crown in the sum stated. Thus, also, it was that in all the courts attention has been focused on this one major issue, and it is with reference thereto alone that the judgments I under review have been given.

The question whether this "loss of net profits" receipt is one which must be brought into calculation for the purpose of arriving in each of the tax years in question at the sum for which the respondents are assessable to provincial income tax must depend upon the provisions, properly construed, of the taxing statute of the province. But it will be convenient before these provisions are applied to that receipt to ascertain apart from any question as to income tax its precise place and character in the economy of the respondents' business. There is, it would appear, little difficulty in ascertaining this. The main purpose of the respondents, as it is of all similar industrial units, is the acquisition of gain, such acquisition in the case of each unit being effected by the exercise of such of the powers conferred upon it by its constitution as it may determine to exercise. In the case of the respondents acquisition of gain was primarily to result from their carrying on of the business of manufacturers of and dealers in lumber and lumber products. In the conduct of that business they were exposed to the grave risk of fire, and the insurance of their premises and plant was an insurance against a possible capital loss dictated by every consideration of prudence. If the risk were not so guarded against, then by a fire sufficiently disastrous the whole operations of the respondents might definitely be brought to a close and acquisition of gain for them definitely ended. But such a fire, even if so far insured against, might still prove a hindrance more or less prolonged to the unbroken acquisition of gain from their business by reason of the fact that its continuance might not be possible during the period of re-instatement. This insurance receipt, therefore, was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount.

Further, this was a receipt which had to be brought into the respondents' revenue account, so that it might enter into the calculation necessary to determine their profits available for dividend. It had been produced by a premium out of revenue, and, therefore, out of potential profits—a premium paid for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net business profits over a defined period of time. All this is clear from the terms of the insurances themselves. Accordingly, this insurance receipt was necessarily a revenue receipt of the business, which must not only have been brought into the respondents' revenue account, but if, for instance, it had happened that any of the stockholders were specially interested in the profits of a particular year, being, for example, non-cumulative preference stockholders, then the receipt must have been brought into credit proportionately for the years in which the profits represented would, but for the stoppage, presumably have been earned. Finally, the receipt was one of which, as their Lordships think, it can be fairly said that it arose from the business of the respondents. The two English cases of *Newcastle Breweries, Ltd.* v. *Inland Revenue Comrs.* (1), and *J. Gliksten & Son, Ltd.* v. *Green* (2) are authorities for this proposition. This receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these particular use and occupancy policies would not have been available to them. As a result, the respondents have secured for themselves a net receipt involving gain—an unusual mode of deriving gain from the business, it may be agreed, but, as WARRINGTON, L.J., said in similar circumstances in the *Newcastle Breweries Case* (1) (135 L.T. at p. 623), not so divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. And it was not a windfall. As observed by SARGANT, L.J., on *Gliksten's Case* (2) ([1928] 2 K.B. at p. 203), it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialised.

This, then, as applied to the respondents' business is the nature of the receipt with reference to which the inquiry must now be made, whether under the Taxation Act, 1924, it is of a character to be brought into charge. That Act is very lengthy, it consists of two hundred sections, but its provisions relevant to the inquiry in hand are not numerous. Section 2 is an interpretation section. It places a meaning upon twenty-eight expressions used in the statute. In thirteen instances the definitions which follow are said to be "included" in the term defined; in fifteen instances the term defined is said to "mean" that which follows. The word "income" is in the former class, and their Lordships cannot doubt that in consequence the word, as used in the statute, includes, unless the context otherwise requires, not only those things which the interpretation clause declares that it shall include, but such things as the word signifies according to its natural import: see *Dilworth and others* v. *Commissioner of Stamps* (3) ([1899] A.C. at p. 106). By s. 2, unless the context otherwise requires, A "'Income' includes the gross amount earned derived accrued or received from any source whatsoever, the product of capital labour industry or skill . . . and includes all income revenue rent interest or profits arising received gained acquired or accrued due . . . from real and personal property or from money lent deposited or invested or from any indebtedness secured by deed mortgage contract agreement or account or from any venture business or profession of any kind whatsoever."

B "Person" includes corporations.

By s. 4 (1) it is provided that:

> "To the extent and in the manner provided in this Act and for the raising of a revenue for provincial purposes—(a) All property within the province and all output and income of every person resident in the province . . . shall be liable to taxation." C

Part III of the Act relates to taxation of income, and certain classes of income are made exempt from taxation by s. 42.

Section 44 (1) is as follows:

> "The net income of every person shall be ascertained for the purposes of taxation D by deducting from his gross income the exemptions provided in s. 42 . . . and all expenses incurred in the production of that part of his income which is liable to taxation . . . and the income tax thereupon payable to the Crown in right of the Dominion . . . but the following shall not in any case be allowed as expenses incurred in the production of income. . . . (e) Any loss or expense recoverable under any insurance policy or contract of indemnity.
>
> E "48.—(1) A return of income as required by this Act shall be made by each taxpayer annually without any notice or demand and filed with the asessor of the assessment district in which the income is liable to taxation. . . . (3) Where the return contains a statement of income derived from any business the taxpayer shall attach thereto a copy of his certified balance sheet and profit and loss account relating to that business for the period covered by the return.
>
> F "51. The tax on income shall be assessed levied and paid annually upon the net income of the taxpayer during the last preceding calendar year."

A reference to s. 44 (1) (i) and s. 48 (3) shows very clearly why in this case the receipt by the respondents in respect of "fixed charges" disappeared from the discussion. In their accounts for the purpose of arriving at their "net income" the respondents were entitled to the benefit of a deduction for fixed charges as an expense; they were, however, G required by s. 44 (1) (i) as against these lost fixed charges to bring in the fixed charges insurance receipt. The effect (the account being otherwise in credit) was necessarily to increase by the amount of that receipt the ultimate net income of the respondents.

Leaving, therefore, that item, the question is whether within the meaning of the Act the insurance receipt in respect of "loss of net profits" was also "income" to be H brought into account so as to enter into the calculations for determining the "net income" of the business for income tax purposes. In view of the nature and origin of the receipt, as they have traced these, their Lordships have reached the conclusion that within the meaning even of the interpretation clause this receipt was "income from a business" and that in ordinary parlance it was income or gain derived from the business of the respondents which had necessarily to be brought into receipt as such in the profit I and loss account of the business referred to in s. 48 (3) of the statute. In effect, this was the view taken by the learned trial judge and by the majority of the Court of Appeal of British Columbia. MARTIN, J.'s dissenting view, although, perhaps, less clearly expressed, may be taken to coincide with that of the learned judges of the Supreme Court, which was that the statute nowhere provides for taxation of moneys paid by way of indemnity for profits not earned but irretrievably lost; that the moneys in question represented insurances placed by the respondents in order to meet the possibility of destruction by fire of its means of earning profits; that that event occurred, with the result that the respondents made no profit out of the property which could be taxed for the period in question; that there were therefore no profits to tax, and in the absence of clear language authorising such a course, there was no warrant for taxing money substituted for profits by way of indemnity for their loss.

Their Lordships feel that the true question at issue has not in this statement been really dealt with by the learned judges of the Supreme Court. The real question was whether the insurance moneys in question constituted "income" of the respondents within the meaning of the Taxation Act, and not whether these moneys were "profits" of its business. Moneys which are not strictly "profits" of a business may yet be income of the taxpayer. But even on the question whether the moneys here could properly be described as "profits" the learned judges do not seem to have referred to the reasoning of the House of Lords in *Glikstenʼs Case* (2), which would appear to be in conflict with their own. But however the receipt be described, it is because it is truly "income" of the respondents that it must be brought into charge in their revenue account for the purpose of arriving in respect of the year of charge at the respondents' net income. Whether the whole or any part of it is finally chargeable depends upon the result of the whole annual expenditure and revenue accounts of which it constitutes one item only.

For these reasons their Lordships find themselves in the result in agreement with the learned trial judge. They are unable to concur in the conclusion of the Supreme Court. They think accordingly that this appeal should be allowed, and the judgment of the Court of Appeal of British Columbia restored. This will automatically revive the judgment of the learned trial judge. And their Lordships will humbly advise His Majesty accordingly. The Crown must have its costs before the Supreme Court, but in view of the observations of their Lordships upon this subject made on the application for special leave there will be no costs of this appeal.

Appeal allowed.

Solicitors: *Gard, Lyell & Co.*; *White & Leonard.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. *v.* NAYLOR

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Acton and du Parcq, JJ.), March 7, 1932]

[Reported [1933] 1 K.B. 685; 102 L.J.K.B. 561; 147 L.T. 159; 23 Cr. App. Rep. 177; 29 Cox, C.C. 493]

Criminal Law—Trial—Misdirection—Summing-up—Comment on failure of prisoner to disclose defence when before examining magistrate—Criminal Justice Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 86), *s.* 12 (2).

At the preliminary investigation of an indictable offence before a stipendiary magistrate, at the close of the case for the prosecution, the formula prescribed by s. 12 (2) of the Criminal Justice Act, 1925, asking the prisoner whether he wished to say anything in answer to the charge, was read to the prisoner, who merely said: "I don't wish to say anything except that I am innocent." In the summing-up at the trial severe comments were made on the fact that the prisoner had not disclosed his defence in the court below.

Held: in view of the language of the statutory formula, the comments ought not to have been made, and the conviction must be quashed.

R. v. *Whitehead* (1), [1929] 1 K.B. 99 applied.

Notes. The Criminal Justice Act, 1925, s. 12 (2) was repealed by the Magistrates' Courts Act, 1952, the formula formerly in s. 12 (2) being now, with some additions, to be found in the Magistrates' Courts Rules, 1952 (made under the Act of that year), r. 5 (4).

A Distinguished: *R.* v. *Parker*, post, p. 718. Explained and distinguished: *R.* v. *Littleboy*, [1934] All E.R. Rep. 434. Considered: *R.* v. *Keeling*, [1942] 1 All E.R. 507. Applied: *R.* v. *Leckey*, [1943] 2 All E.R. 665. Referred to: *R.* v. *Dawkins*, *R.* v. *Toone* (1942), 28 Cr. App. Rep. 151; *R.* v. *Haddy*, [1944] 1 All E.R. 319; *R.* v. *Tune* (1944), 29 Cr. App. Rep. 162; *R.* v. *Gerard*, [1948] 1 All E.R. 205.

As to the summing-up in a criminal trial, see 10 HALSBURY'S LAWS (3rd Edn.) 423–425, B and for cases see 14 DIGEST (Repl.) 330 et seq., 643 et seq. For Magistrates' Courts Rules, 1952 (S.I. 1952 No. 2190/L.18), see 13 HALSBURY'S STATUTORY INSTRUMENTS.

Case referred to:

(1) *R.* v. *Whitehead*, [1929] 1 K.B. 99; 98 L.J.K.B. 67; 139 L.T. 640; 92 J.P. 197; 27 L.G.R. 1; 28 Cox, C.C. 547; 21 Cr. App. Rep. 23, C.C.A.; Digest Supp.

C **Appeal** against conviction.

The appellant was charged at Grimsby Quarter Sessions on an indictment containing counts for shopbreaking and larceny, housebreaking and larceny, and receiving stolen goods. The jury returned a general verdict of Guilty, and the recorder imposed a sentence of six months' imprisonment with hard labour.

Evidence was given that when the case was before the examining stipendiary magis- D trate and after the statutory formula prescribed by s. 12 (2) of the Criminal Justice Act, 1925, and concluding with the words:

> "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial,"

E had been read to the appellant at the close of the case for the prosecution, the appellant said: "I don't wish to say anything except that I am innocent." The recorder, in his summing-up at the trial, commented adversely on the fact that the appellant had not made any further statement on that occasion. The material portions of the summing-up are set out in the judgment.

A. M. Lyons for the appellant.

F *P. E. Sandlands* for the Crown.

March 7. The judgment of the court was delivered by

LORD HEWART, C.J.—Taking the view we do, we do not think it necessary to deal in detail with the facts of the case. The appellant gave evidence and denied his guilt. The real point is to be found in the criticism which has been made of the summing-up. G The appellant was asked, in the usual formula, in the magistrates' court whether he had anything to say, and that formula was read out to him. The important words are:

> "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence upon your trial,"

whereupon the accused said: "I don't wish to say anything except that I am innocent." H In referring to those words, the recorder, in his summing-up, continued as follows:

> "Now, you would imagine a purely innocent young man accused of housebreaking and having these words put to him: 'Do you wish to say anything?'—surely if he is an innocent man one would think he would give some explanation of where he was, and what he was doing at the particular time, and would make his defence then and there. But he says nothing."

I The recorder added:

> "I can understand the answer to that made by counsel, and I have heard the same answer on many other occasions. It is all blamed on the solicitor. His solicitor was there and advised him to say nothing. Well, the solicitor had to get his client off somehow, and it is very likely his solicitor did advise him to say nothing. But supposing your solicitor did advise you to say nothing when a charge of felony or murder is against you, you would surely say the best thing to do is to say 'I am not guilty' and explain why."

Then follow these remarkable words:

> "Of course, what lurks in the background of this sort of hanging back, and not disclosing his defence, is that he gives the prosecution and the police no time to inquire into any statement he may make, so that it might be possible to show that these statements are not true. That is the real reason why many men don't make statements when they are first called upon to do so, why they don't wish to do so."

We are of opinion that that was a misdirection. The case is really a fortiori upon *R.* v. *Whitehead* (1), where it was held that it is not corroboration of incriminating evidence that the accused did not deny the charge or was silent about it. But it is well to add something further. When one looks at the words of the formula which must be deliberately framed, it is obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. If those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say, and that an accused person is quite entitled to say: "I do not wish to say anything except that I am innocent." The matter becomes even stronger when one reflects that what was done here was done on the advice of an able and experienced solicitor. It would be strange if a point could properly be made against an accused person if, acting on the advice of his solicitor and following the very words of that which is said to him, he remains silent, that he did not then and there disclose his defence.

Counsel for the Crown has urged everything that can be urged, but we have come to the conclusion that, after this summing-up, this conviction is unsatisfactory and cannot stand. We think that this appeal ought to be allowed and this conviction quashed.

Conviction quashed.

Solicitors: *Registrar of Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

CROFT *v.* DUNPHY

[PRIVY COUNCIL (Lord Tomlin, Lord Thankerton, Lord Macmillan, Lord Wright and Sir George Lowndes), July 5, 7, 8, 28, 1932]

[Reported [1933] A.C. 156; 102 L.J.P.C. 6; 148 L.T. 62; 48 T.L.R. 652; 18 Asp.M.L.C. 370]

Dependency—Legislation—Limitation—Territorial waters—Construction.

As a general principle a dependent legislature can legislate effectively only for its own territory. To what distance seaward that territory is to be taken as extending is a question of international law, but, whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health, and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory.

Once it is found that a particular topic of legislation is among those on which a dependent legislature may competently legislate there is no reason to restrict the permitted scope of such legislation by any consideration other than is applicable to the legislation of a fully sovereign State. When acting within the limits laid down by the Act of the Imperial Parliament creating it the dependent legislature is

A in no sense an agent or delegate of the Imperial Parliament, but it has plenary powers of legislation as large, and of the same nature, as Parliament itself.

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power, e.g., in considering B anti-smuggling legislation of a dependent legislature regard should be had to measures against smuggling enacted by the Imperial parliament.

Notes. By s. 3 of the Statute of Westminster, 1931, it is declared that the parliament of a Dominion has full power to make laws having extra-territorial operation so that the question of the validity of extra-territorial legislation by the Dominion of Canada can- C not now arise, but the principles set out in the headnote (supra) have application to the legislation of still existing dependent legislatures.

Referred to: *Re An Act to amend the Supreme Court Act*, [1940] S.C.R. 49; *Montreal Trust Co.* v. *Abitibi Power and Paper Co.*, [1942] O.R. 183.

As to dependent legislatures, see 5 HALSBURY'S LAWS (3rd Edn.) 579 et seq., and for cases see 8 DIGEST (Repl.) 697 et seq.

D Cases referred to:

(1) *The Le Louis* (1817), 2 Dods. 210; 11 Digest (Repl.) 323, *9*.

(2) *R.* v. *Burah* (1878), 3 App. Cas. 889, P.C.; 11 Digest (Repl.) 621, *485*.

(3) *Hodge* v. *R.* (1883), 9 App. Cas. 117; 50 L.T. 301; 3 Cart. 144; 14 Digest (Repl.) 565, **3813*.

E (4) *R.* v. *Riel* (1885), 10 App. Cas. 675; 55 L.J.P.C. 28; 54 L.T. 339; 16 Cox, C.C. 48, P.C.; 8 Digest (Repl.) 704, *120*.

(5) *Mortensen* v. *Peters* (1906), 8 F. (Ct. of Sess.) 93; 14 Digest (Repl.) 154, **638*.

(6) *Royal Bank of Canada* v. *Larue and A.-G. for Canada*, [1928] A.C. 187; 138 L.T. 562, P.C.; Digest Supp.

(7) *A.-G. for Canada* v. *Cain, Same* v. *Gilhula*, [1906] A.C. 542; 75 L.J.P.C. 81; 95 L.T. 314; 22 T.L.R. 757, P.C.; 2 Digest 193, *541*.

F **Appeal** by defendant, by special leave, from a judgment of the Supreme Court of Canada (DUFF, RINFRET, and LAMONT, JJ., NEWCOMBE and CANNON, JJ., dissenting), reversing the unanimous judgment of the Supreme Court of Nova Scotia, in banco, affirming the decision at the trial (PATON, J., with a jury), whereby the respondent's action had been dismissed.

G The action was commenced in the Supreme Court of Nova Scotia by the respondent, a resident of North Sydney, in Nova Scotia, as owner of the schooner *Dorothy M. Smart* and her cargo, against the appellant, the commander of Patrol Boat No. 4, in the employ of the Department of National Revenue of Canada, for the return of the said vessel and her cargo, which had been seized by the appellant as master of said patrol boat eleven and a half miles from the coast of Nova Scotia, for an alleged violation of the H Customs Act of Canada, or, in the alternative, for payment of the value of the vessel and cargo and damages for their detention.

The question raised on this appeal related to the validity of ss. 151 and 207 of the Customs Act of Canada (R.S.Can. 1927, c. 42), as amended by 18 & 19 Geo. 5, c. 16, 1928, an Act to amend the Customs Act, ss. 1 and 3, which authorised, inter alia, the seizure of any vessel registered in Canada in the circumstances provided for in the sections I within twelve marine miles of the territory of the Dominion of Canada. The provisions of the sections in question were as follows:

> "151. (1) If any vessel is hovering in territorial waters of Canada, any officer may go aboard such vessel and examine her cargo and may also examine the master or person in command upon oath touching the cargo and voyage and may bring the vessel into port. . . . (6) The evidence of the officer that the vessel was within territorial waters of Canada, shall be primâ facie evidence of the fact. (7) For the purposes of this section and s. 207 of this Act, 'Territorial waters of Canada' shall mean the waters forming part of the territory of the Dominion of Canada and the

> waters adjacent to the Dominion within three marine miles thereof, in the case of any vessel, and within twelve marine miles thereof, in the case of any vessel registered in Canada.
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> "207. (1) If upon the examination by any officer of the cargo of any vessel hovering in territorial waters of Canada, any dutiable goods or any goods the importation of which into Canada is prohibited are found on board such vessel with her apparel, rigging, tackle, furniture, stores and cargo, shall be seized and forfeited. . . ."

The Supreme Court of Canada held that the sections in question were ultra vires.

J. McG. Stewart, K.C., and *Frank Gahan* for the appellant.

D. A. Cameron, K.C., and *Horace Douglas* for the respondent.

July 28. **LORD MACMILLAN.**—On June 10, 1929, the schooner *Dorothy M. Smart* sailed for "the high seas" from the French island of St. Pierre with a cargo on board of rum and other liquors, which are dutiable under Canadian law. The vessel was registered in Nova Scotia, and with her cargo was the property of the respondent, who is resident in Nova Scotia. On June 13, 1929, the schooner, when at a distance of eleven and a half miles from the coast of Nova Scotia, was boarded by the appellant, and officer in the customs service of the Canadian Government. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into port.

The validity of the seizure, which was effected in pursuance of powers conferred by the Customs Act of Canada (R.S.Can. 1927, c. 42), as amended by 18 & 19 Geo. 5, c. 16, is challenged in the present proceedings on the broad ground that the Parliament of the Dominion in conferring the powers in question exceeded its legislative competence.

The enactments impugned are contained in ss. 151 and 207 of the statute, as amended, and, accordingly, the question is whether it was within the power of the Dominion Parliament to pass such legislation purporting to operate to a distance of twelve miles from the coast of Canada.

To test this question the respondent as plaintiff below initiated proceedings in the Supreme Court of Nova Scotia against the customs officer who had seized his vessel and cargo, claiming their return and damages for their detention on the ground of the illegality of the seizure. The trial judge upheld the validity of the legislation, and, consequently, of the seizure, and his decision was affirmed by five judges of the Supreme Court of Nova Scotia in banco. On an appeal being taken to the Supreme Court of Canada this judgment was reversed by a majority consisting of Duff, Rinfret and Lamont, JJ., Newcombe and Cannon, JJ., dissenting. The matter now comes before their Lordships on the defendant's appeal.

It may be accepted as a general principle that States can legislate effectively only for their own territories. To what distance seaward the territory of a State is to be taken as extending is a question of international law upon which their Lordships do not deem it necessary or proper to pronounce. But, whatever be the limits of territorial waters in the international sense, it has long been recognised that for certain purposes, notably those of police, revenue, public health, and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in *Le Louis* (1) (2 Dods. at p. 245):

> "Maritime States have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination."

The special latitude of legislation in such matters is a familiar topic in the textbooks on international law. Thus Sir Travers Twiss, in his treatise on International Law in the volume dealing with Peace, says, at p. 265, that a State in matters of revenue and health

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> "exercises a permissive jurisdiction the extent of which does not appear to be limited within any certain marked boundaries further than that . . . it can only be exercised over her own vessels and other such foreign vessels as are bound to her ports."

In HALLECK'S INTERNATIONAL LAW, 3rd Edn., vol. 1, p. 157, it is pointed out that
B beyond the generally accepted limits of territorial waters

> "States may exercise a qualified jurisdiction for fiscal and defence purposes—that is, for the execution of their revenue laws and to prevent 'hovering on their coasts.'"

Again, in HALL'S FOREIGN POWERS AND JURISDICTION OF THE BRITISH CROWN, it is stated in para. 108 that

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> "the justice and necessity of taking precautionary measures outside territorial waters, in order that infractions of revenue laws shall not occur upon the territory itself, is in principle uncontested."

Without further multiplying quotations it may be sufficient to add references to PHILLIMORE'S INTERNATIONAL LAW, para. 198, and WHEATON'S INTERNATIONAL LAW, 6th
D Edn., vol. 1, p. 367. But while the Imperial parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or, at any rate, beyond a
E marine league from the coast.

In their Lordships' opinion the parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason to restrict the per-
F mitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State. In the well-known case of *R.* v. *Burah* (2), LORD SELBORNE, in expressing the views of the Board in the comparable instance of India, uses (3 App. Cas. at p. 904) this very significant language:

> "The Indian legislature has powers expressly limited by the Act of the Imperial parliament which created it, and it can, of course, do nothing beyond the limits
> G which circumscribe those powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

Again, speaking of the provincial legislature of Ontario, SIR BARNES PEACOCK, in giving the judgment of this Board in *Hodge* v. *R.* (3), said (9 App. Cas. at p. 132):

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> "When the British North America Act enacted that there should be a legislature for Ontario, that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in s. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial parliament, but authority as plenary and as
> I ample within the limits prescribed by s. 92 as the Imperial parliament in the plenitude of its power possessed and could bestow."

To the Dominion parliament these words apply a fortiori, with the substitution of s. 91 for s. 92. Their Lordships also recall the language used by LORD HALSBURY, L.C., in expressing the views of the Board on the power of the Dominion parliament to legislate for the peace, order, and good government of Canada, in the case of *R.* v. *Riel* (4) (10 App. Cas. at p. 678): "The words of the statute," said his Lordship, "are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to."

Legislation of the Imperial parliament, even in contravention of general acknowledged principles of international law, is binding upon and must be enforced by the courts of this country, for in these courts the legislation of the Imperial parliament cannot be challenged as ultra vires: per DUNEDIN, L.J.-G., in *Mortensen* v. *Peters* (5) (8 F.(Ct. of S.) at p. 101). It may be that legislation of the Dominion parliament may be challenged as ultra vires on the ground that it is contrary to the principle of international law, but that must be because it must be assumed that the British North America Act has not conferred power on the Dominion parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognised as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. The sole question is whether the Imperial parliament, in conferring upon Canada, as it admittedly has done, full power to enact customs legislation, bestowed or withheld the power to enact the provisions now challenged. No question of any infraction of international law arises. The question is a domestic one between the Imperial parliament and the Dominion parliament.

When in the course of the hearing it became clear that this was the nature of the controversy, their Lordships deemed it proper that intimation should be made to His Majesty's Attorney-General in order that he might, if so advised, intervene on behalf of the Imperial government. The Attorney-General attended at their Lordships' Bar and stated that, having considered the issue raised in the case, he did not deem it his duty to offer any argument on the matter. It may, therefore, be taken that the appellant's contention in support of the validity of this Canadian legislation is not regarded as contrary to any Imperial interest. This, of course, does not affect in any way the pure question of law arising on the interpretation of the British North America Act, as that question has been defined above.

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power. Thus, in considering what might be appropriately and legitimately enacted by the Dominion parliament under its power to legislate in relation to "bankruptcy and insolvency," it was considered relevant to discuss the usual contents of bankruptcy statutes: *Royal Bank of Canada* v. *Larue* (6). Now, from early time the customs legislation of the Imperial parliament has contained anti-smuggling provisions authorising the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially in excess of the ordinary territorial limits. So far back as 1736 there is to be found in the statute 9 Geo. 3, c. 9, s. 22, legislation authorising the forfeiture of dutiable goods found in vessels "hovering" within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar, indeed, are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." Although these Acts have now all been repealed, the Customs Consolidation Act, 1876, by s. 179, authorised the forfeiture of any ship belonging wholly or in part to British subjects, or having half the persons on board subjects of Her Majesty, if found with prohibited goods on board within three leagues of the coast of the United Kingdom. In the case of other vessels not British the limit is fixed at one league from the coast. The previous Imperial Act, 1853 (16 & 17 Vict., c. 107), which was in force when the British North America Act was passed, dealt, in s. 212, with even greater distances from the coast. It is not without interest to note as a matter of history that the risk of illicit trade between the French island of St. Pierre and His Majesty's North American possessions was the subject of special legislation in a statute of 1763, 4 Geo. 4, c. 15, by s. 35, of which any British ship "hovering" within two leagues of St. Pierre and Miquelon might be seized and forfeited.

It will thus be seen that when the Imperial parliament in 1867 conferred on the Parliament of Canada full power to legislate regarding customs, it had long been the practice to include in Imperial statutes relating to this branch of law executive provisions to take effect outside ordinary territorial limits. The measures against "hovering" were, no doubt, enacted by the Imperial parliament because they were deemed necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial parliament in bestowing plenary powers on the Dominion parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy: cf. *Attorney-General for Canada* v. *Cain* (7). The British North America Act imposed no such restriction in terms, and their Lordships see no justification for inferring it, nor do they find themselves constrained to import it by any of the cases to which they were referred by the respondent, for these cases are not in pari materia.

Their Lordships' attention was drawn to s. 3 of the Statute of Westminster, 1931, by which it is

> "declared and enacted that the parliament of a Dominion has full power to make laws having extra-territorial operation,"

and it was suggested that this section had retrospective effect. In the view which their Lordships have taken of the present case it is not necessary to say anything on this point beyond observing that the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

The result is that their Lordships will humbly advise His Majesty that the appeal be allowed, the judgment of the Supreme Court of Canada reversed, and the judgment of the Supreme Court of Nova Scotia restored. The appellant will have the costs of the appeal and in the Supreme Court of Canada.

Appeal allowed.

Solicitors: *Charles Russell & Co.*; *Lawrence Jones & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* ADAMSON

[HOUSE OF LORDS (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Russell of Killowen, and Lord Wright), November 7, December 8, 1932]

[Reported [1933] A.C. 257; 102 L.J.K.B. 129; 148 L.T. 365; 49 T.L.R. 169]

Estate Duty—Passing—Property deemed to pass—Interest arising on death—Settlor reserving power to appoint income and capital in favour of children—In default corpus and accumulations to children in stated shares—Failure to exercise power—Whether corpus and accumulations pass or are deemed to pass on settlor's death—Finance Act, 1894 (57 *&* 58 *Vict., c.* 30), *s.* 1, *s.* 2 (1) (*d*).

By a deed dated March 24, 1924, a settlor (by cl. 3) directed the trustees of the settled funds therein defined to pay and apply the capital thereof unto the children of the settlor then living or thereafter to be born in such shares and manner as the settlor should direct in writing, and in default the settled funds were to be held on the trusts following. Clause 4 provided for the application of the income of the settled funds for the maintenance, support and benefit of the settlor's children as the settlor might in writing appoint, and, subject thereto, the trustees were to hold the income as an accumulation to capital. By cl. 5 it was provided that after the settlor's death the trustees should stand possessed of the settled funds in trust for all or any of the settlor's children living at his death as the settlor should by deed or will appoint, and, in default of appointment, in trust as to two-fifths thereof for the settlor's son J., and, as to the remaining three-fifths for equal division among all the other children of the settlor living at his death. There followed a gift over, in the event of J. dying without obtaining a vested interest in the said two-fifths, of such two-fifths to the children of the settlor entitled to the remaining three-fifths. There was a further gift over to the statutory next-of-kin of the settlor on failure of the foregoing trusts. The settlor appointed, during his lifetime, small sums out of the capital and income to J. and another child, and the rest of the income was accumulated. On March 11, 1928, the settlor died, leaving surviving four children including J. (all of whom were born before the date of the settlement), and without exercising further his powers of appointment. Estate duty was claimed in respect of the settled funds and accumulations under the Finance Act, 1894, s. 1, or, alternatively, under s. 2 (1) (d) of that Act.

Held: (i) (Lord Buckmaster and Lord Blanesburgh dissenting) the settled funds and accumulations did not pass on the settlor's death within the meaning of s. 1 of the Act of 1894. (ii) (Lord Russell of Killowen dissenting) the beneficial interest of each child of the settlor in the said settled funds and accumulations to the extent to which the principal value of such beneficial interest on the death of the settlor exceeded the actual value, if any, of the expectant beneficial interest of each child prior to such death, was an interest accruing or arising on the settlor's death within s. 2 (1) (d) of the Act of 1894, and, therefore, was to be deemed to be property passing on the death of the settlor, and estate duty was leviable on the principal value of such excess.

Decision of the Court of Appeal ([1932] 2 K.B. 159) reversed.

Notes. The Finance Act, 1934, s. 28, nullified this decision in so far as the House held that, in ascertaining the extent of a beneficial interest accruing or arising, regard must be had to any interest in expectancy which the beneficiary may have had before the death in the annuity or other interest purchased or provided by the deceased.

Considered: *A.-G.* v. *De Trafford* (1933), 150 L.T. 24. Explained: *A.-G.* v. *Lloyds Bank, Ltd.*, [1935] All E.R. Rep. 518. Considered: *A.-G.* v. *Burrell*, [1936] 3 All E.R. 758; *Scott* v. *I.R.Comrs.*, [1936] 3 All E.R. 752; *Re Hodson's Settlement, Brookes* v. *A.-G.*, [1939] 1 All E.R. 196. Distinguished: *D'Avigdor-Goldsmid* v. *I.R.Comrs.*, [1953] 1 All E.R. 403. Applied: *Re Parkes' Settlement Trusts, Midland Bank Executor and Trustee Co.* v. *I.R.Comrs.*, [1956] 1 All E.R. 833. Referred to: *Re Bickerton's Settlement, Shaw* v. *Bickerton*, [1942] 1 All E.R. 217; *Barbour's Life Assurance Policies, Westminster Bank, Ltd.* v. *I.R.Comrs.*, [1956] 1 All E.R. 627.

As to annuities and interests provided by the deceased, see 15 Halsbury's Laws (3rd Edn.) 25, para. 47; and for cases on the subject see 21 Digest 15, 16, *73–80*.

Cases referred to:

(1) *A.-G.* v. *Gell* (1865), 3 H. & C. 615; 6 New Rep. 299; 34 L.J.Ex. 145; 12 L.T. 461; 29 J.P. 566; 11 Jur. N.S. 566; 13 W.R. 900; 159 E.R. 673; 21 Digest 87, *640*.

(2) *A.-G.* v. *Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 30 T.L.R. 476; 58 Sol. Jo. 577, H.L.; 21 Digest 46, *296*.

(3) *A.-G.* v. *Beech*, [1899] A.C. 53; 68 L.J.Q.B. 130; 79 L.T. 565; 63 J.P. 116; 47 W.R. 257; 15 T.L.R. 85; 43 Sol. Jo. 94, H.L.; 21 Digest 7, *26*.

(4) *Earl Cowley* v. *I.R.Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 47 W.R. 525; 15 T.L.R. 270; 43 Sol. Jo. 348, H.L.; 21 Digest 7, *27*.

Appeal by the trustees of a settlement dated March 24, 1924, from a decision of the Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.).

By an indenture dated March 24, 1924, and made between the said John Weston Adamson, the elder (hereinafter called "the settlor"), of the one part, and the settlor, the defendant John Weston Adamson, the younger, and the defendant Joseph William Cottee (in the said indenture called "the new trustees") of the other part, after reciting that the stocks, shares, securities, and cash described in the schedule thereto, and therein called "the settled funds," were and had been for a number of years past held by the settlor as a trustee for the benefit of the settlor's children, but no deed declaring the trusts in respect thereof had been executed, the settlor appointed the new trustees to be trustees for the purposes of the trusts aforesaid and declared the said trusts to be as follows: the new trustees should pay and apply the capital of the settled funds unto all or any of the children of the settlor as the settlor might direct; in default of such direction, and so far as such direction should not extend, the new trustees should hold such capital upon trust to pay or apply the income thereof for the benefit of all or any of the children of the settlor as the settlor might direct, and, subject thereto, to hold the said income as an accumulation to capital; and after the death of the settlor the new trustees should stand possessed of the capital and income of the settled funds so far as not so paid or applied in trust for all or any of the children of the settlor living at his death as the settlor should by deed or will appoint, and in default of appointment in trust as to two-fifths thereof for the said John Weston Adamson, the younger, and as to the remaining three-fifths for equal division among all the other children of the settlor living at his death; with a gift over, in the event of the said John Weston Adamson, the younger, dying without obtaining a vested interest in the said two-fifths, of such two-fifths to the children of the settlor entitled to the remaining three-fifths, and a further gift over, in the event of the failure of all the said trusts, to the statutory next-of-kin of the settlor. It was by the said indenture further provided that no child of the settlor should take any share in the unappointed part of the capital of the settled funds without bringing into hotchpot any sums already appointed or thereafter to be appointed to him, or her, including three sums of £9,473 2s., £10,000 and £10,000, applied by the settlor prior to the date of the said indenture for the benefit of the said John Weston Adamson, the younger, and the settlor's daughters, Mary Frances Cail and Clarice Muriel Weston Goodson, respectively.

The settlor, during his lifetime, in exercise of the power of appointment conferred on him by the said indenture, appointed a capital sum of £518 11s. 1d. to the said John Weston Adamson, the younger, and further appointed out of income sums amounting in all to £825 and £736 1s. 3d. to the said John Weston Adamson, the younger, and the settlor's daughter, Audrey W. Adamson, respectively. The remaining income arising from the settled funds during the lifetime of the settlor was accumulated to capital under the provision in that behalf contained in the said indenture.

The settlor died on March 11, 1928, without having exercised, save as above mentioned, the power of appointment conferred on him by the said indenture. The settlor left him surviving four children, and no more, namely, the above-mentioned John Weston Adamson, the younger, Mary Frances Cail, Clarice Muriel Weston Goodson, and Audrey W. Adamson.

Under the provisions in default of appointment contained in the said indenture the four said children of the settlor became entitled at his death to the capital of the settled funds and accumulations in the following proportions, namely, John Weston Adamson, the younger, two-fifths; Mary Frances Cail, one-fifth; Clarice Muriel Weston Goodson, one-fifth; and Audrey W. Adamson, one-fifth; subject to their bringing into hotchpot the sums respectively applied for their benefit or appointed to them by the settlor during his lifetime as above mentioned. The settled funds and accumulations consisted at the date of the settlor's death of property of considerable value.

The Crown claimed that the settled funds and accumulations were property which passed on the settlor's death within the meaning of s. 1 of the Finance Act, 1894, or alternatively, that the interest of the children of the settlor in the settled funds and accumulations which arose at the said date under the provisions of the above-mentioned indenture were interests provided by the settlor within the meaning of s. 2 (1) (d) of the Finance Act, 1894, and in either case estate duty at the appropriate rate became payable in respect of the whole of the settled funds and accumulations on the death of the settlor.

The aggregate value of the estate which passed on the death of the settlor within the meaning of the Finance Act, 1894 (including the settled funds and accumulations as at the date of such death) exceeded £250,000.

The Crown also claimed that the disposition of the settled funds and accumulations under the above-mentioned indenture conferred on the four said children of the settlor a succession to their respective interests in the settled funds and accumulations within the meaning of s. 2 of the Succession Duty Act, 1853, and that accordingly succession duty at the appropriate rate, namely, 1 per cent., became payable on the death of the settlor in respect of the interests in the settled funds and accumulations to which the said children became respectively entitled on such death.

The defendants were the surviving trustees of the above-mentioned indenture and were accountable as such trustees for any estate duty and succession duty payable in respect of the settled funds and accumulations as above mentioned.

The Commissioners of Inland Revenue caused application to be made to the defendants for an account and payment of the said duties respectively, but the defendants refused to deliver such accounts or to pay such duties and contended that no such duties are payable.

The informant on behalf of His Majesty prayed as follows:

That it might be declared that on the death of the settlor estate duty at the appropriate rate became payable under the provisions of s. 1 of the Finance Act, 1894, in respect of the settled funds, or, alternatively, under the provisions of the Finance Act, 1894, in respect of the interests in the settled funds and accumulations respectively arising at the date of such death to the four children of the settlor under the above-mentioned indenture dated March 24, 1924.

That the defendants might be ordered to deliver an account of the estate duty so payable and the appropriate interest thereon, and to pay the amount of the said duty and interest to the Commissioners of Inland Revenue, the informant thereby waiving such penalties as the defendants might have incurred by reason of the said duty not having been paid up to the present time.

That it might be declared that on the death of the settlor succession duty at the rate of 1 per cent. became payable under the provisions of s. 2 of the Succession Duty Act, 1853, in respect of the said interests in the settled funds and accumulations.

That the defendants might be ordered to deliver an account of the succession duty so payable and the appropriate interest thereon, and to pay the amount of the said duty and interest to the Commissioners of Inland Revenue, the informant thereby waiving such penalties as the defendants might have incurred by reason of the said duty not having been paid up to the then present time.

That all necessary and proper inquiries might be made, directions given, and accounts taken for the purposes aforesaid.

That the informant on behalf of His Majesty might have such further or other relief in the premises as the case might require.

The Court of Appeal held, affirming the decision of ROWLATT, J., that the settlor having retained a power to determine how the settled funds both as to capital and income should be disposed of during his lifetime, and until his death each of the children having some contingent interest in the funds, which was at no time definable, and if they had predeceased the settlor, there being a resulting trust to him, the property passed on the death of the settlor within the meaning of s. 1 of the Finance Act, 1894, to the four children and became liable to estate duty. The settled funds passing to the children were also liable to succession duty under the Succession Duty Act, 1853, having regard to the decision on *A.-G.* v. *Gell* (1).

The present appeal related only to estate duty.

Wilfrid Greene, K.C., W. P. Spens, K.C., and P. M. Walters for the appellants.

The Solicitor-General (*Sir F. Boyd Merriman, K.C.*) and *J. H. Stamp* for the Crown.

The House took time for consideration.

Dec. 8. **LORD BUCKMASTER.**—The provisions of s. 1 of the Finance Act, 1894, are so well known that their verbal repetition is unnecessary. They provide that there shall be levied a duty, called estate duty, on all property "which passes on the death" of every person dying after the commencement of the Act. The overriding and dominating word of this section is the word "passes." It makes no difference from whom the property passes, nor to whom, in order to satisfy the claims it is only necessary that it should pass. Whether, in the circumstances of this case, property has passed is the main question of this appeal. The circumstances are unusual.

One William Adamson died on March 11, 1928, leaving four children—one son and three daughters. On March 24, 1924, he executed an appointment of new trustees of a large sum of money, which was apparently already subject to a trust, of which there is no evidence. But by this deed of appointment the trusts were expressly defined, and they may be summarised as follows: The capital of the trust fund was to be divided among the settlor's children as the settlor should, in writing, direct. The income of the whole, or such part of the capital as had not been so dealt with, was to be paid or applied by the trustees for the benefit of all or any of the settlor's children in such manner and at such times as he should direct in writing, and so far as any directions should not extend the income was to be held as an accretion to the capital of the settled funds. After the death of the settlor the capital and income of the funds not already distributed was to be held in trust for his children living at his death at such age and times and in such manner as he should by deed or will appoint, and in default of appointment in trust as to two-fifths for his son, John Weston Adamson, and the remaining three-fifths for equal division among his other children living at his death as tenants in common. If the son died before he attained a "vested interest" in the funds his share was to be added to the shares of the other children, and, if there should be no children who attained a "vested interest," then in trust for the settlor's next-of-kin, according to the statute. The testator made no direction by writing, deed or will, and the question is whether the property subject to the trust "passed" at his death. The Inland Revenue authorities claim that it did, and their claim has been supported by ROWLATT, J., and the Court of Appeal. From this judgment the trustees have appealed to this House.

The provisions in this deed with regard to vesting suggest that its intention was that the property only vested at the date of the settlor's death, but I do not think that is its true interpretation. There was an interest in the children from the date of the creation of the trust, contingent upon the children surviving the testator, and liable to be divested in respect of any child by the exercise of the rights which the settlor reserved to himself. Any children born after the creation of the trust would enjoy a similar interest.

In these circumstances did the property pass on the settlor's death? It is argued on behalf of the trustees that, as the property had already passed when the trust was created, all that remained was the power to define certain interests, or, in the absence of direction, their definition by death, but that does not appear to me to conclude the whole matter. Supposing the testator had assigned all the property by will to one child. According to the ordinary meaning of the word that would, I think, involve that all the interests under the settlement had passed to that child at the settlor's death. Before that event there was no interest under the settlement which that or any child could enjoy except the prospect of what might happen when the settlor died. It is true that all the children together might have made a title supported by policies of insurance, but no one child could possibly do so.

In *A.-G.* v. *Milne* (2) ([1914] A.C. at p. 779) LORD PARKER says that the expression "passing on the death" is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. It is said that this only means that, as, for example, in the gift of the fee simple of an estate, as the title was formerly in the testator, it would then change to that of the devisee. I think the phrase has a wider meaning. There was in this case a change of title at death. The title, which had formerly been contingent and liable to be divested, became absolute. It might have been in one, or more, or in all of the children, but the title had emphatically changed, and, if their interests in the estate were regarded as the property, that property then passed. So also had the possession, if possession be the equivalent of the opposite of expectancy. In *A.-G.* v. *Beech and another* (3), where a life tenant having surrendered a life interest to a son absolutely entitled in remainder, it was none the less sought to tax the property at the death of the former tenant for life, LORD HALSBURY, in rejecting this claim, says ([1899] A.C. at p. 57) that after the surrender the son "was completely master of the situation, and he might have sold the property next day." If this were accepted as a test, it is plain no such thing could have happened here with regard to any individual child until the death of the settlor. Until that event the property was all subject to trusts which might have defeated any individual share. After his death it became free of the trusts, and, in my opinion, within the meaning of the statute it should then be regarded as passing to the children or child.

If this view were wrong, I am also of opinion that the same result might be reached by regarding s. 2 of the statute, which provides that property passing on the death shall be deemed to include any interest provided by the deceased, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death. The interest here provided by the deceased was materially changed at his death from being an interest liable to be divested and contingent into an interest absolute and undefeatable, and that new interest arose on the death of the deceased.

Lord Warrington has prepared a declaration to give effect to that opinion, and with that declaration I am in agreement. I need add no more on that part of the matter.

LORD BLANESBURGH.—It is unnecessary to set forth in detail the provisions of this so-called appointment of new trustees of March 24, 1924. The deed as a whole is under your Lordships' notice, and I shall have occasion to refer later to its place in the story of this trust. For the rest it will suffice if I draw attention to its general effect, so far as relevant to the question whether, as asserted by the appellants, the trust property passed, within the meaning of s. 1 of the Finance Act, 1894, on the execution of the deed or whether, as contended by the Crown, it so passed on the death of the settlor.

Except to an extent so insignificant that it may be disregarded, the settlor left the deed to operate without interference by him under any of his reserved powers. But even if there had been no such reserved powers to be exercised the interests of the named and living beneficiaries remained sufficiently precarious.

As to the settlor's son, it is true that he takes in his share, as orginally fixed, an immediately vested interest, but that interest is liable to be defeated by his death in the settlor's lifetime. In effect, therefore, his interest is contingent on his surviving his father. That is in actual terms the position of each of the three daughters. In one respect only is the son in a less uncertain position than they. The birth of further children to the settlor would have reduced, in its proportion, the contingent share of each daughter. No additions to the settlor's family would affect the amount of the contingent share to be taken by the son.

But these original interests are relatively stable when they are contrasted with those which are left when the whole story is told. For the over-riding powers reserved to the settlor to direct that the whole fund shall go to one or more of his children present or future to the exclusion of the others are wide enough to enable him to allocate the fund to all or some or one of these children for any interest and in any proportion he may think fit. Accordingly, it becomes plain that so long as he lived it was impossible to predicate of any of his children that even contingently on survivorship he or she would take any interest whatever in the property. And it is with reference to property so circumstanced, and not with reference to it as in terms settled, that the critical question between the parties must be answered.

Now it is not in contest that the title to the property passed on the execution of the deed. This is, of course, asserted by the appellants; but it is not disputed by the Crown. The title, however, which so passed was the entire title—the title whatever it might ultimately be in the events which would ultimately happen—the titles of the son and the three living daughters certainly; but the titles also of any further children to be born to the settlor, or his statutory next-of-kin, if, in the event, he died without leaving a child: of his own legal personal representatives under the resulting trust to himself, if he died leaving neither child nor statutory next-of-kin, a remote but not in these days an impossible contingency. It is, I think, not unimportant to stress this point. At any rate it misleads me to treat the title of the son or of the three daughters which "passed" as being in any legal sense different in its essence from any of the other titles which also passed. The difference as I see it is a difference in degree only and not in kind. It is the

A unexpected which happens. If the supremely unexpected had happened in this case, the only title that in the end would have mattered would have been the settlor's under the resulting trust to himself. But the truth as I see it is that in point of law no one of the possible beneficiaries existing or potential, ascertainable or not, had under his or her title any position different from that of any other, for the sufficient reason applicable to them all that from the moment of execution of the deed down to the moment of
B the settlor's death the titles which had respectively passed gave no one of them anything that could be reckoned. In this respect they were each and all in the same case.

Accordingly it is not, I think, in accord with the true position to say that all that happened on the settlor's death—for example, with reference to his son's share—was that a previous fetter on his enjoyment of it was then removed. It is not, I think, right to say that while his father lived he was in law in any stronger or other position in
C relation to enjoyment than any of the other beneficiaries actual or potential—the truth being that although the title to the entirety was contingently under the deed amongst all the children for the time being alive, no one of them so long as the settlor lived had any right to say that his or her title gave a right to anything at all. It has been suggested that the right the son or any daughter had during the settlor's life was a right that could have been insured against. Possibly. But at a premium measured not
D by the mere chance of survivorship, but by the danger that even on survivorship there might be nothing to receive. Technically it would not, I suppose, be correct to describe the interest of any child as being a spes successionis only. But many a spes successionis has at its initiation had a fuller promise of enjoyment.

And not less striking as I think, is the result, if the true problem is to ascertain when it was that in enjoyment, the property "passed." Take again the case of the son.
E Under the deed as drawn, and apart from any intervening act of the settlor, had anything in enjoyment passed to him while his father still lived? The answer it seems must be in the negative. The position may be tested in this way. If the son died in the lifetime of the settlor, had any share of this property passed to him, so as to become chargeable with estate duty as on his own death? The answer must be No. But suppose, further, that his father the settlor had died on, say, some New Year's Eve, and he him-
F self had died on the following New Year's Day, what then? Clearly, in that event estate duty on his entire share would be chargeable as on property passing on his death. Why, it may be asked. The answer of the Crown is, because, by the death of the settlor, his father, the property had passed to him during the night. The question is whether that answer is correct. I believe it is.

This deed has been very skilfully framed so that the settlor's estate may in the matter
G of estate duty be protected against the uncertainties of survivorship as between himself and his children. Its object very clearly was to relieve everybody in respect of the trust property of the burden of duty on the settlor's death whether he survived all his children or whether all or any of them survived him. But the deed would have lost much of its value in the settlor's eyes, if consistently with that advantage he could not have retained to himself the power to allocate the property amongst his children during
H his life or by his will as might seem to him to be proper. The settlor lived for more than three years after the execution of the deed. Counsel for the appellants in his reply suggested that this was an attempt on the part of the Crown to subject to duty the subject-matter of a gift made more than three years before the donor's death. I do not agree with him. This was not such a gift. It could not be said of this deed that the property comprised in it had been assumed by the donee immediately upon the gift or
I that it had thence-forward been retained to the entire exclusion of the donor. There was no ascertainable donee to assume it, and it was of the essence that the settlor's reserved powers over it should not be excluded so long as he lived. The very fact that it was, as I think, impossible consistently with the settlor's reservations to make of this deed "a gift," weakens the cogency of the appellants' present contention that the property had in fact passed at the date of the deed, so that there was nothing left to pass at the settlor's death.

The correctness or otherwise of that contention must, in my judgment, be tested by the working out of this transaction in the world of reality, and not by its history in a world of abstractions. In my judgment, no thing worth that name in the world of reality passed here until the death of the settlor. The metamorphosis of the situation effected by that event has been shown. It was total. If the words of s. 1 of the Act are to be interpreted in their ordinary natural sense only then was the "passing" complete. In my judgment the passing to be within the section is a process which is finished only when the property in respect of enjoyment or of the right to it reaches its prescribed destination.

It will have been noticed that the so-called appointment of new trustees was made on the narrative that the settlor had, a considerable number of years before, with reference to the trust property, verbally declared himself to be a trustee in the very terms of the trusts which by the deed were thenceforth to be executed by the new trustees to whom, with himself still as trustee, the property was then assigned. If that assignment had not been made, and the settlor had continued up to his death to retain and administer the property in accordance with the identical trusts of his verbal declaration, it would, I think, have been difficult indeed to contend that the property "passed" a moment before the settlor's death, trustee though he was. Yet in principle there is no distinction I can see between that position and the position created by "the appointment of new trustees."

The view I have taken is, I think, borne out by the authorities. *A.-G.* v. *Beech and another* (3) is useful because of the description it gives of the circumstances under which property does "pass" at the moment when it is conveyed. In that case there had been a disposition of her life interest by an equitable tenant for life in favour of her son, the immediate equitable remainderman in fee.

"The moment that conveyance was made," said Lord Halsbury, L.C. ([1899] A.C. at p. 57), "the son was completely master of the situation, and he might have sold the property the very next day."

Lord Davey put it thus ([1899] A.C. at p. 60):

> "When cestui que trustent became absolutely entitled to the trust funds in possession with power of disposition without the consent of any other parties, the settlement is at an end. . . . There is no single test of ownership that can be applied to [the son's] position [after the assignment] which shows that he was in any degree other than the absolute owner of the property. If he was the absolute owner of the property before [his mother's] death, he remained absolute owner of the property afterwards, and there was no passing of the estate—that is, no change of ownership by reason of Mrs. Beech's death. This is not a mere technical doctrine. It is the expression of a fact."

It is by invoking the same principle to the facts of this case that here I arrive at the conclusion that there was no "passing" until the settlor's death. I am further confirmed in that view by Lord Dunedin's description of what is meant by "passing" in *A.-G.* v. *Milne* (2), where he says:

> "Pass is a word of ordinary language . . . a death occurs and somebody in consequence gets property which he did not have before."

Last of all I find strong support in this language of Lord Parker's in the same case ([1914] A.C. at p. 779). After pointing out that the expression "passing on the death" by s. 22 of the Finance Act of 1894 includes "a period ascertainable only by reference to death," Lord Parker proceeds:

> "The expression 'passing on the death' is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death."

In these words as applied to the facts of this case I find full justification for all I have said.

In my judgment the Crown is right here in its main contention. But if the case, in the view of the House, is not brought within s. 1, then, accepting, as I must, that position, I am in agreement with my noble friend, Lord Warrington, whose opinion I have had the advantage of reading, that it may be brought within s. 2 (1) (d) of the Act, with the consequences indicated by him.

LORD WARRINGTON.—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., GREER and ROMER, L.JJ.) dismissing an appeal from an order of ROWLATT, J., dated June 15, 1931. By the last-mentioned order it was declared that on the death of the settlor John Weston Adamson the elder, estate duty became payable under the provisions of s. 1 of the Finance Act, 1894, in respect of the interest arising at the death of the settlor under an indenture of settlement dated March 24, 1924, to the four children of the settlor. The rest of the order (relating to succession duty) is not now complained of.

The settlor died on March 11, 1928, having one son (the appellant, John Weston Adamson) and three daughters. He also left his wife, who is still living. No child was was born after his death.

Section 1 of the Finance Act, 1894, is as follows:

> "In the case of every person dying after the commencement of this Part of this Act there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person, a duty called estate duty at the graduated rates hereinafter mentioned."

Section 2, so far as is material, is as follows:

> "(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: (d) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

The order appealed from is not happily drawn. It purports to be under s. 1, but introduces an expression "to the extent of the interests, &c.," which is taken from s. 2 (1) (d). It is clear, however, from the judgments of ROWLATT, J., and of the members of the Court of Appeal that their decision was based on s. 1, and that s. 2 (1) (d) was only relied on as an alternative ground for an order in favour of the Crown, and the matter was so dealt with in argument before this House.

The first question, therefore, is whether on the true construction of s. 1 it can properly be said that the property on the principal value of which the duty is to be levied and paid passed on the death of the settlor.

The section is one that imposes a tax on the subject, and it is well settled that in such cases it is incumbent on the Crown to establish that its claim comes within the very words used, and if there is any doubt or ambiguity this defect—if it be in view of the Crown a defect—can only be remedied by legislation.

The property on which the duty is in this case claimed is of very considerable value, namely, £128,437, consisting partly of capital funds originally settled and partly of accumulations of income. It would appear from the recitals to the deed of March 24, 1924, that the fund had been constituted some years before that date, but that the trusts thereof were then for the first time formally declared.

I need not refer in detail to the provisions of the deed; it is quite enough to give a summary of them. Clause 2 is a general trust for investment which is left to the absolute discretion of the trustees within the range referred to in the deed. Clause 3 contains a direction to pay and apply the capital unto the children then living or thereafter to be born in such shares and manner and at such time or times as the settlor might direct in writing, and in default the capital was to be held on the trusts following. Under this clause payments were made to certain of the children, and no question arises as to these.

Clause 4 provides for the application of the income for the maintenance and support or otherwise for the benefit of all or any of the children for the time being of the settlor as the settlor might in writing appoint. Any income not so applied was to be held on the same trusts as were applicable and as an accretion to the capital of the funds. Clause 5 provides that after the settlor's death the trustees were to stand possessed of the capital and income of the funds in trust for all or any one or more of the children of the settlor living at his death in such shares and so forth as he should by deed or will appoint, and in default as to two-fifths for the son and as to the remaining three-fifths for equal division among all the other children living at his death. It was further provided that if the son should die before he should attain a vested interest in the funds his two-fifths were to be added to the shares of the other children. There was an ultimate trust, in the event of no child of the settlor attaining a vested interest, for the settlor's next-of-kin under the Statute of Distribution.

The result was that the property itself, both as regards ownership and possession, passed wholly out of the hands of the settlor on the execution of the deed. It is true he retained some control over both income and capital as to the application thereof respectively for the benefit of the children. His power was, however, strictly limited. He could not lawfully exercise it directly or indirectly for his own benefit. Moreover, the trust in default of children was not for him but for his next-of-kin, according to the Statute of Distribution, who would take as personæ designatæ. It was, indeed, suggested that there might be a resulting trust for him in the event of all the children dying in his lifetime and there being under the existing law no person entitled to take by virtue of the ultimate trust. It is, however, by no means clear that in such an event, remote and improbable as it is, there would have been a resulting trust, and the point may, I think, be ignored. In my opinion, under such circumstances, it is correct to say that after the execution of the deed no property remained in the deceased, and, if so, no property passed at his death.

The case is a very peculiar one and authorities are of little value. There is, however, a dictum of LORD PARKER in *A.-G.* v. *Milne* (2), which, I think, rightly understood, supports the appellants' contention. He said ([1914] A.C. at p. 779):

> "Passing on the death, is used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes."

I think the emphasis in this statement is in the words "as a whole," that is to say, for the purposes of s. 1 it is irrelevant to consider the several interests of the persons beneficially entitled. For these reasons I am of opinion that the appellants are correct in their main contention, and that on the true construction of s. 1 of the Act the property did not pass on the settlor's death.

But this does not conclude the matter. It is still necessary to consider the alternative claim of the Crown under s. 2 (1) (d). This section, unlike s. 1, which deals only with property as a whole, brings within the ambit of the charge individual interests provided by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the interest of each child was unquestionably provided by the deceased, and is, therefore, to be deemed to be included in the expression "property passing on the death of the deceased," but only to the extent of the beneficial interest accruing or arising on the death of the deceased.

Prior to his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value, if any, of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under s. 1 be charged with duty accordingly.

The result, in my opinion, is that the appeal ought to be allowed and the order of June 15, 1931, discharged so far as it declares that on the death of the settlor John Weston Adamson, the elder, estate duty at the appropriate rate became payable under the provisions of s. 1 of the Finance Act, 1894, in respect of the interest in the settled funds and accumulations respectively arising at the date of such death to the four children of the settlor under the indenture dated March 24, 1924, in the information mentioned, and that in lieu thereof an order should be made in the following terms:

A "Declare that upon the true construction of s. 1 of the Finance Act, 1894, and in the events which have happened the settled funds and accumulations subject to the trusts of the indenture of March 24, 1924, in the information mentioned were not property which passed on the death of the settlor and estate duty did not become leviable and payable upon the principal value thereof but declare that on the true construction of s. 2 (1) (d) of the above-mentioned Act the beneficial interest of each B child of the settlor in the said settled funds and accumulations to the extent to which the principal value of such beneficial interest upon the death of the settlor exceeded the actual value, if any, of the expectant beneficial interest of each child prior to such death was an interest accruing or arising on his death, and is therefore to be deemed to be property passing on the death of the settlor and that estate duty on the principal value of such excess is leviable and payable accordingly. Remit the C information to the King's Bench Division with liberty to apply."

As to costs, I propose that as neither party wholly succeeds there should be no costs in this House, leaving, however, unaffected the orders as to costs in the courts below.

LORD RUSSELL OF KILLOWEN.—Clauses 2, 3 and 4 of the settlement declare the trusts which are to operate during the life of the settlor. Under cl. 2 the capital and D any income not applied under cl. 4 are to be invested. Under cl. 3 the capital is to be paid to or applied for the benefit of all or any of the settlor's children as he may from time to time in writing direct. Under cl. 4 the income is to be paid to or applied for the benefit of all or any of the settlor's children as he may from time to time in writing direct, and in default of such direction, the income is to be held on the same trusts as are applicable to and as an accretion to the capital.

E The trusts which are to operate after the settlor's death are declared by cl. 5 and relate to the capital and income of

> "the settled funds which shall not have been paid in accordance with the directions hereinbefore mentioned."

There is an overriding power in the settlor to appoint by deed or will in favour of all F or any of his children living at his death, and subject to the exercise of that power the trust fund (capital and income) is to be held in trust (as to two-fifths) for the settlor's son John and (as to three-fifths) for the settlor's other children living at his death, share and share alike as tenants in common. There follows a proviso that if the son John died before attaining a vested interest (which in the circumstances must I think be construed as meaning vested in actual possession) his two-fifths share should be added to the shares G of the other children of the settlor living at the death of the settlor. If no child attained a vested interest, there is an ultimate trust in favour of the settlor's statutory next-of-kin. There is no express disposition of the three-fifths share in the event of all the children (other than John) dying before the settlor, but a cross limitation in John's favour would probably, if the event happened, be implied from the form of the ultimate trust. If the settlor should happen to die without having any statutory next-of-kin, H there would be a resulting trust in favour of the settlor, and the trust fund in that event could pass under his will if he left one: but, except for that remote contingency, the settlor had by the settlement deprived himself of all beneficial interest in the settled fund, and made a gift of it to the cestuis que trust under the settlement.

The settlor died on March 11, 1928, without having exercised the special power conferred by cl. 5 of the settlement, leaving his son John and three daughters him surviving. I They were all living at the date of the settlement and were the settlor's only children. The Crown claims to be paid estate duty on the principal value of the trust property which was in the hands of the trustees at the time of the settlor's death on the ground that such trust property was either (i) property which passed on the death of the settlor within the meaning of s. 1 of the Finance Act, 1894, or (ii) property which, although not property passing on his death, must be deemed to be included in property passing on his death by reason of s. 2 (1) (d) of that Act.

I will deal first with the contention that the trust fund was property which passed on the death of the settlor within the meaning of s. 1, bearing in mind that the property which is said to pass on the death is the trust fund then in the hands of the trustees, i.e., a trust fund composed of the original capital increased by accumulations of so much of the income as has not been paid or applied under cl. 4, but less so much capital as has been paid or applied under cl. 3.

What were the interests of the children under the settlement in that property immediately before the settlor's death? The position of the son John would appear to be somewhat different from that of the other children. He was given an immediately vested interest in two-fifths of that property, but his interest was defeasible (a) if his father exercised, and to the extent to which he exercised, the special power of appointment conferred by cl. 5, and (b) if he died in the lifetime of his father. That was his exact position in relation to that property. When the settlor died the property did not in my opinion pass either from the settlor or to John. It did not change hands. The effect of the death was not to pass it to John, but to render impossible the happening of any of the events which would deprive him of his interest, and make the property pass from him. But then it is said that the father's death has conferred a benefit on the son, or that the son succeeded to a benefit on his father's death in that his interest which before the death would have been unmarketable in view of the overriding special power, has become readily saleable immediately after the death. That may well be, but that is not the element which according to s. 1 attracts the duty. In order to attract the duty under s. 1 the property must pass on the death. As LORD MACNAGHTEN pointed out in *Earl Cowley* v. *Inland Revenue Comrs.* (4), unless the case is within the precise terms of s. 1 you cannot say it is within its principle and bring it within the section unless it is one of the few cases specified in s. 2.

The case of the daughters differs in form, though not, I think, in substance, from the case of the son. In form the trust for them of the property, which is said to pass on the settlor's death, is a contingent interest, contingent on their surviving the settlor. It is not (as is the trust for the son) an interest vested, but liable to be divested in the event of his dying before the settlor. The position immediately before the settlor's death was this: that each of the three daughters was entitled to a one-fifth share of the trust fund contingently on her and her two sisters all surviving the settlor. The contingent share of each daughter was liable to be increased if one or both of her sisters died before the settlor and to be diminished if any other child was born to and survived the settlor. These contingent shares to which each daughter was entitled were liable to be defeated if the settlor exercised and to the extent to which he exercised the special power of appointment conferred by cl. 5.

That being the position immediately before the death, what happened when the settlor died? Did this property pass? If it did it must have passed to some one; to whom? The daughters were already entitled to it each for a contingent interest, which the father's death converted into a vested interest, and it was conceded in argument that the mere turning of a contingent interest into a vested interest, or a defeasible interest into an indefeasible interest was not a passing of property.

So far as I can see, what happened on the death of the settlor was that the contingent interest of each daughter in a one-fifth share became a vested interest and ceased to be liable to be defeated by the exercise of the special power of appointment conferred by cl. 5. This latter feature, however, adds nothing to assist the Crown, for the non-exercise of a power of disposition cannot in my opinion make property pass. Take the cases of two settlements of property which are executed a sufficient number of years before the death of the settlor and under which the settlor takes no interest. One is subject to a power of revocation and new appointment, a general power; the other is subject to a power of revocation and new appointment, but a special power. The settlor dies without having exercised either power. In neither case does any property pass on his death. It passed when the settlements were executed. Estate Duty, however, will be payable in the case of the property comprised in the first settlement by reason of s. 2 (1) (a), not because property passes, but because the property, although it does not pass, is to be deemed included in property passing on the death.

It was, however, suggested that the words "passes on the death" in s. 1 might well cover the present case on the footing that a process of passing commenced with the

A execution of the settlement when the property left the beneficial ownership of the settlor, that the process continued during his life while (as it was said) the beneficial ownership remained in suspense, and the passing reached its completion on the settlor's death when the children would come into physical possession and actual enjoyment of the trust fund. This is a highly artificial conception, and in my opinion the Act does not contemplate under s. 1 a passing commencing before the death, and s. 22 (1) lends support B to this view.

It is not easy to state the grounds of the decisions in the courts below. ROWLATT, J., thought that the property passed within the meaning of s. 1 because the property came into a different ownership upon the death, i.e., before the death the owners were the class of children, whereas after the death the owners were the individual children who turned out to be entitled. This view can, however, have no application to the son and C his two-fifths, but, as regards the daughters, it seems to me unsound, and omits consideration of the fact that the daughters were each immediately before the death entitled to the definite contingent interests which I have described above.

The judgment of the Master of the Rolls turns, I think, on the view that on the death there was a passing of the right to possession of the property to the four children. GREER, L.J., thought that the children succeeded to the property by reason of the terms D of the settlement on the death of the settlor. ROMER, L.J., put the case of a settlement with trusts for the accumulation of the income during the life of the settlor and a provision that the accumulations should go to A if he survived the settlor, and that the fund the income of which had been accumulated should go to B. He then stated that on the death of the settlor the property would pass to B, and that the present case ought to follow the same way. All these judgments appear to me to overlook the E essential fact that from the inception of the settlement the settlor deprived himself of all beneficial interest in the funds, and that as regards the property now in question he declared trusts under which the four children at the time of the settlement took interests defeasible, but which on his death became indefeasible.

In my view the beneficial interest in the whole fund passed, on the execution of the settlement, from the settlor as to two-fifths to his son John and as to three-fifths to F his three other children then alive, subject in the case of each beneficiary to the possibility of his or her interest being taken away or otherwise affected by the exercise of the special powers reserved to the settlor, or by the occurrence of certain events in his lifetime. His death merely abolished this possibility and made the beneficial interests indefeasible. Or the matter may be put in another way, thus: the particular interest in the fund which was vested in each child immediately after the settlor's death was the G same as it was immediately before the death, except that by the death it became indefeasible.

Personally, I cannot see my way to decide this case in favour of the Crown under s. 1 unless I am prepared to hold that property passes when a contingent interest therein becomes a vested interest or when a defeasible interest therein becomes indefeasible, and this I am not prepared to do.

H Reliance was placed in the courts below and in your Lordships' House on extracts from speeches made here in debates on other and wholly different cases, for the purpose of showing that s. 1 has been construed so as to include the present case. Thus LORD HALSBURY is quoted as having said in *A.-G.* v. *Beech and another* (3) ([1899] A.C. at p. 57) that the son after the surrender to him of his mother's life interest "was completely master of the situation and could have sold the property the next day," and this I is used as a test by which you may decide that here the property did pass. LORD HALSBURY, however, was not emphasising the fact that the son's interest was free from restriction or readily saleable, but that the surrender of the life interest had made the son owner of the fee simple in possession. Further, a phrase of LORD PARKER'S in *A.-G.* v. *Milne* (2) ([1914] A.C. at p. 779) is quoted as showing that that eminent authority took the view that whenever any change of title to property takes place at death, property passes within the meaning of s. 1. I cannot so interpret what LORD PARKER said. As I read his statement he means no more than that when property passes there must be some change in the title to or possession of the property as a whole which takes place on the death. I confess that I consider it a dangerous and unreliable practice to take fragments from speeches made in other cases away from their context and apply them as authoritative for the decision of a case the facts of which the authors could not have had within their contemplation; and the danger is well exemplified here where some of your Lordships cite LORD PARKER's phrase in support of conflicting views.

Nor do I think that this trust fund can be brought within the description contained in s. 2 (1) (d). The relevant words are these:

> "any . . . interest . . . provided by the deceased . . . to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

In my opinion, and for the reasons already stated, the beneficial interests of the four children neither "accrued" or "arose" on the death of the deceased. They came into existence when the settlement was executed and were in existence immediately before the death. What happened on the death was not that they accrued or arose, but that they ceased to be defeasible.

I would allow the appeal.

LORD WRIGHT.—This case has been argued on the provisions of an indenture dated March 24, 1924, made between John Weston Adamson as settlor and the appellants, who are called the new trustees. This indenture has been conveniently referred to, and is herein throughout referred to, as the settlement, though in fact the trusts had been orally declared some time before. The settlor died in 1928. The first question is whether, as the Crown contends, the settled funds are subject to estate duty as settled property passing on death within the meaning of s. 1 of the Finance Act, 1894. The settled funds consisted of various stocks and shares of considerable value. The trusts on which in the settlement the funds were vested in the trustees may be thus summarised: (i) The settlor was to have a power of appointment exercisable by directions in writing both as to capital and income in favour of any or all of his children then born or thereafter to be born, but so far as the income was not so appointed the income was to be accumulated and held by the trustees as an accretion to the capital of the funds. (ii) After the settlor's death the settled funds, so far as not paid or applied in accordance with the settlor's directions, were to be held by the trustees in trust for all or any one or more of his children living at his death, in default of other disposition by him in favour of all or any of them, as to two-fifths for his son John Weston Adamson, and as to the remaining three-fifths for equal division among all his other children living at his death for equal division, share and share alike as tenants in common and not as joint tenants, subject to a provision for bringing into account in the case of any child of any moneys already directed or appointed to be paid to that child in accordance with the above powers of the settlor. (iii) If the son should die before obtaining a vested interest (that is, an interest in possession) in the settled funds his two-fifths share was to be added to the shares of the other children living at the settlor's death. (iv) If no child of the settlor should attain a vested interest in the settled funds then they were to be held in trust for the persons entitled under the statutes of distribution as in intestacy.

At the date of the settlement there were living the son and three daughters, and the same children, and no others were living at the date of the settlor's death. The settlor made no directions after the settlement as to the settled funds, save in respect of three small sums paid by his directions in favour of the son and one daughter respectively.

Except for the remote contingency of a resulting trust in favour of the settlor in the event of all possible beneficiaries under the limitations in the settlement dying before the settlor, he reserved no beneficial interest for himself: as that remote contingency may be disregarded, the property, both legal and equitable, in the settled funds passed from him at the date of the settlement. The appellants contend that the property in equity then passed to the son and the three daughters: as a vested right in the son, though liable to be defeated by exercise by the settlor of his limited power of appointment, and also liable to fail if he should predecease the settlor: and in the case of the daughters, as a right contingent on all or any of them surviving the settlor and likewise subject to defeasance by the exercise of the power of appointment. It is difficult to see any substantial difference between the positions of the son and of the daughters. The appellants contend that the beneficial right of the settlor when it passed from him on the settlement passed at the same time to the four children, though it passed as right both contingent and defeasible. I think this contention is well founded. The section does not contain any definition of the words "passes on the death," and I have not found any real guidance on this point in any authority which has been cited. But s. 22 (1) of the Act states that "property passing on the death" includes

> "property passing immediately on the death or after any interval either certainly or contingently and either originally or by way of substitutive limitation."

By analogy, I think that in the present case the property passed on the settlement, though it did not pass immediately in the sense that the beneficiaries had enjoyment or mastery of it then, and though it did not pass certainly but only contingently, that is, subject to the risk of defeasance or of failure to survive. On any other view the beneficial right in the settled funds with which alone the section is in a case like this concerned must remain in suspense between the date of the settlement and the settlor's death, a view which does not appear to me to be well founded. Nor do I agree with the contention of the respondent that the passing of the property under the section means the passing or transfer of enjoyment or (if such a term be apt) of possession. I think the beneficial right became vested in the children at the date of the settlement, and all that happened on the death was that the right which had been future became presently vested in possession, so that what had been contingent became certain and what had been liable to be defeated became indefeasible. I do not think the words "property passing on death" are sufficient to attract the duty in such a case as this. Even if the case falls within what has been called the spirit and intention of the taxing provision, the matter falls to be decided on the meaning of the precise words used, according to the well-recognised rule for construing taxing statutes.

In my judgment the respondent fails in regard to his claim under s. 1. There remains, however, the alternative claim under s. 2 (1) (d). Section 2 differs from s. 1 in that whereas s. 1 imposes duty on the property as a whole, s. 2 is concerned with limited or particular interests in property: it also deals with subjects which fall outside the terms of s. 1 and are only brought within its taxing scope by a fiction; such subjects are "deemed" (i.e., notionally and contrary to the actual scope of s. 1) to be property passing on the death. The words relied on by the Crown are

> "other interest provided by the deceased to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased."

It is clear that the children's interests became increased in present value when the risks of defeasance and of failure to survive ceased to affect them, as happened on the settlor's death. Though I have felt considerable doubt as to the true effect of this subsection, I think on the whole that the appellants fail in their contention that the duty is not payable to the extent of the beneficial interest so accruing or arising, and in my judgment a valuation must accordingly be made to determine the amount so payable.

In the result I agree that the order which my noble and learned friend Lord Warrington has proposed should be the order made on this appeal.

Appeal allowed.

Information remitted.

Solicitors: *Middleton, Lewis, & Clarke*, for *Middleton & Co.*, Sunderland; *Solicitor of Inland Revenue.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

ROYLE *v.* ORME

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), July 20, 1932]

[Reported 96 J.P. 468; 30 L.G.R. 494]

Town and Country Planning—Advertisement—Hoarding—"Exceeding twelve feet in height"—Panels less than twelve feet in height affixed to wall—Tops of panels more than twelve feet from ground—Advertisements Regulation Act, 1907 (7 *Edw.* 7, *c.* 27), *s.* 2 (1).

The defendant was summoned for erecting and maintaining for advertising purposes a hoarding or similar structure in contravention of a byelaw made under s. 2 (1) of the Advertisements Regulation Act, 1907, prohibiting the erection or maintenance for advertising purposes of any hoarding or similar structure exceeding "twelve feet in height." The alleged hoarding or structure consisted of rectangular panels or advertisement boards measuring approximately twenty feet in length horizontally and ten feet in height vertically and attached to the wall of a building. On these panels advertising posters were pasted. Although the panels did not themselves exceed twelve feet in height, they were fixed in such a position on the wall that their top edges were more than twelve feet above ground level.

Held: the words "twelve feet in height" in s. 2 (1) meant the measurement of the hoarding itself and not the height at which its top was above ground level.

Per AVORY, J.: Neither the wall nor the panels were hoardings or similar structures within the meaning of the byelaw which was intended to apply to some independent structure erected on the ground and not to panels fixed to a wall.

Notes. The Advertisements Regulation Act, 1907, was repealed by the Town and Country Planning Act, 1947, s. 31 (1) (a) of which empowers the Minister of Housing and Local Government to make regulations regulating, inter alia, the "dimensions" and "position" of advertisements.

Applied: *Borough Billposting Co.* v. *Manchester Corpn.*, [1948] 1 All E.R. 807.

As to control of advertisements, see 26 HALSBURY'S LAWS (2nd Edn.) 518–521, and for cases see 38 DIGEST 178, 179. For Town and Country Planning Act, 1947, see 25 HALSBURY'S STATUTES (2nd Edn.) 489.

Case Stated by Middlesex justices.

On Oct. 6, 1931, the justices dismissed two informations preferred by Ernest Rupert Royle, the appellant against Henry Evelyn Victor Orme, the respondent charging respectively (a) that the respondent on or about Aug. 31, 1931, at No. 7, The Broadway, Preston Road, Wembley, did unlawfully erect a structure erected or intended only for the display of advertisements and fixed to the flank wall of No. 7, The Broadway aforesaid, contrary to byelaw 9 of the byelaws for the regulation of hoardings and advertisements made by the Wembley Urban District Council pursuant to the Advertisements Regulation Acts, 1907 and 1925; (b) that the respondent, between Aug. 31, 1931, and Sept. 21, 1931, did unlawfully maintain a certain structure erected or intended only for the display of advertisements and affixed to the flank wall of No. 7, The Broadway aforesaid in contravention of the same byelaw.

Upon the hearing of the informations it was proved that the appellant was the clerk to the Wembley Urban District Council and had been duly authorised to prefer the informations on their behalf. The byelaws duly made by the council under the provisions of the said Acts provided:

> "For the regulation and control of hoardings and similar structures used for the purpose of advertising where they exceed twelve feet in height. . . . (9) No person shall erect or maintain for advertising purposes any hoarding or similar structure in the district hereinafter specified, that is to say, that portion of the urban district north of the Harrow main road. Provided that this byelaw shall not apply to the

> use of a hoarding or similar structure for the exhibition of any advertisement relating to the trade or business carried on, or to any entertainment, meeting or religious service to be given or conducted, or to any auction or sale to be held, in, upon, or in relation to the building or ground in or upon which such advertisement is exhibited, or to any property therein or of any advertisement announcing that the building or ground in or upon which such advertisement is exhibited is to be or has been let or sold."

The respondent at all material times carried on business under the name "Paddington Advertising Company" as bill poster and general advertising contractor. At some date prior to Aug. 31, 1931, the owner of a shop known as No. 7, The Broadway, Preston Road, Wembley Park, within the area named in the byelaw, let to the respondent for the purpose of his trade and business the right to display posters on the flank wall of the shop. Thereupon the respondent caused metal plates or sheets to be fixed to the wall forming three separate panels, each panel being surrounded by a wood moulding $\frac{7}{8}$ in. by 3 in., which moulding was nailed to the wall. Between Aug. 31 and Sept. 21, 1931, he kept posted on each of the panels advertisements which did not come within the proviso to byelaw 9. The separate panels did not exceed twelve feet in height, but were so affixed to the wall that the top edge of each panel was more than twelve feet above the ground.

It was submitted on behalf of the respondent that the appellant had not proved the erection or maintenance of a hoarding or similar structure within the meaning of the byelaw, or, alternatively, that any such hoarding or similar structure did not exceed twelve feet in height. It was contended on behalf of the appellant that in the circumstances (a) the wall with the plates fixed thereto, or alternatively (b) each of the framed panels was a structure similar to a hoarding, and that, inasmuch as each was more than twelve feet above the ground, the respondent should be convicted under both, or, alternatively, under one of, the informations.

The justices directed themselves to the application of the byelaws and had to place a construction upon the words "exceed twelve feet in height," and, not being able to come to a satisfactory and conclusive decision whether those words were to be construed as "height from the ground" or vertical dimensions of each separate panel and moulding, they found themselves bound to give to the defendant the benefit of the doubt existing in their minds, and, therefore, dismissed the informations. The question upon which the opinion of the court was desired was whether the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

By the Advertisements Regulation Act, 1907, s. 2:

> "Any local authority may make byelaws—(1) For the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed twelve feet in height. . . ."

Montgomery, K.C., and *A. C. Caporn* for the appellant.

Pritt, K.C., and *R. J. Sutcliffe* for the respondent.

LORD HEWART, C.J.—I cannot see any good reason for differing from the finding of these justices. The words in the section are "for the regulation and control of hoardings and similar structures used for the purpose of advertising when they exceed twelve feet in height." "They" must obviously mean the hoardings, or the similar structures. If it had been intended to say that the hoardings and structures were to be regulated and controlled at a height exceeding twelve feet it would have been very easy to say so, but we have to look at the meaning which has been expressed, and not at the meaning which we suspect was intended by somebody. It seems to me, therefore, that this appeal fails, and ought to be dismissed.

AVORY, J.—I am of the same opinion. I think that both of the alternative contentions of the appellant set out in this Case were ill-founded. The first contention was that the wall with the places fixed thereto was a structure similar to a hoarding, and that as the wall was more than twelve feet above the ground—this part of the wall, I suppose, it means—the respondent should be convicted. Upon that contention I think that it is quite clear that the wall of this building was not a hoarding or similar structure within the meaning of this byelaw. Another objection to that contention is that, if the wall is to be treated as the hoarding, the respondent did not erect the wall. The second contention is that each of the framed panels was a structure similar to a hoarding, and that, as each was more than twelve feet above the ground, the respondent should be convicted. In my opinion, the framed panels were not hoardings or similar structures within the meaning of this byelaw, and, further, if they were hoardings, or similar structures, neither of them exceeded twelve feet in height. In my opinion, these byelaws are intended to apply to some independent structure and not to the wall of a house, and the byelaws have no application to advertisements affixed to the wall of a house. Whether it is desirable that there should be power to control advertisements affixed to the wall of a house is quite a different matter. We have not to deal with it. I am satisfied that they are intended to apply, as I have said, to an independent hoarding which is erected on the ground, and not to a case like the present where advertisements are fixed to a wall.

HUMPHREYS, J.—I agree. I think, apart from any other difficulties, that it would have been impossible for the justices to have convicted on the basis of the wall itself being a hoarding or similar structure, and it was not true, as one information alleges, that the respondent erected, and, as the other information alleges, that he maintained the structure affixed to the wall of a house. On the other point I agree with what has been said.

Appeal dismissed.

Solicitors: *Sharpe, Pritchard & Co.* for *E. R. Royle*, Wembley; *T. England*, Preston.

[*Reported by* J. W. HALL, ESQ., *Barrister-at-Law.*]

IBERIAN TRUST, LTD. *v.* FOUNDERS TRUST AND INVESTMENT CO., LTD.

[KING'S BENCH DIVISION (Luxmoore, J., sitting as an additional judge), February 22, 26, 1932]

[Reported [1932] 2 K.B. 87; 101 L.J.K.B. 701; 147 L.T. 399; 48 T.L.R. 292; 76 Sol. Jo. 249]

Company—Director—Enforcement of order against company by attachment of director—Order for transfer of shares by company—Form of order—Necessity for service on director—Time within which order must be served—R.S.C., Ord. 41, *r.* 5; *Ord.* 42, *r.* 31.

Contempt of Court—Attachment—Attachment of directors in respect of failure of company to obey order of court—Form of order—Penal notice—Necessity for service on directors—Time within which order must be served—R.S.C., Ord. 41, *r.* 5; *Ord.* 42, *r.* 31.

Execution—Company—Writ of attachment against directors—Indorsement of order—Service on directors—Time for service—R.S.C., Ord. 41, *r.* 5; *Ord.* 42, *r.* 31.

The plaintiff company had obtained against the defendant company an order for the return of certain shares which had been transferred to them on terms. The order adjudged "that the plaintiffs do have a return of the . . . shares within fourteen days from the date hereof." The order was not served on the defendant company or on any of the directors until a date more than six weeks from its date, nor was the copy served endorsed with a memorandum as to the penal consequences of disobedience, as required by Order 41, r. 5. The defendant company did not comply with the order. On the plaintiff company seeking to enforce the order by writs of attachment against two directors of the defendant company,

Held: the order could not be enforced in this manner because (i) it did not direct the defendant company to do anything; (ii) it was not served on the defendant company or the directors within the time limited by it for the return of the shares: *Duffield* v. *Elwes* (1) (1840), 2 Beav. 268 followed; (iii) the directors had not been served with a copy endorsed with a memorandum as to the penal consequences of disobedience: *McKeown* v. *Joint Stock Institute, Ltd.* (2), [1899] 1 Ch. 671 followed; (iv) the remedy against the directors under Order 42, r. 31, was an alternative one, and, therefore, could not be applicable where the plaintiff company were not in a position to pursue the original remedy against the defendant company.

PER CURIAM: The proper form of order would have been for a declaration that so many shares standing in the name of the defendant company were the property of the plaintiff company, followed by an order requiring the defendant company and its directors and secretary, within a limited time, to execute a proper transfer of those shares to the plaintiff company, or as it should direct, such transfer to be settled by the judge in case the parties disagreed.

Notes. Considered: *Gordon* v. *Gordon,* [1946] 1 All E.R. 247; *Redwing, Ltd.* v. *Redwing Forest Products, Ltd.* (1947), 177 L.T. 387. Referred to: *Benabo* v. *William Jay & Partners, Ltd.*, [1940] 4 All E.R. 196.

As to enforcing judgments and orders against a company, see 6 HALSBURY'S LAWS (3rd Edn.) 450, para. 873, as to attachment of directors, see 8 ibid. 27, para. 47, text and notes (d)–(h), as to orders unenforceable for ambiguity, see ibid. 26, para. 46, text and note (t), as to service of an order to be enforced by attachment, see ibid. 36, para. 64 (and for cases on the subject see 16 DIGEST 51 et seq., *547* et seq.), as to execution on a judgment requiring an act to be done, see 16 HALSBURY'S LAWS (3rd Edn.) 6, para. 5, and as to sequestration against directors, see ibid. 70, para. 106, text and note (l).

Cases referred to:

(1) *Duffield* v. *Elwes* (1840), 2 Beav. 268; 48 E.R. 1183; 16 Digest 56, *631.*

(2) *McKeown* v. *Joint Stock Institute, Ltd.*, [1899] 1 Ch. 671; 68 L.J.Ch. 390; 80 L.T. 641; 6 Mans. 338; 16 Digest 52, *564.*

(3) *A.-G.* v. *Walthamstow Urban District Council, Walthamstow Sewage Question* (1895), 11 T.L.R. 533; 21 Digest 593, *1745.*

(4) *Re Oddy, Major* v. *Harness,* [1906] 1 Ch. 93; 75 L.J.Ch. 141; 94 L.T. 146; 54 W.R. 291; 50 Sol. Jo. 155, C.A.; 16 Digest 50, *537.*

Summons for leave to issue writs of attachment against directors of a company, on the ground that the company had not complied with an order of the court.

An action was brought by the Iberian Trust, Ltd., against the Founders Trust and Investment Co., Ltd., in the following circumstances. By an agreement dated Jan. 14, 1929, the Iberian Trust, Ltd., agreed that, in consideration of the Founders Trust and Investment Co., Ltd., undertaking to procure that a company known as Radium Springs, Ltd., would be in receipt of sufficient capital to carry on its business and to meet its obligations, the Iberian Trust, Ltd., would cause to be allotted or transferred to the Founders Trust and Investment Co., Ltd., such numbers of preferred and deferred shares in Radium Springs, Ltd., as should be equivalent to 22½ per cent. of the total amount of financial assistance which the Founders Trust and Investment Co., Ltd., should procure for Radium Springs, Ltd. It was also agreed that the Founders Trust and Investment Co., Ltd., should receive one-third of their commission in preferred shares, and two-thirds in deferred shares, in Radium Springs, Ltd. On March 18, 1929, by letter addressed to Radium Springs, Ltd., the Iberian Trust, Ltd., caused to be allotted or transferred to the Founders Trust Co. 13,000 preferred and 300,000 deferred shares in Radium Springs, Ltd. The plaintiff company claimed that the defendant company, having regard to the amount of financial assistance for Radium Springs, Ltd., actually obtained by the defendant company, was entitled to only 1,820 preferred and 42,000 deferred shares. They accordingly claimed a declaration that they were entitled to the return of 11,180 preferred and 258,000 deferred shares. The action was tried before Rowlatt, J., who, on July 7, gave judgment for the plaintiff for the declaration asked. The material portion of the order, which bore the same date, was in the following terms:

> "It is this day hereby adjudged and declared that the plaintiffs are entitled to the return by the defendants of the following shares, namely, 258,000 deferred shares and 11,180 preferred shares in Radium Springs, Ltd., within fourteen days from the date hereof. And it is further adjudged that the plaintiffs do have a return of the said shares within fourteen days from the date thereof."

A copy of the order was served on A. E. Holt, a director of the defendant company, on Aug. 19, 1931, and on J. W. W. Shuttleworth, another director, on Nov. 7, 1931. In neither case did the order have on it an indorsement of a memorandum as to the consequences of disobedience, as required by the Rules of the Supreme Court, Order 41, r. 5, which is in the following terms:

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, namely, 'If you, the within-named A. B., neglect to obey this judgment (or order) by the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same judgment (or order).'"

Order 42, r. 31:

> "Any judgment or order against a corporation wilfully disobeyed may, by leave of the court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

The defendant company did not comply with the order or transfer the shares and a summons was accordingly taken out by the plaintiff company for leave to issue writs of attachment against Holt and Shuttleworth, as directors of the defendant company on the ground that the company had not complied with the order.

J. W. Morris and *P. R. E. Browne* for the applicant Iberian Trust, Ltd., the plaintiff company.

Hon. S. O. Henn Collins for the respondent Holt, a director of the defendant company.
F. G. Enness for Shuttleworth, another director of the defendant company.

LUXMOORE, J.—The Iberian Trust, Ltd., the plaintiff company, by this summons ask for leave to issue writs of attachment against Alfred Ernest Holt and John William Watson Shuttleworth, as directors of the Founders Trust and Investment Co., Ltd., the defendant company, because that company have not complied with an order made against it on July 7, 1931, by Rowlatt, J.

[His Lordship having stated the facts as outlined above and the form of the order, continued:]

The form of the order is a little unfortunate, because, although one may understand what is intended by it, it certainly does not define the precise steps which are to be taken to bring about the transfer of the legal title to the shares in question from the defendant company to the plaintiff company. I think that the proper form of order would have been for a declaration that so many shares standing in the name of the defendant company are the property of the plaintiff company, followed by an order to the defendant company to execute a proper transfer of those shares to the plaintiff company, or as it should direct, such transfer to be settled by the judge in case the parties disagree. There has, in fact, been no transfer of shares by the defendant company, although the plaintiff company appear to have pressed for the transfer of the shares.

The plaintiff company ask for leave to issue writs of attachment against the two directors under Order 42, r. 31. That rule is as follows:

> "Any judgment or order against a corporation wilfully disobeyed may, by leave of the court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property."

From this it appears that in order to constitute a contempt of court for which the directors may be punished there must be wilful disobedience either by the company or its servants or directors to do something which it has been ordered to do. Now, turning back to ROWLATT, J.'s order, what is it that the defendant company have been ordered to do which the company and its directors have failed to do? In terms, the order does not direct the defendant company to do anything; it says "that the plaintiffs do have a return of the said shares within fourteen days." Am I to spell out of that an order on the defendant company to do something? I think not. If the court is to punish anyone for not carrying out its order, the order must in unambiguous terms clearly direct what is to be done. In saying this I do not intend to say anything which would be contrary to what was said by CHITTY, J., in *A.-G.* v. *Walthamstow Urban District Council* (3), which was relied on by counsel for the plaintiff company in his argument that it was the duty of the defendants to find out the proper means of obeying the order. Of course, there is such a duty on a defendant where the order either prohibits or orders the doing of a specific act. In the case mentioned the order restrained the defendant council from discharging sewage into a particular brook so as to create a nuisance. That was definite enough in its terms. The defendant council were, as I gather, unable to prevent discharge of sewage into the brook so long as the existing system of drainage or sewage disposal was used by them. The defendant council admitted that they were trying to find a solution of the difficulty while still retaining the existing system.

Here the order does not even provide that the defendant company shall return the shares. What it says is "that the plaintiffs do have a return of the said shares within fourteen days." Personally I do not think that even an order on the defendant company to return the shares would be sufficiently definite to be enforced by penal proceedings. But the actual order is far more ambiguous than that; the order is no more an order to do an act than an order that the plaintiff is to recover something from the defendant is an order upon the defendant to do an act. It was held by the Court of Appeal in *Re Oddy, Major* v. *Harness* (4) that an order to recover money is not an order on the defendants to do anything, and therefore that such order could not be enforced either by a supplementary order for the payment of the money within a fixed time or by attachment.

In my judgment, before this order becomes enforceable against the defendant company or its directors it is necessary for the plaintiff company to obtain a supplementary order requiring the defendant company and its directors and secretary, within a limited time, to execute a proper transfer of the shares to the plaintiff company. The supplementary order should provide that the transfer should be settled by the judge in case the parties differ.

This, however, is not the only objection to the order, and for the purposes of the rest of my judgment I shall assume, contrary to the opinion already expressed, that the order is one which orders the defendant company to do an act, namely, the execution of the transfer of the shares in question. The first question which arises is whether this judgment has been served on the defendant company within the time limited by the order for the doing of the particular act. The order in question, which is dated July 7, 1931, was not served on the defendant company and on Mr. Holt until Aug. 19, 1931. It was not served on Mr. Shuttleworth until Nov. 7, 1931. In each case, therefore, the time limited by the order for the doing of the act had in fact expired. I think it is quite plain from *Duffield* v. *Elwes* (1) that that order could not be enforced by penal proceedings, because there can be no default in compliance with an order ordering something to be done within a certain time when the order was not served until after the time within which the act was to be done has in fact expired. That again would be a complete answer to the application for attachment in this case.

But the matter does not end there; there is a further objection with which I think I must deal, because it raises a question of some importance. The order when it was served on the defendant company and on the directors had no endorsement on it such as is required by Order 41, r. 5. That rule is as follows:

> "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be endorsed a memorandum in the words or to the effect following, viz.: 'If you, the within named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purposes of compelling you to obey the same judgment (or order).' "

It is to be noticed that the form of the memorandum is not in any sense a rigid form. It may be altered so long as the effect is in substantial accord with the form. This must give such latitude as is necessary to meet the facts of the particular case. The object of the endorsement is plain, namely, to call to the attention of the person ordered to do the act that the result of disobedience will be to subject him to penal consequences. In the present case it is admitted that no steps can be taken to sequestrate the property of the company because the order served on it was not endorsed as required by Order 41, r. 5. It is admitted that service on the defendant company is necessary as a preliminary to enforcement of the order by sequestration. It is argued, however, that Order 41, r. 5, does not apply to a director of a defendant company who is himself not a defendant to the action. The orders of the Supreme Court do not, in fact, require service of a copy of the judgment or order on a person who is not required by the order to do a particular act. But in practice the courts have always required that the order to be enforced should be personally served on the director before it would be enforced against him by attachment. As an authority for this proposition I refer to the decision of North, J., in *McKeown* v. *Joint Stock Institute* (2). In my judgment, the order so served should, as a preliminary to its enforcement against the directors, be endorsed with a notice to the effect of the memorandum prescribed by Order. 41, r. 5, including in it the name of the particular director served. So far as my experience goes, this has been the practice in the Chancery Division.

But apart from this, the remedy against the directors of the company under Order 42, r. 31, is an alternative one, and I do not see how it can be applicable unless the plaintiffs be in a position to pursue the original remedy against the defendant company. In my judgment, on this ground also, the plaintiff company is not in a position to ask for leave to issue writs of attachment against Holt and Shuttleworth.

The objections I have dealt with are, of course, purely technical. The respondents Holt and Shuttleworth have each sworn affidavits. Mr. Holt says that he has charge of the shares in question. In para. 13 of his affidavit he says that at a board meeting of the defendants held on Feb. 19, 1931, it was resolved that all the shares of Radium Springs, Ltd.

> "should be handed over to me and my son, as security against our loans to the defendants, and that transfers of the shares were to be executed by the defendants whenever desired by myself and my son, and that a formal document of charge was to be prepared. The share certificates were there and then placed in my custody and have remained with me ever since, and I hold same on behalf of myself and my son, but no transfer or document of charge has ever been prepared."

I have seen a copy of the minute of that meeting, and it appears that only two directors were present at that meeting, of whom one was Mr. Holt, and it would therefore seem that the resolution was invalid so far as any charge in his favour was concerned, but it might be valid so far as it authorised a separate charge to be given to Mr. Holt's son. It appears, however, that there are only two directors now. Any transfer of the shares in order to be validly executed must be executed under the seal of the company, and a resolution of the Board in the presence of such persons as may be required to comply with the provisions of art. 71, Table A, of the Companies' Act, which governs the

A defendant company. I am unable to say what form of transfer is required by the articles of Radium Springs, Ltd. Mr. Holt, in his affidavit, has claimed that the charge in his son's favour makes it impossible to transfer the shares to the plaintiff company. For the reasons I have stated I do not think this charge is valid so far as Mr. Holt is concerned, and it may be invalid so far as his son is concerned. If the charge in favour of the son is valid it would certainly make a compliance with the order a matter of B difficulty. Mr. Shuttleworth says that he is ready to do what is necessary to transfer, but that he cannot do so because of the claims of Mr. Holt and his son. There may be grounds, therefore, for saying that the refusal to hold a meeting of the defendant company and pass a resolution for the transfer of the shares was not in fact wilful.

In my judgment, this application for leave to issue writs of attachment against Mr. Holt and Mr. Shuttleworth for disobedience to the order is misconceived and must be C dismissed, with the usual consequences that the plaintiffs must pay the costs.

Application dismissed.

Solicitors: *Churchill, Clapham & Co.*; *Biddle, Thorne, Welsford & Gait, H. Davis.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

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BANCO DE PORTUGAL *v.* WATERLOW & SONS, LTD.

[HOUSE OF LORDS (Lord Sankey, L.C., Lord Warrington, Lord Atkin, Lord Russell and Lord Macmillan), February 2, 4, 5, 9, 11, 12, 15, 16, April 28, 1932]

F [Reported [1932] A.C. 452; 101 L.J.K.B. 417; 147 L.T. 101; 48 T.L.R. 404; 76 Sol. Jo. 327]

Contract—Breach—Damages—Measure—Contract to print banknotes and supply to issuing bank—Notes not convertible into gold—Subsequent supply of identical notes to third person acting fraudulently—Unauthorised notes put into circulation—Exchange by bank of good notes for unauthorised notes—Bank's duty to minimise G *loss—Right to recover face value of authorised notes given in exchange.*

By a contract, dated Nov. 27, 1922, the defendants printed, on the order of the plaintiff bank, certain banknotes, which were known as the "V. de G." notes, and in 1923 and 1924 supplied them to the bank which held from the government of Portugal an exclusive licence to issue banknotes as legal tender in Portugal. At all material times the notes issued by the bank were not convertible into gold, and, H therefore, the bank was not under any obligation to replace them, when presented, by anything other than its own notes. In 1925 the defendants, in breach of their duty to the bank under the contract of 1922 and of an implied term of that contract, printed, either from the same plates or from plates made from the same dies as had been used to fulfil the contract of 1922, a quantity of banknotes of the V. de G. design and supplied them to fraudulent persons who put them into cir- I culation in Portugal. On discovering the fraud the bank withdrew from circulation all V. de G. notes and exchanged notes of that issue then in circulation for authorised notes of equivalent face value. As a result the bank issued a large number of authorised notes in exchange for unauthorised V. de G. notes. On a claim by the bank against the defendants for damages for breach of contract,

Held: (i) a person was not obliged to minimise his damages for a breach of contract if by so doing he would injure his commercial reputation, and in the circumstances the bank was justified in exchanging new notes for V. de G. notes both authorised and unauthorised;

(ii) despite the fact that the notes were not convertible into gold, when issued they represented so much purchasing power, in the hands of holders or of the bank, in terms of commodities, including gold, foreign currency, and securities, and could be accepted by the bank in discharge of debts due to it, and, therefore, the measure of the damages to which the bank was entitled was the face value expressed in sterling of the authorised notes given in exchange for the unauthorised notes, plus the cost of printing the authorised V. de G. notes which were rendered valueless and withdrawn.

Notes. Considered: *The Edison*, [1933] All E.R.Rep. 144. Referred to: *Hall, Ltd.* v. *Barclay*, [1937] 3 All E.R. 620; *Liffen* v. *Watson*, [1940] 1 K.B. 556; *Monarch S.S. Co.* v. *A/B Karlshamns Oljefakriker*, [1949] 1 All E.R. 1.

As to damages for breach of contract, see 11 Halsbury's Laws (3rd Edn.) 241 et seq., and for cases see 17 Digest (Repl.) 91 et seq.

Cases referred to:

(1) *James Finlay & Co.* v. *N. V. Kwik Hoo Tong, Handel Maatschappij*, [1929] 1 K.B. 400; 98 L.J.K.B. 251; 140 L.T. 389; 45 T.L.R. 149; 34 Com. Cas. 143; 17 Asp.M.L.C. 566, C.A.; Digest Supp.

(2) *The Morgengry and The Blackcock*, [1900] P. 1; 69 L.J.P. 1; 81 L.T. 417; 48 W.R. 121; 16 T.L.R. 14; 8 Asp.M.L.C. 591, C.A.; 17 Digest (Repl.) 176, *710*.

(3) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 23 L.J.Ex. 179; 23 L.T.O.S. 69; 18 Jur. 358; 2 W.R. 302; 2 C.L.R. 517; 156 E.R. 145; 17 Digest (Repl.) 91, *99*.

(4) *Livingstone* v. *Rawyards Coal Co.* (1880), 5 App. Cas. 25; 42 L.T. 334; 44 J.P. 392; 28 W.R. 357, H.L.; 17 Digest (Repl.) 80, *30*.

Appeal from an order of the Court of Appeal (Scrutton, Greer and Slesser, L.JJ.) reported 145 L.T. 362.

The facts, which are summarised in the headnote, appear in their Lordships' opinions.

In the Court of Appeal it was held by Greer and Slesser, L.JJ., that any payments made by the plaintiff bank before it was possible for them by reasonable exertions to obtain information which would enable them to distinguish between the good and the bad notes, were recoverable as damages from the defendants and that these damages should be assessed at £300,000, thus reducing the amount of the damages—£569,421—awarded to the bank by Wright, J., at the trial. Scrutton, L.J., was of opinion that the only loss sustained by the bank was the cost of replacing the genuine notes with which they had parted, and that judgment should be entered for the bank for £8,922.

The bank appealed, and there was a cross-appeal by the defendants, on the measure of damages.

Stuart Bevan, K.C., *C. T. Le Quesne, K.C.*, *D. B. Somervell, K.C.*, and *H. L. Parker* for the bank.

Gavin T. Simonds, K.C., *Norman Birkett, K.C.*, *James Wylie*, and *H. Bensley Wells* for the defendants.

The House took time for consideration.

April 28. The following opinions were read.

LORD SANKEY, L.C.—These are the appeals of the Banco de Portugal, hereinafter called "the bank," and of Waterlow & Sons, Ltd., hereinafter called "Messrs. Waterlow," from an order of the Court of Appeal dated March 26, 1931, varying the judgment and order of Wright, J., dated Jan. 12, 1931. The learned judge directed judgment to be entered for the bank for £569,421 with costs. The Court of Appeal, by a majority consisting of Greer and Slesser, L.JJ., directed that judgment should be entered for the bank for the reduced sum of £300,000, Scrutton, L.J., dissenting from that judgment, for in his view the Bank of Portugal was only entitled to the sum of £8,922, which was covered by a payment by the defendants into court of £10,000.

The bank is the Central Bank of Portugal, and is incorporated by special charter under the law of Portugal. Since 1887 it has held from the government of Portugal an exclusive licence for the issue of banknotes as legal tender in Portugal and the adjacent

A Portuguese islands, but this licence does not extend to the issue of banknotes for the Portuguese colonies. At all dates material to this case the currency of Portugal was composed solely of notes issued by the bank. The bank act as bankers to the Portuguese government and carry on a general banking business, having a head office in Lisbon, a branch office in Oporto, and agencies and correspondents in various towns and places throughout Portugal and the islands. The governor of the bank is appointed by the B Portuguese government and presides at directors' meetings. The directors at all material times selected the names of three of their number, out of which the government in its turn selected one to act as vice-governor. The directors are appointed by the general meeting of the shareholders. The government also at all material times appointed a secretary-general whose duties were defined by art. 66 of the statutes of 1892. This article prescribed (inter alia) that he shall

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> "satisfy himself of the strict observation of the bank's statutes and regulations . . . in order to be able to appreciate the situation of the bank as regards the safeguard of the public interest and of the fiduciary circulation."

He did not vote at directors' meetings.

Messrs. Waterlow are a well-known firm of printers having their registered office at D 26, Great Winchester Street, in the City of London. A considerable proportion of their business consists of banknote and security printing. Under a contract dated Nov. 27, 1922, and a repeat order under that contract dated Feb. 20, 1924, the bank employed them to print and supply certain banknotes required by the bank for issue in Portugal. Under this contract and repeat order Messrs. Waterlow supplied to the bank 600,000 notes of a face value of 500 escudos. The said notes contained on their face a portrait E of Vasco da Gama and are referred to as 500 escudos notes of the Vasco da Gama type. These notes were delivered to the bank in 1923 and 1924, and all or nearly all of them were put into circulation. The value of the escudo at dates material to this case was approximately two-pence halfpenny, so that a 500 escudo note was worth approximately £5.

The notes of the bank are at present inconvertible, that is to say, the bank is under F no obligation to replace them when presented by anything else than its own notes. The learned judge found, and the Court of Appeal agreed with him, that the prospect of the notes ever becoming convertible with gold was so remote that it might be disregarded. With that finding I agree. The amount of notes which could be issued was controlled by law. Within these limits it was subject to the policy of the bank. The right was accompanied by conditions as to the maintenance of reserves and pro- G hibitions as to certain classes of business. For example, by art. 28 of the Law of July 29, 1887, the bank is expressly forbidden from carrying out the following operations: (a) to purchase for its own account any shares in the bank; (b) to re-discount its own bills; (c) to carry out any Stock Exchange operations which cannot be immediately liquidated even if for account of third parties; (d) to pay interest on any cash received in account current payable at sight; (e) to promote or take part in the creation of com- H mercial banking or other undertakings; (f) to undertake any risky negotiations or insurance; (g) to buy and sell, for its own account, any commercial goods; (h) to possess real estate and rights apart from the city premises necessary for the carrying out of its functions, except through the effect of any assignment or public sale, or in order to secure the re-payment of credits, but it will have to proceed to the liquidation of such goods (or "estate") within the shortest period possible. Again, there was an obliga- I tion upon them to issue notes on government service. Finally, it must be remembered that the bank is a bank of issue with control and management of the currency. Its directors were only entitled to issue notes as far as in their reasonable opinion it was right and proper for them to do so in their capacity as guardians of the currency of the country.

In the course of 1925 Messrs. Waterlow, as it has been found by the courts below, and as they admitted on appeal, were guilty of a breach of an absolute duty to the bank under the contracts referred to because, without authority from or the knowledge of the bank, they printed and delivered to one Marang van Ysselvere 580,000 notes of

500 escudos of the Vasco da Gama type. Marang was one of a group of criminals, among whom was the Portuguese Minister at the Hague. The criminals, having obtained the notes from Messrs. Waterlow, introduced them into Portugal, and proceeded to put a very large number of them into circulation there. These notes were printed either from the same plates as had been used for the notes printed for the bank or from plates made from the same die. Each of the bank's notes bore a serial letter and number and the signatures of the governor and one or other of the directors. 490,000 of the said 580,000 were exact duplicates of notes printed for the bank and were indistinguishable from the genuine notes delivered to and issued by the bank except by certain tests unknown to the bank and depending on data which were exclusively in the possession of Messrs. Waterlow. These tests involved various matters, such as the existence and the significance of minute letters on the genuine and the unauthorised notes and of minute differences between the genuine and the unauthorised notes in the distance from one typographical element to another on the face of the note. The notes were delivered to Marang as to 200,000 in February and March, 1925, and as to 380,000 from August to November, 1925.

In order to facilitate the putting into circulation of very large quantities of these notes the criminals formed a bank known as the Banco Angola e Metropole. Under Portuguese law in order to constitute and operate a bank it was necessary to obtain the authority of the Minister of Finance, who was advised on such matters by a body known as the Banking Council. The Minister of Finance on June 27, 1925, authorised the formation of the Banco Angola e Metropole on the condition, among others, that the capital of that bank, the minimum figure for which he had previously fixed at 20,000,000 escudos, should be fully subscribed. This condition was accepted and as the criminals had already received notes to an amount of 100,000,000 escudos from Messrs. Waterlow, they were able promptly to comply with it. The Banco Angola e Metropole, having been formed, proceeded to carry out transactions on a large scale, but their business fell under suspicion, and upon Nov. 19, 1925, the Minister of Finance instructed the Inspector of Banking Commerce to investigate their activities. On Friday, Dec. 4, 1925, the manager of a private bank in Lisbon called upon Dr. Ulrich, a director of the bank, and informed him of certain suspicious dealings affecting the Banco Angola e Metropole at Oporto, and Dr. Ulrich communicated with the Assistant Judge of Criminal Investigation. On the evening of that day a number of officials both of the State and the bank went to Oporto. On the following day the premises of the Banco Angola e Metropole were searched by the police. Many packets of 500 escudos notes of the Vasco da Gama type were found, but, apparently, the notes, though new, were not consecutive, nor were the series the same. Instructions were given that all notes of this type in the Oporto branch of the bank should be arranged in series, and also that 2,000 of the notes found on the premises of the Banco Angola e Metropole should be similarly arranged. Late on the night of the 5th, Saturday, or early on the Sunday morning, the 6th, four notes, each in duplicate, making eight in all, were discovered among those in the bank's branch, and this was conclusive proof of forgery.

The bank's officials returned immediately to Lisbon, and on the Sunday evening a meeting of the bank's directors was held. The position was certainly alarming. It was obvious that there were forged notes in existence, but how, when, where, and to what extent the forgeries had taken place was entirely unknown. After prolonged consideration, the bank resolved to withdraw from circulation the notes of 500 escudos, second plate, gold, on which appeared the effigy of Vasco da Gama. The notice was given in the following terms, and was published in the "Diario de Noticias" and in the "Seculo" of Dec. 7, 1925, and other papers:

> "The Administration of the Bank of Portugal has resolved to withdraw from circulation the notes of 500 escudos, 2nd plate, gold, on which appears the effigy of Vasco da Gama. In view of this resolution, the notes of this type and plate now in circulation are to be exchanged for others of the same or some other denomination at the Head Office of the Bank in Lisbon, at the Branch Office in Oporto and at the Offices of its Agencies on the Continent and in Funchal.—Lisbon, Dec. 7, 1925.—

A For the Bank of Portugal, THE DIRECTORS: J. MOTTA GOMES, Junior, MANUEL CASAL RIBEIRO CARVALHO."

The result was a run on the bank, and in the course of the next few days many thousands of notes both good and bad of the Vasco da Gama type were brought by their holders to the bank or one of its branches, and for each note so brought into the bank, B the bank handed to the holder a good note for 500 escudos. On Dec. 7, the bank telegraphed to Messrs. Waterlow as follows:

> (Dispatched at 2.25 p.m. Recd. 5.14 p.m.)—"Imprimerie, London.—Dec. 7, 1925. —Great falsification notes of five hundred escudos send expert Lisbon urgently to examine. Make investigations on your side. Bank of Portugal, CAMACHO RODRIGUEZ."

C Messrs. Waterlow replied in the following terms:

> "Camacho Rodriguez, Bank of Portugal, Lisbon.—Dec. 8, 1925.—Your cable 7th received. Arranging for expert to leave London immediately. Will wire you actual time and departure. Write fully and send specimens.—WATERLOW & SONS, LTD." (Dispatched 12.25 p.m. Received 1.56 p.m.)

D Sir William Waterlow, accompanied by two other of his directors, had interviews with Colonel Lucas in London, who was acting on behalf of the bank, and eventually left for Lisbon, where he arrived on Dec. 13. Meantime the bank had been exchanging the notes in the way above mentioned.

It ought here to be said that no suggestion has been made, or can be made, against the honesty of Messrs. Waterlow. They were, just as much as the bank was, victims of E Marang's fraud, but when Sir William Waterlow arrived in Lisbon he was an object of suspicion (as, indeed, the directors of the bank themselves had been), and was for a time kept at arm's length. In the result, the bank finally found itself in possession of 799,190 Vasco da Gama notes, and of these it was subsequently ascertained that 209,718 were notes printed without authority by Messrs. Waterlow for Marang, and which are hereinafter referred to as "the forged notes."

F On Dec. 1, 1925, the note circulation of the bank consisted of two classes: (i) notes issued as loans to the government which the government would put into circulation, and (ii) notes issued by the bank for its ordinary commercial needs, against a certain specified reserve of gold much less than the face value of the notes. The total note circulation in Portugal was about 1,700,000,000 escudos (seventeen million pounds). Messrs. Waterlow had printed and delivered to Marang notes to the value of 290 million escudos, G or about one-sixth of the total note issue. Of these, notes to a value of over 100 million escudos had been put into circulation. They had been put in circulation from time to time from some date in the first half of 1925. They must have passed from hand to hand. Many of them must have been paid into the bank's head office or some branch office of the bank, and been re-issued. On such notes the bank would certainly be liable, and it had no means of knowing whether any note had, or had not, been re-issued. H Notes to the value of 195,630,000 escudos had been authorised against a 15 per cent. minimum gold reserve for the bank's commercial business as bankers. Of this amount the bank had, prior to Dec.7, 1925, issued about sixty-five million escudos. The unissued balance of about 131 million escudos constituted reserves on which the bank could draw as and when they required to do so. It may here be stated that as a result of Messrs. Waterlow's breach of contract, the note issue was increased by approximately I 104,859,000 escudos, and the unissued balance was thus considerably reduced.

Within a short space of time, i.e., by July 19, 1926, the bank obtained a considerable increase in its power to issue notes. The government, by the Prime Minister, had approved of the original action of the bank on Dec. 6, 1925, and the delay in regulating the position, as appears from the preamble to the decree of July 19, 1926, resulted from a change of government, which interrupted negotiations. That decree authorised (i) an issue of a 100 million escudos to be repaid out of the anticipated indemnities from Waterlows. It is not suggested that this loan from a third party can be used to reduce damages due from Waterlows; (ii) a further issue of a 100 million escudos to be used for commercial operations; (iii) a further issue of 125 million escudos, to be used in colonial development, which does not affect this case.

The plaintiffs, the bank, issued a writ on April 5, 1928, claiming damages for breach of contract and/or negligence and/or conversion. In their statement of claim the plaintiffs added a count under the Copyright Act, but this and the claims for negligence and conversion were not pressed on appeal, and they relied upon the breach of contract only. Such breach of contract is set out in para. 9 of their statement of claim and is as follows:

> "In breach of the express terms of the said contract and/or negligently and in breach of the implied terms as set out in para. 4 hereof and/or negligently and in breach of the duty set out in para. 5 hereof, the defendants between January, 1925, and September, 1925, without the authority of the plaintiffs printed from the said plates and/or from plates made from the said die or dies on paper made to the plaintiffs' specification and bearing the watermark 'Banco de Portugal' and delivered in London to one Marang a Dutchman about 580,000 bank-notes of the value of 500 escudos each of the said Vasco da Gama design purporting to be bank-notes of the plaintiff bank."

The particulars of damage originally amounted to the sum of £1,115,613, but the bank professed itself willing to give credit for the sum of £488,430, which they had received in the liquidation of the Banco Angola e Metropole, and so the net claim was £610,392.

By their amended defence, Messrs. Waterlow denied that the contract of Nov. 27, 1922, was subject to the implied terms alleged. They denied that they were guilty of any breach of the express or implied terms of the contract; they denied that the bank had suffered any loss and alleged in the alternative that, if the bank had suffered any loss, such loss was caused solely by the bank's own voluntary act in withdrawing from circulation the Vasco de Gama 500 escudos notes and exchanging them for other notes although the forged notes or some of them which were in circulation were distinguishable from the authorised ones and although the bank were under no liability to pay the unauthorised notes; and in the further alternative they alleged that any damage was caused by or contributed to by the negligence of the bank.

In this state of the pleadings, the matter came before WRIGHT, J. In effect he rejected the contentions of Messrs. Waterlow, both as to the amount of damage and the measure of damage. He, however, was of opinion that by Dec. 16 the bank knew (or ought to have known) the tests by which they could distinguish some of the forged notes from the authorised notes, and he held that from that date Messrs. Waterlow were not liable for damages in respect of the good notes which they gave in exchange for forged notes, and upon this basis gave judgment for the amount above referred to, and not for the whole of the bank's claim. When the matter came before the Court of Appeal, all the learned lords justices agreed that the bank were justified in calling in the Vasco da Gama type notes and exchanging good notes both for the authorised and forged notes, but GREER and SLESSER, L.JJ., came to the conclusion that the bank knew (or ought to have known) how to distinguish between the authorised and the forged notes by Dec. 10 instead of by Dec. 16, as WRIGHT, J., had held, and acting upon this finding they reduced the damages to a round sum of £300,000 to cover all items. SCRUTTON, L.J., took a contrary view. He was of opinion that the bank were justified in exchanging all notes up to as late a date as Dec. 26, but he also held that a different measure of damage applied, namely, that the only loss which the bank had really suffered was the loss incurred in printing new notes to give out in exchange for the Vasco da Gama issue. In the result, judgment from the Court of Appeal was given for £300,000, and from that the present appeal is brought.

The main questions in the appeal are briefly: (a) Whether the bank, issuing an inconvertible currency, i.e., having the right to issue notes, but no obligation to honour them otherwise than by giving in exchange other notes, until some future return to convertibility at a date so remote and unlikely to occur that it could not be taken practically into account, suffered any other than a merely nominal loss (apart from the cost of printing) when they called in bad notes put into circulation by forgers and gave good notes in exchange for them. (b) Whether in the circumstances of this case the bank, when they gave in exchange for a forged note of the face value of 500 escudos a good note of that face value, could properly be said to have suffered a loss of 500 escudos, with the result that Waterlows, who are liable by reason of a breach of contract which enabled the forged notes to be put into circulation, are bound to pay to the bank 500 escudos converted into sterling at the rate current at the date of the loss. (c) Whether the bank gave evidence of, or proved, any loss at all. (d) Whether, if the bank proved any loss, such loss was not caused in whole or in part by the voluntary action of the bank themselves or was not in whole or in part such a loss as could not fairly and reasonably be considered as arising naturally from the breach of contract or such a loss as could not be reasonably supposed to have been in contemplation by both parties at the time of making the contract as the probable result of the breach, or whether the loss was not aggravated by the failure of the bank to take reasonable steps to limit the loss. Messrs. Waterlow, on appeal, did not dispute the proposition that they were guilty of a breach of absolute duty under an implied term of the contract.

It will be convenient to take first the question whether the bank were justified in exchanging new notes for the Vasco da Gama notes (both authorised and forged) as and when they did. It will be observed that upon this point we have concurrent findings in the courts below. Both WRIGHT, J., and all the three members of the Court of Appeal held that they were, the only difference of opinion being up to what period they were so justified. In coming to a proper determination of this question, it is important to recollect the position of the bank both before and after the discovery of the forgeries. It will be recollected that the bank was in effect the National Bank of Portugal, the sole issuing bank in that country, and the bank upon which the credit and currency of the country depended. This appears from the answers given by Dr. Ulrich in his examination in chief:

> Q. 286.—Supposing that you had refused to pay any Vasco da Gama notes, what would the effect have been on the public as regards your issue of notes altogether, in your opinion?—I think the effect would be extremely serious because the people, seeing that the bank were refusing a note of a certain type, would easily have been inclined to think that next day another could be refused in the same way. In these conditions there would have been a general discredit for all the notes of the bank, that means for the total currency of the country. I cannot really easily foresee the effects coming from such a measure, but it is easy to understand that if anybody has merchandise in his power of a certain and definite value he would have refused to exchange his merchandise against a piece of paper of a doubtful value or discussed value, so the country would have been brought to a general stoppage for the economical life of the country, and naturally the people in Portugal would have taken the most severe violences against the bank, and I am sure that a revolution would have been brought about by this fact.
>
> Q. 287.—In your opinion that would have been the internal result in Portugal?—Yes.
>
> Q. 288.—What about the external result as regards foreign exchanges?—I think the market for Portuguese currency abroad would have been suppressed at once, no bank would have been willing to sell escudos when they knew the escudos were paid in paper of doubtful value and of discussed value, so the foreign exchanges of the country probably also would have been stopped.

Similar evidence was given on the bank's behalf by other witnesses called by them, and the learned trial judge said:

> "The justification for acting with such promptitude which is put forward, and I think put forward with foundation, was that it was already known and could not be suppressed that there was this great falsification of notes going on, that the only way to avoid a financial crisis and an entire upheaval of the currency was to withdraw this issue, and that there was no opportunity of further delay because the consequences of delay would have been too serious to contemplate. . . . At least 4,000 notes ready to be issued had been found in the Banco Angola e Metropole, and

> what the plaintiffs did was simply done in order to maintain the credit of their currency and of their bank, and was, so far as I can judge, and as I hold, done reasonably in all the circumstances. It was a necessary and indeed, in all the circumstances, an inevitable consequence of the falsification and circulation of these spurious notes."

Scrutton, L.J., commenting upon this, says (145 L.T. at p. 371):

> "The judge below has found that by Dec. 16 the bank might have discovered a means of identifying some of the forged notes. The bank, by government decree, stopped paying all Vasco da Gama 500 escudos notes after Dec. 26. Wright, J., has deducted from the damages £80,000 for notes paid after Dec. 16. As he finds that the bank were justified in their action on Dec. 7, in calling in the issue and paying all notes, he must have found that they would have been justified when they could distinguish the forged notes, which innocent holders could not do, in refusing to pay some forged notes, while paying others. Such an action, in my opinion, would destroy all confidence in the paper currency. It was the bank's own printers who had from the bank's own plates wrongly put this unauthorised currency on the market. It was indistinguishable to innocent holders from genuine currency, and I cannot think the bank was bound to sacrifice innocent holders and the reputation of its national currency to protect the printers, the wrongdoers."

In England the law is that a person is not obliged to minimise damages on behalf of another who has broken a contract if by doing so he would have injured his commercial reputation by getting a bad name in the trade: *James Finlay & Co., Ltd.* v. *N. V. Kwik Hoo Tong, Handel Maatschappij* (1). The evidence is that the bank—remembering always that they were the issuing bank of the paper currency—had to protect before anything else the confidence which such currency inspired in the Portuguese public. "What confidence," they asked, "would all the other notes of the Bank of Portugual merit if the bank did not adopt such a policy?" "It is one," they say, "always adopted and similar to that adopted as a rule by banks of issue, even when they can allege the forgery is manifest and that the public has not taken the precautions necessary in receiving false notes." I have come to the conclusion that the bank would have been failing in their duty to their shareholders, their customers and their country if they had not taken the step they did.

In my opinion, these findings are correct, and the bank had no alternative on Dec. 7 but to do what they in fact did. They were in a position of extreme difficulty and extreme danger, caused, as I think, by the unfortunate and unwitting breach of contract on the part of Messrs. Waterlow. As the bank urge, for a country to find that what it believed to be a substantial portion of its legal wealth was nothing more than worthless pieces of paper instead of genuine notes of the bank would have created an economic panic and confusion which would have caused the gravest damage to the credit of the bank and might even have shaken the whole economic and commercial life of the country.

I now pass to a consideration whether Dec. 10, as Greer, L.J., and Slesser, L.J., held, or Dec. 16, as Wright, J., held, or Dec. 26, as Scrutton, L.J., held, is the correct date for determining when the bank's knowledge was of such a character as disentitled them from exchanging new notes for the Vasco da Gama notes, both authorised and forged. I would add here that the learned counsel at the Bar of Your Lordships' House, arguing on behalf of Messrs. Waterlow, endeavoured to persuade the House that the bank ought not to have acted so precipitately in giving notice of calling in, and that they must have known by Dec. 9 how to distinguish between the authorised and the forged notes, and so that they ought not to have exchanged any more after that date. This is, largely, a question of fact, but having come to the conclusion that the bank were entitled to issue their notice on Dec. 7, I reject the argument for Messrs. Waterlow that the bank acted too precipitately, and the only question, therefore, remaining is whether Dec. 10, Dec. 16 or Dec. 26 is the proper date to take as being that upon which the knowledge of the bank was such as disentitled them from paying out further good notes. It appears to me that Scrutton, L.J., was right for his reasons above referred

A to in rejecting the contention that Dec. 10 or Dec. 16 was the date to be taken as to the one upon which the bank knew or were in a position that they should have known how to distinguish certain of the notes. The bank in fact exchanged new notes for forged notes as late as July, 1927. Logically I can see no reason why they should not claim from Messrs. Waterlow any damage properly flowing in respect of notes so exchanged so late, and upon this showing even the date fixed by SCRUTTON, L.J., of B Dec. 26 would have to be re-considered. I agree, however, that Dec. 26 is the proper date and for the following reason. By a notice issued by the Ministry of Finance in Portugal it was ordered that Dec. 22 should be fixed as the last day for the exchange of notes. This date was subsequently extended to Dec. 26, and I am content to leave it at that.

What then is the amount of damages to which the bank are entitled upon that date, C subject to the question of the correct measure of damages? Taking Dec. 26 as the date it remains to be considered how the sum of £488,430 which the bank recovered in the liquidation of the Banco Angola e Metropole is to be dealt with. It was contended by Messrs. Waterlow that this sum ought to be treated as salvage in respect of the total loss suffered by the bank in respect of the unauthorised notes. It was said that in the present action the amount to be recovered was in respect of part only of those D notes, namely, 209,718 less 16,000 notes, and that any credit to be given must be based on the same subject-matter, namely, salvage in respect of 209,718 less 16,000 notes, i.e., twelve-thirteenths of £488,430, namely, £450,860. In my view this is not the true principle applicable. Legally, Messrs. Waterlow may not be entitled to any credit in respect of this sum of £488,430, as the amount was recoverable against different parties and on a different cause of action. The bank, however, do not desire to stand upon their E strict rights, and, in my opinion, if the total amount to be recovered from Messrs. Waterlow added to the sum of £488,430 exceeds the total loss actually incurred, Messrs. Waterlow should have credit for such excess. The bank's total loss was £1,092,281 plus £6,541. Against this, credit should be given for £488,430, leaving a net loss of £610,392. This is the principle laid down by the Court of Appeal in *The Morgengry* (2), and it is that principle which, in my view, should be followed in the present case.

F I now pass to the question: What is the true measure of damage? Two points are taken on behalf of Messrs. Waterlow. They contend: (i) The loss, if any, suffered by the bank was caused in whole or in part by the voluntary action of the bank, and/or was in whole or in part a loss which could not fairly and reasonably be considered as arising naturally from Waterlow's breach of contract, and was a loss which could not reasonably be supposed to have been in contemplation of both parties at the time of the making of G the contract as the probable result of the breach. (ii) The loss suffered by the bank, if any, was merely nominal, being the present value of the liability at an undetermined and undeterminable future date, to give gold or other value for the good notes it issued in exchange for bad notes.

As to (i), the law is as follows. The leading case in English law is that of *Hadley* v. *Baxendale* (3), where it is laid down by ALDERSON, B., giving the judgment of the court H (9 Exch. at p. 354):

> "We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered arising naturally, i.e., according to the usual I course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking

> the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract."

A B

It was similarly stated by LORD BLACKBURN in the House of Lords in *Livingstone* v. *Rawyards Coal Co.* (4) (5 App. Cas. at p. 39), in these words:

> "Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."

C

There is no doubt as to the law; the real difficulty is to apply it to the peculiar facts of this case.

The first question is: "Was this loss one which could reasonably be supposed to have been in contemplation by both parties at the time of the making of the contract as to the probable result of the breach?" This rule has often been criticised on the ground that people when they make contracts do not contemplate their breach. Be that as it may, I have come to the conclusion that GREER, L.J., was right in taking the view that it would be naturally in the usual course of things, and would be within the contemplation of the parties (i) that in circumstances like those which happened in the present case, the bank would be compelled for their own protection to issue a public notice informing the holders of their notes that the only notes of which forgeries had been discovered were the Vasco da Gama issue; and (ii) that they would also be compelled in the interest of their own credit and currency to act reasonably in the matter, and (iii) that it would be reasonable to exchange any of those forged notes which were presented for payment for valid notes of an equal value. Once it is found, as it has, in my view, been rightly found in this case, that the bank acted reasonably, and it is also found that Messrs. Waterlow committed a breach of contract, the resulting consequences from such reasonable action must be damages which the bank are entitled to receive in respect of breach of contract, because they are damages fairly and reasonably to be considered as arising naturally, i.e., occurring in the usual course of things from such breach of contract, as the probable result of the breach.

D E F G

As to (ii), I now turn to the last and, in my opinion, most difficult part of the case. Was the loss suffered by the bank merely nominal, and was the only sum recoverable by them the cost of printing and paper in regard to the new issue? Upon this point WRIGHT, J., said:

> "In Portugal these notes are currency. They are the currency of Portugal. They can purchase commodities in Portugal, including gold, which after all is only a commodity like any other, though it is raised in financial affairs to a special preeminence as a convenient medium for fixing values, they can buy foreign exchanges, that is sterling or dollar exchange, they can buy any exchange in any currency which is convertible, and they do that because they have behind them the credit, that is the liability, of the Bank of Portugal."

H

GREER, L.J., states it in a similar way. He says (145 L.T. at p. 381):

I

> "Every ninety-six escudos issued by the bank in form of paper notes in exchange for the Marang notes was worth £1 in English money, because it would buy in Portugal, and by exchange all over the world, the same amount of goods as the pound sterling would buy. . . . In my judgment, the bank are entitled to say to the defendants 'By your wrong I lost a certain number of escudos worth x pounds, give them back to me in English money at the rate of exchange at the date of my loss.'"

A In the present case the bank, by reason of Messrs. Waterlow's breach of contract, had to increase their note issue by 104,859,000 escudos, and received in exchange for each banknote no value at all, but only worthless bits of paper. Upon each of the good notes so exchanged, the assets of the shareholders were diminished to the extent of the liability which the bank assumed for the good note which they had given in exchange for the worthless note. Some confusion appears to me to have arisen in this case by
B dwelling too much upon the fact that the notes were not convertible into gold. In my opinion, that fact has nothing to do with the case. In a country where there is a managed currency a note when issued by a Central Bank becomes part of the currency of the country and obtains a certain value which may for the moment be called its market value. The fact that it is not convertible into gold is reflected in the price the note fetches in the terms of any foreign exchange. We are not here considering the case
C of an unlimited right to issue notes. The essence of the right conferred on the bank of issue in this case was the ability, within limits allowed by law, to print and issue its notes as currency and for value. The notes are the currency of the country, and have the value of that currency when issued. Whatever may be the conditions imposed as to reserves and whether the currency is convertible or inconvertible, a bank of issue receives value for every note which it issues. This consideration has to be kept in view
D during the whole of the present case. It must never be forgotten that the bank was a bank of issue. The notes may be advanced as loans to the government or private persons; they may be used to buy gold or securities, to discount bills or to pay the bank's debts, and the notes may also be received from a customer of the bank in order to reduce an overdraft at the bank. In every instance the bank obtains the currency value of the notes, or may receive it, in discharge of a liability due to the bank.

E Analogies may be misleading, if not dangerous, in these peculiar and unusual circumstances. The simplest way of posing the problem is to imagine two persons coming into the bank at the same time, each of them wanting a good 500 escudos note. The first is an Englishman who wants to get some Portuguese money. He hands over to the bank five English pounds, and gets in return a 500 escudos note. The other person hands over a forged note, and also get a 500 escudos note. What is the position of the
F bank? In the first case it has obtained in exchange for the 500 escudos note five pounds in English money; in the second case it has got in exchange for the 500 escudos note a worthless forged note. It is not possible to say that in the second case the bank has suffered no damage because it could print and issue a third 500 escudos note should it so desire to do. For that note it could also have obtained value. In truth, it has lost the face value of the second note by reason of the fact that it has only got a worthless note in
G exchange. I am, however, unable to accept in its entirety the argument put forward by the bank in their reason 16, where it is stated that the bank's notes, being the currency of the country, have the same value in their hands as in those of third parties. What exactly is meant by the words "in their hands" it is difficult to appreciate. A banknote is, after all, merely a promise to pay in some form or other. Supposing the bank had had in its cellars, say, for example, 1,000 of these notes, and, owing to the
H negligence of some contractor who happened to be engaged in repairing the premises, a fire had broken out and all the new unissued notes in the bank's cellars had been burnt, it would not be possible to contend that the contractor whose negligence had caused the loss of the notes would be liable for their face value. He might in such an instance be liable for the cost of paper and printing of each note, but it is a completely different position when the notes, instead of remaining in the cellar, are rightly, as is
I found in this case in the circumstances, put into circulation by the bank. Then their value is entirely changed. Again, it is possible to conceive of cases where a person who has been deprived of a chattel by the negligence of another is entitled to recover from such other the replacement value of such chattel, but the present case is not an example of that character. Here the issue of the note and putting it into the currency of the country, which the bank were entitled to do, makes all the difference.

For these reasons, I am of opinion that the appeal of the bank succeeds, and that judgment should be entered for the bank for the sum of £610,392. The appeal of Messrs. Waterlow should be dismissed.

LORD WARRINGTON.—These are two appeals from an order of the Court of Appeal dated March 26, 1931, varying the order and judgment of Wright, J., dated Jan. 12, 1931, whereby he directed that judgment be entered for the bank for £569,421 with costs. The Court of Appeal by a majority (Greer and Slesser, L.JJ.) reduced the damages to £300,000, and unanimously dismissed a cross-appeal by the bank that this sum should be increased to £611,851. Scrutton, L.J., was of opinion that no larger sum than £8,922 was recoverable by the bank. The bank by their appeal seek to have the damages increased to £610,392 or, alternatively, to £567,040. Messrs. Waterlow, on the other hand, seek to have the damages reduced in accordance with the opinion of Scrutton, L.J. It is now admitted by Messrs. Waterlow that they are liable to the bank in damages for breach of contract, and the only question before this House is as to the damages to be awarded.

I do not propose to re-state in detail the facts already related in the opinion of the Lord Chancellor but only to give a summary sufficient to render my conclusions intelligible. The bank is incorporated under the laws of Portugal, and holds from the government an exclusive licence for the issue of banknotes as legal tender in Portugal and the adjacent islands, but this does not extend to the Portuguese colonies. At all material dates the currency of Portugal was composed solely of notes issued by the bank. They act as bankers to the government and carry on a general banking business with a head office at Lisbon and a branch in Oporto, and numerous agencies in other places. At all material dates the notes of the bank were and they still are inconvertible, that is to say they are not payable in gold but only in the currency of the State. The unit of currency is the escudo. The notes to which the present litigation relates are those of 500 escudos. It is agreed that for the purpose of assessing damages the equivalent in sterling of 500 escudos would be £5. The contract, the breach of which has occasioned the litigation, was made between the bank, of the one part, and Messrs. Waterlow, of the other part, and was dated Nov. 27, 1922. Under it and a repeat order dated Feb. 20, 1924, Messrs. Waterlow printed and delivered to the bank 600,000 notes for 500 escudos each. They are known as notes of the Vasco da Gama type, bearing as they do a portrait of Vasco da Gama on the face. These 600,000 notes as delivered were put into circulation by the bank in 1923 and 1924. In 1925 the bank and Messrs. Waterlow were made the victims of an elaborate fraud on the part of one Marang and his associates, and Messrs. Waterlow were induced, in the belief that they were acting with the approval of the bank, to print and deliver to Marang 580,000 Vasco da Gama notes. These notes were exact duplicates of the genuine notes printed under the contract, being printed from the same plates or from plates made from the same die. These notes were delivered to Marang as to 200,000 in February and March and as to 380,000 in August and September, 1925, and large numbers were put into circulation by means of a bank known as the Banco Angola e Metropole, formed by the conspirators for that purpose. It is now common ground that in printing and delivery to Marang the 580,000 notes Messrs. Waterlow committed a breach of their contract for which they are liable to the bank in damages.

There is no doubt as to the law applicable in such cases. It is sufficient to quote the well-known rules laid down in *Hadley* v. *Baxendale* (3) in the judgment of Alderson, B. (9 Exch. at p. 354):

> "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of breach of it."

Moreover, it is well settled that a voluntary act on the part of the injured party does not necessarily break the chain of causation between the wrong which occasioned the voluntary act and the damages. If the voluntary act is one which would be reasonably expected in the ordinary consequence of a breach of contract it is not a sufficient answer

A to say that the damage would not have happened but for the plaintiff's voluntary act. In the present case the introduction by reason of Messrs. Waterlow's breach of contract into the currency of Portugal of a large number of spurious notes indistinguishable from the genuine notes would, if some drastic step had not been at once taken by the bank, have had an incalculable and disastrous effect on the economic position in Portugal as well as on the reputation and credit of the bank, as the body responsible for the issue B of currency. As a consequence of the discovery, the result of investigations made at Oporto on Dec. 4 and 5, 1925, of the fact that a number of the spurious notes were in circulation, the bank on Sunday, Dec. 6, determined immediately to withdraw from circulation the whole of the Vasco da Gama notes of 500 escudos, and to have notices published in the papers of Lisbon and Oporto advising the public that the cashing of the said notes would be effected at once at the chief office of the bank and at all its branches. C Such notices were duly published on the morning of Dec. 7, and from that date onwards until the process was stopped, as hereinafter mentioned, all notes of the type in question whether genuine or spurious presented at the head office of the bank or at any branch or agency were exchanged for currency of another type.

It is for the loss occasioned to the bank by the exchange of genuine currency that the damages in this action are claimed. On this claim the following questions arise: D (i) Was the loss occasioned to the bank such a loss as in accordance with the rules above referred to could be recovered in damages for breach of the contract? (ii) If so, what is the measure of such damages? (iii) Was there any and what date as from which by reason of matters coming to the knowledge of the bank subsequently to Dec. 7 they ought as between themselves and Messrs. Waterlow to have ceased to exchange spurious notes for genuine currency and thus have minimised the loss? (iv) In what way and to what E extent ought moneys recovered from the perpetrators of the fraud to be credited to Messrs. Waterlow in reduction of damages?

The first question has been answered in the affirmative by all the judges in the courts below, and I agree with their decision. It is, in my opinion, impossible to say that, having regard to the position at the time, and the possible consequences both to Portugal and to the bank itself of the circulation of the spurious notes, the action taken by the F bank in exchanging all the notes of the type in question whether genuine or spurious for other genuine currency was not a reasonable step to take, and one which might be expected to be taken as a consequence of such a breach of contract as that in the present case.

As to the proper measure of damages there has been a difference of opinion in the courts below. The majority (GREER and SLESSER, L.JJ.) in the Court of Appeal and G WRIGHT, J., in the court of first instance, were of opinion that the proper measure of damages was the face value expressed in sterling of the genuine currency given in exchange for the spurious notes, namely, in the present case £5 per note of 500 escudos, together with the cost of printing the genuine notes so given in exchange. SCRUTTON, L.J., on the other hand was of opinion that the loss was confined to the cost of printing the new notes. This is a difficult, and, in this case, a very important, question, seeing H that in one view Messrs. Waterlow would be liable for a very large sum of money, and in the other for nothing beyond the £10,000 paid into court with their amended defence. There are no principles applicable except such as are expressed in *Hadley* v. *Baxendale* (3), nor are there any authorities which are of help. The damages are, however, damages for breach of contract, and in such cases it has to be remembered that they are exclusively measured by a loss actually incurred by the bank and capable of being I quantified in terms of money. In reaching a conclusion it is essential to bear in mind that the sole measure of damage on which the bank insisted at the trial and still insists is the face value, translated into sterling at the rate of £5 for every sum of 500 escudos issued by them in exchange for a spurious note. They have maintained throughout that in issuing genuine currency in exchange for spurious notes they must be treated as having expended so much cash without receiving any consideration in return, and, therefore, to be the poorer by the amount so expended. This is made quite clear by reasons 16 and 17 in their case. They made no attempt to prove that (except the expense of obtaining the paper and printing the notes) they incurred any other loss or damage, directly or indirectly as, for example, by the increase in the currency and the A consequent depreciation of its purchasing power, or by injury to their credit or interference in their relations with the government or otherwise. All these considerations may be set aside, and, accordingly, in explaining the views I entertain by "damages" I mean only such damages as are claimed by the bank. There may be loss or damage of another kind, but this is not in question.

The whole question, in my opinion, turns on the nature of the obligation incurred by B the issuing bank under the notes it issues. They are in effect promissory notes payable to bearer on demand. So long as they remain in the possession of the bank they are merely pieces of paper, and if, for example, they were lost or destroyed while in their possession they could be replaced by printing other notes at the cost of the paper and the printing. As soon as a note is issued it imposes an obligation on the bank to pay to the bearer on demand 500 escudos. This last is the only material obligation in the C present case. There may be two others, namely (a) to pay in gold should the notes hereafter cease to be inconvertible, and (b) to pay in some new form of currency should any such new form be introduced, but these possible obligations are contingent only and are of no importance in the present case. It is proved by the evidence of witnesses called on behalf of the bank itself that the only material obligation is satisfied by exchanging the note in question for another note of like denomination. If a judgment D were recovered against the bank it would be satisfied by delivery of currency for the amount. Where, therefore, the bank elects, as it has done in the present case, to treat the spurious notes as on the same footing as genuine notes, all it does is to accept an obligation to pay the holders in currency, that is to say, in notes. To do so all it has to do is to take so many pieces of printed paper from its existing stock or to have further notes created should the existing stock be insufficient. In either case, the loss to the E bank is, in my opinion, confined to the expense of procuring the necessary paper and of printing the necessary number of notes. Wright, J., says:

> "They [the bank] are damaged by having to assume liability on these notes without getting anything in return. I think this argument is correct, and I think these notes must be taken for this purpose at their face value, just as they would be if they had been issued by some other institution that is not a bank of issue." F

With all respect, I cannot accept the conclusion of the learned judge. It seems to me that by treating the bank on the same footing as "any other institution" he ignores the vital distinction, namely, that the obligation incurred by the bank is merely to pay in other currency which it has power to create for the purpose, whereas the institution not a bank of issue would have to procure the necessary currency by expenditure of G money or sale of goods or in some similar way or pay it out of currency already in hand. In fact, reason 16 breaks down on examination, and its corollary the 17th falls with it.

The next question, namely, at what point of time did the exchange of genuine currency for spurious notes cease to be a natural result of the breach of contract, in the view I take as to the measure of damages does not arise for decision, but, if it did, I should agree with the opinion expressed by Scrutton, L.J. He says (145 L.T. at p. H 371):

> "As he [Wright, J.] finds that the bank were justified in their action on Dec. 7 in calling in the issue and paying all notes, he must have found [namely, in arriving at the conclusion that they should have ceased on Dec. 16 to have paid all the spurious notes without distinction] that they would have been justified, when they could distinguish the forged notes, which innocent holders could not do, in refusing I to pay some forged notes, while paying others. Such an action, in my opinion, would destroy all confidence in the paper currency. . . . It [the unauthorised currency] was indistinguishable to innocent holders from genuine currency, and I cannot think the bank was bound to sacrifice innocent holders and the reputation of its national currency to protect the printers, the wrongdoers."

I think the right, as against Messrs. Waterlow, continued until Dec. 26. In the circumstances no question arises as to the sum recovered from other persons. The result is, in my opinion, that the appeal of the bank should be dismissed with costs, and that of

Messrs. Waterlow should be allowed with costs. I need hardly say that it is with great regret after anxious consideration I have arrived at the conclusion that I must differ from opinions for which I have the greatest possible respect, but it is some consolation that I do so in good company. I should also like to say that I have been much assisted by the very clear and forcible argument of Mr. Gavin Simonds in reply.

LORD ATKIN.—In this case your Lordships are, I think, agreed that, as the result of the breach of contract by Messrs. Waterlow, the Bank of Portugal issued 209,718 500 escudo notes in exchange for forged notes innocently printed by the defendants. The question is what damages can be recovered by the bank. The contention of Messrs. Waterlow is that the bank, when it issued good notes to the face value of over 100 million escudos in return for no consideration, suffered no damage at all except the cost of printing the good notes. This would have appeared to me a departure from the ordinary principles of assessing damages; but it has found favour with more than one judicial personage for whose opinions I have unfeigned respect, and was urged with much apparent zeal by eminent counsel. So obviously, it demands careful examination. The difficulty, it appears, only arises where the person issuing the notes is a bank of issue and where the obligation expressed in the note is not to pay in gold, but to pay in paper currency, i.e., other notes of the bank. In such cases it is said the bank have only parted with bits of paper and their damage is completely measured by the cost of re-printing the bits of paper. The argument strikes home at the present time where our currency is in the main a paper currency and where the Bank of England are under no liability to pay their notes in gold. I hope to satisfy your Lordships that if the Bank of England by fraud or breach of contract are induced to issue a million pounds worth of notes for nothing they are entitled to recover against the wrongdoer a million pounds in damages. The result of the present contention is sufficiently striking. If the issue of 10,000 dollars good notes by the Bank of Portugal for nothing involves them in no loss, it would seem to result that the issue of a similar amount for goods or obligations of an equivalent value would be complete gain. The bank, therefore, when it creates a good debt for 10,000 dollars by advancing that amount in notes to its customer will appear to have increased its assets by 10,000 dollars without adding to its liabilities; similarly, when with the same sum it buys a £100 gold bond or the equivalent amount of bullion. It follows that it makes no difference to the financial position of the bank whether in exchange for a good note it receives a good note or a bad note. I should have thought this result, in the language of one of your Lordships, "manifestly impossible": but rules of law have to be tested in these days, and must survive the application of first principles.

A banknote is a promissory note issued by a bank payable on demand. The English note contains the promise on the face. The Portuguese note does not, but there is competent evidence in this case that the note has the same effect. So far the banker issuing his note incurs precisely the same liability as a merchant issuing his note. If either fails to pay he is liable for the face value of the note. One bank becomes alone entitled to issue notes; and let us assume that they have become currency so that they can be tendered in discharge of a debt. The position of the bank remains the same. It is liable on its note. If its note is payable in gold then to a claim on a note the bank must pay in gold: otherwise on debts in general the bank as well as private traders will pay in currency: and as I have said on default will be liable to judgment for the face value. In any civilised state it will not be permitted to issue notes to an unlimited amount: it will, if honestly conducted, in any case determine its obligations by its possible resources: but the State will require that behind the promises to pay there stand solid resources in the form of gold and liquid securities, and will impose a positive restriction on the issue of notes beyond an amount which it considers necessary. But this has no bearing on the liability of the bank to pay the face value of a note when issued.

Now let us assume that the State alters the law by decreeing that the banknotes need no longer be paid in gold. While that decree lasts the notes are inconvertible, the currency is in the ordinary sense a paper currency. This happened in Portugal in 1891 by a moratorium directed to payment in gold which has been continued in Portugal ever since. The position has not altered. The merchant is in precisely the same position as before: he must pay in currency which will as before be notes but now inconvertible notes. If he fails to pay he can be sued for the face value of his promissory note. The bank is for the first time put in the same position as the merchant: it is bound to pay on its note: but it need only pay its note in currency, i.e., in its own notes: and, if it will not or cannot so pay, it can be sued for the face value of the note. Counsel for Messrs. Waterlow produced an analysis of the obligation of the bank in issuing inconvertible notes with which in substance I agree. It is (i) to pay in other notes; (ii) when there is a return to gold, to pay in the decree amount of gold; (iii) if other currency is decreed, to pay in that other currency. But how this helps him it is difficult to see, for on examination it will be found that the obligation of a trader on his note is precisely the same, except that (ii) will probably only be to pay in notes convertible into gold instead of paying in gold itself. Now in the case of a private trader it appears to be conceded that his loss in similar circumstances would be measured by face value. On this analysis the obligation of the bank would appear to be the same. That it meets its obligation on its note by issuing a further note seems to have no effect upon the nature or amount of the original obligation: the original obligation is met by a renewal, the bank have only gained time, not increased or decreased an obligation which would be measured just as before. They have, in fact, done exactly what the merchant has done; they have paid in currency, and their obligation is measured in the same way. If they had an unrestricted right of issuing notes their obligation would not be altered; they would still be liable to be sued on default for the face value of the note, but the effect of the unrestricted power would presumably be that the face value of the note would have a much lower exchange value than if there were a restricted power, so that the bank would either have received little value originally or the holder of the note would intermediately have suffered loss on the diminution of the note value. But, in fact, in the ordinary course of civilised government, as in Portugal, restrictions still continue.

In the present case in 1925 the issue of notes by the bank for commercial purposes was restricted to 195 million dollars of which they had issued sixty-four million dollars, leaving a power to issue of 131 million dollars. In addition, the State from time to time had authorised the bank to issue notes for State purposes supporting these notes by a borrowing from the bank secured by State marketable bonds. Restrictions as to proportions of gold and securities reserves still continued in existence so far, at any rate, as the issue for commercial purposes was concerned. Let us assume, as might well have happened, that the forged issue, instead of amounting to 100 million dollars, had amounted to 131 million dollars. If the bank had taken the same action they would have issued promissory notes to the full extent of their legal power. When sued on the notes so issued in exchange for the forged notes they could not have issued their notes in payment; they could have been sued for 131 million dollars, and judgment must have gone against them for that sum. Of course, this never would have been permitted by the State, but ex post facto relief has nothing to do with the question of legal obligation. I, therefore, find the position to be that the bank, by issuing its note, like the trader issues its promise to pay a fixed sum; issues a bit of its credit to that amount; like the trader, it is bound to pay the face value in currency; like the trader, it is liable on default to judgment for the face value exigible out of its assets; and, like the trader, if it is compelled by the wrong of another to incur that liability, its damages are measured by the liability it has incurred. It may be noted that this liability to pay the face value is not in the least affected, as has been suggested, by the question of convertibility. Whether the obligation is to pay in gold or in paper, the liability remains the same to pay 500 escudos, and a judgment on the note would be for precisely the same sum. The exchange value and the face value are quite different matters; 500 escudos in gold will exchange for many more goods and much more foreign currency than 500 escudos in paper; as Messrs. Waterlow would have found to their cost, if they had printed these notes when they were convertible into gold. The damages then claimed would have been twenty million pounds sterling instead of a million.

Another way of illustrating the position seems to be this. If a person is wrongfully induced to part with a valuable thing, whether it be goods or choses in action, his

A measure of damage is the value of the thing at the time he parted with it. The cost of replacement does not enter into the measure of damage at all. If a man is fraudulently induced to part with 500 standards of timber he recovers the value at the time; it is quite immaterial that he could have replaced the timber, say, from the Russian market, at a small portion of the value. If he manufactures for 1d. articles which can sell for 6d., the measure of damages against the wrongdoer is 6d., not 1d. So if he was by B fraud induced to promise to deliver 500 of the 6d. articles so that the contract could be enforced by an innocent holder of the contract it appears to me that on well-established authority the damages would be £12 10s. not £2 1s. 8d. This means that whether he parts with goods or parts with an obligation, the measure of damages is the market value of what he parts with, which means what it will exchange for; and this necessarily means in the case of an obligation expressed in currency of the country the face value C of the obligation. If he incurs an obligation to pay pounds sterling, you do not inquire at what cost he will acquire the pounds sterling necessary to fulfil the obligation; he may get them by getting someone to produce an article at much less cost which he can sell for the equivalent sterling; he may get them from a benevolent uncle or from someone who for a small premium has undertaken to make good his loss. Whatever the liability incurred, the measure of damages is market value, which, in the case of an D obligation to pay currency is face value.

Some confusion has been introduced into the discussion by considering the question as though the bank had "lost" the banknotes. If the notes had been "lost" before the bank had made them the bank's contractual obligation by delivery the proposition of the defendants would be correct. The notes in such a case are nothing but a collection of bill stamps completed but not delivered; to destroy them would but have the same E result as burning a man's cheque-book, whether the cheques were filled up and signed or not. I doubt myself whether reason 16 of the bank's case ever meant to contend anything so unsound as is suggested; it was probably meant to be read together with the rest of the reasons. But I am quite satisfied that such a fallacy never entered into the head of such an experienced lawyer as WRIGHT, J. Throughout his judgment he is speaking of the liability of the bank on the notes, and he finishes his judgment on this F point by these words:

> "They say they were damaged by having to assume liability on these notes without getting anything in return. I think this argument is correct, and I think these notes must be taken for this purpose at their face value just as they would be if they had been issued by some other institution that is not a bank of issue."

G I have already stated my grounds for believing this statement to be correct. For my part I cannot see the way to decide this case for Messrs. Waterlow without reversing a number of authorities which have governed our commercial law as I understand it from earliest times.

There is one final and conclusive proof of the fallacy of the defendants' contention to which I have not yet heard any answer. By issuing a note the bank provide the H holder of it with a piece of currency which he can bring to the bank next day and compel the bank to receive in discharge of his overdraft or in payment under a contract to buy securities or bullion. By issuing 100 million escudos in notes they provide the public with the means of coming to the bank and depriving it of 100 millions' worth of assets in debts, securities and gold. I say debts, for even Messrs. Waterlow's contention does not suggest that a debt payable in paper currency is worth nothing, or that if the I debtor is solvent it is not worth its face value. If the bank releases a debt of 500 escudos it loses 500 escudos. If it parts with 500 escudos' worth of gold it loses 500 escudos: but if it issues for nothing a 500 escudo note to-day by the return of which to-morrow the debt of 500 escudos is discharged or the 500 escudos worth of gold is bought and paid for it loses nothing. I refuse to proclaim to business men in this country or abroad that our law is so unreasonable. It is, with respect, no answer to say that when the note is returned it can be used again for value. In fact, strictly speaking, it is not available: the note, when returned, is discharged, and the re-issue of it creates a fresh obligation: but the answer to that suggestion is that notes issued for value can also, when returned, be re-issued; so that the contention again amounts to this, that − note + value = − note, a proposition which I do not wish to qualify with an epithet.

On the general question as to the number of notes in respect of which damages are to be claimed which turns upon the day upon which it could be said that the bank no longer reasonably could continue to pay good notes for bad, I agree entirely with the view expressed by Scrutton, L.J. I put the question in that form, for it was conceded at the Bar that, at any rate, there were some days at the beginning in which the bank's action was reasonable and was the natural result of the defendants' default. Without such a concession I think the views expressed by all the judges below correct on this point. The majority of the Court of Appeal limited the damages by fixing on Dec. 10 as the day upon which the bank could have obtained full information if they had acted reasonably. I cannot agree with this. It seems to me disproved by the fact that Messrs. Waterlow, though on Dec. 9 they had reason to suspect the Marang transaction, did not in fact give the necessary information on that day or the 10th, though they were in fact writing to the bank on that day; in fact, they never imparted the relevant information at all except in a deposition to the police magistrate. I also think that the trial judge, with whose admirable judgment I agree on almost every other point, took too early a date for closing the transaction. It seems to me that once the exchange began it had to continue until the end of the period fixed by the bank in conjunction with the government, which is Dec. 26. On the whole, I think that notes exchanged after that date must be treated as benevolences by the bank.

It only remains to consider how far the damages are to be reduced by the sum recovered from the actual conspirators, a sum of about £400,000. Wright, J., has apportioned this sum over the total loss of the bank, thus reducing proportionately so much of the total loss as has been recovered from Messrs. Waterlow. This seems to me to be incorrect in principle. The bank's claim against Messrs. Waterlow would be, say, £1,000,000, but they cannot recover more from the defendants than their net total loss. This is to be ascertained by taking the total amount of their loss, not merely that part of it which is recoverable from Messrs. Waterlow, and deducting from the total the amount recovered elsewhere. This is the principle laid down in *The Morgengry* (2), where a ship was injured by the negligence of both tug and tow. The owners recovered judgment for the full amount of the damage from the tow, but only obtained a sum of £850 from the proceeds of the judgment: they then proceeded against the tug, and it was found that both were to blame, and, therefore, the plaintiffs were only entitled to half their damage, about £2,000. But it was held that the defendant was not entitled to credit for either the whole or a proportionate part of the £850, for the two sums together did not make up the total loss. The decision seems to fit this case exactly, and I think is rightly decided. The result is that the bank's total loss on 209,718 false escudo notes paid by the bank at the agreed rate of exchange is £1,092,281; to this must be added the cost of the genuine notes printed by Waterlows and rendered valueless, £6,541–£1,098,822. The total amount recovered from the conspirators is agreed at £488,430. The bank's net loss is therefore, £610,392. The actual notes paid up to Dec. 26 exceed 200,000, so that the total claim against the defendants without any credit far exceeds £610,392. The result is, after being given credit against the total loss suffered by the bank, the plaintiffs are entitled to judgment for £610,392. In my opinion, therefore, the appeal of the bank should be allowed, and the judgment of the Court of Appeal should be set aside, the judgment directed by Wright, J., to be entered for the plaintiffs should be varied by increasing the sum there mentioned to £610,392, and the plaintiffs should have the costs here and in both courts below. The appeal of the defendants should be dismissed with costs here and in the Court of Appeal.

LORD RUSSELL.—Both in the Court of Appeal and in this House, Waterlows admitted that their contract with the Bank of Portugal contained an implied term that they would not print or deliver Bank of Portugal banknotes without the authority of that bank, that in printing and delivering the notes to Marang they had committed a breach of that term, and that they were liable to the bank in damages for that breach. The case was still further narrowed here, because the bank based their claim to damages

A solely upon breach of contract. The arguments related only to the amount of such damages; other matters which have at one time figured in the case, such as conversion, negligence and passing off, may be disregarded. The case divides itself into two very distinct branches, namely (i) consideration of the question whether the bank have proved that Waterlow's breach of contract has caused them damage beyond a certain sum of £8,922; and (ii) consideration of the conduct of the bank in treating Marang notes as B if they were authorised notes, particularly in relation to the question whether any date can be fixed on or after which the bank could no longer so act at the expense of Waterlow's. The sum of £8,922 above mentioned represents the cost of printing (a) the genuine notes which were withdrawn from circulation, and (b) the notes which were given in exchange for Marang notes. This damage, it is admitted, the bank suffered. To that extent damage, as a result of Waterlows' breach of contract, was proved.

C I will start with the first branch, which raises a problem both novel and difficult. The bank's claim is simply this: That having given 209,718 good notes in exchange for mere bits of paper, they have lost the face value of each note so given in exchange. The loss of 500 escudos is, according to the bank, the inevitable consequence of the gift of the note. The language in which this loss is expressed varies at times. In para. 31 of the bank's Case here it is stated that: "The bank claim the value of the escudos which D they had to part with for nothing." In para. 39 they say:

> "The bank paid out 104,859,000 escudos in exchange for unauthorised notes. At . . . the then rate of exchange, the sterling equivalent of this sum is £1,092,281."

They treat the matter as though, being the owners of assets worth over a million sterling, they had parted with those assets (or had incurred an immediate liability to part with E assets of that value), receiving nothing in return. Therefore they claim that they did in December, 1925, suffer, and have now suffered, damage to that amount.

WRIGHT, J., accepted this view. As I read his judgment he treated banknotes while in the hands of the bank as of the same value as in the hands of any other person, and held that the bank therefore lost that value when they issued a note in exchange for a Marang note. The pith of his judgment upon this point is contained in five lines, in F which he says:

> "They say they are damaged by having to assume liability on those notes without getting anything in return. I think this argument is correct, and I think these notes must be taken for this purpose at their face value just as they would be if they had been issued by some other institution that is not a bank of issue."

Those five lines are the basis of his judgment on this head, and are re-echoed in the G sixteenth reason of the bank's Case here, namely,

> "Because the bank's notes being the currency of the country have the same value in their hands as in those of third parties."

GREER, L.J., says:

> "Every time they issued good notes to the value of 500 escudos in place of worthless notes, they lost the market value of 500 escudos."

H In another passage he phrases it thus:

> "In my judgment the bank are entitled to say to the defendants, 'By your wrong I lost a certain number of escudos worth x pounds, give them back to me in English money at the rate of exchange at the date of my loss.'"

I And the lord justice makes this additional statement:

> "If my purse containing £5 is stolen I do not recoup my loss because I have an unusual balance in my bank out of which I can draw by cheque another £5. The damage I have suffered is still £5, not merely the 2d. I have to pay for the cheque form."

Here again is reason No. 16.

SLESSER, L.J., seems to rest his judgment on the question whether the bank had established damage beyond cost of printing upon a twofold basis. His language is as follows:

> "Now in the case of the issue to cover the exchange of the Marang notes, the bank received nothing in respect of this issue. To all intents and purposes it gave away 209,000 odd notes, worth on the exchange about £5 each, receiving nothing in exchange; and I cannot see in these circumstances—the notes of Portugal being currency within that country and exchangeable as we are told at ninety-six escudos to the pound in London—why the bank cannot say that by being compelled to issue this currency for no value, and thus proportionately to deplete their further power to issue, they have suffered damage to the extent of this value of the notes."

All three judgments are founded upon this view—that the bank in December, 1925, suffered damage to the extent of over a million pounds sterling, by having in that month paid away 104,859,000 escudos. If this view correctly represents the position, then the bank would, on the giving of each good note in exchange for a bad note, become in fact poorer by the face value of the good note, and there could be no doubt that damage to that amount had been sustained by the bank. But, in my opinion, this view does not represent the facts, but overlooks the exceptional situation which arises when a bank of issue issues notes constituting an inconvertible currency.

It is necessary to state a few facts as they existed in December, 1925, in order to appreciate the situation at that time. The bank were a Portuguese joint stock company, which acted as bankers to the Portuguese government, and which ever since 1887 had enjoyed an exclusive licence to issue their own notes as the only legal currency in Portugal. The capital of the bank was 13,500,000 escudos in fully paid shares with limited liability. There were two species of issue and of notes in circulation, namely, one destined for the banking operations of the bank, the other applied as loans to the Treasury. The limit of the right of issue for banking operations was between 195 and 196 million escudos; notes for this purpose had in fact been issued to an amount between sixty-four and sixty-five million escudos, leaving an unexhausted power of issue to an amount of about 131 million escudos. Notes issued on government account amounted to 1,640 million escudos, so that the total issue of authorised notes amounted in December, 1925, to a face value of 1,704 million escudos or thereabouts. The loans to the government bore interest only at 1 per cent. per annum of which five-eighths fell to a sinking fund. None of the bank's notes were payable or redeemable in gold or silver. A period of inconvertibility had been established in 1891, and was still continuing with no likelihood of its ever being determined. The only liability of the bank, so far as concerns paying or redeeming a note when presented at the bank, was to give in exchange for it another note or notes of equivalent face value. Each note when issued by the bank became in the hands of the holder legal tender, and any such note if paid to the bank by a debtor to the bank must be accepted by the bank in discharge pro tanto of the debt.

That being the condition of affairs, when the bank gave a good unissued note in exchange for a Marang note, did they become poorer to the amount of 500 escudos either by parting with 500 escudos or by incurring an immediate liability to part with 500 escudos? That appears to me to be the crucial question: and the answer seems to me to depend upon a correct appreciation of what happened when the bank issued the good note to the holder of a Marang note, and a correct statement of the obligations which the bank assumed by the issue of that good note. As already pointed out, Wright, J., and Greer and Slesser, L.JJ., were of opinion that the bank, in issuing the note, were parting with 500 escudos. It is true that Wright, J., also refers to the bank assuming a liability in issuing the note, but I think he bases his judgment on the former view, for he expressly treats the case as if it were just the same as a case where a bank has been deprived of a note issued by some other authority. In my opinion, the bank parted with no escudos. They issued something which in the hands of the recipient was currency of Portugal and legal tender for payment of indebtedness up to 500 escudos the form of that currency being, not any metal or other substance of value, but a piece of paper by virtue of which an obligation was incurred by the bank to the holder thereof. While that something was in the possession of the bank it could have no value assigned to it, for an obligation by one to himself is nothing worth. The value

A attaches to the note when it is issued to the holder, but the value does not quit the bank, and leave the bank so much poorer. The value attaches to the note when the bank issue it, and thereby undertake an obligation to the holder. The bank are affected, not by the parting with anything which they possessed, but by the incurring of an obligation.

That, in my opinion, is an accurate statement, and a complete statement of what B happened when the bank issued a good note to the holder of a Marang note. If that be so, then it must follow that the judgments below cannot stand, in so far as they are based upon the view that the bank parted with or lost escudos to the amount of the face value of the good notes which were given in exchange for Marang notes. In truth, this view was the outcome of the erroneous belief that there was no distinction to be drawn between a note of the Bank of Portugal in the possession of that bank, and the same note C in the possession of another bank or individual—a belief which in terms emerges in the judgments of WRIGHT, J., and GREER, L.J., and which underlies the bank's sixteenth reason. This belief is clearly ill-founded. This was, indeed, admitted in your Lordships' House; and the bank's argument proceeded upon the footing that by reason of the obligation incurred by the bank in issuing a good note and of the fact that they had received nothing in return, they had necessarily suffered damage to the extent of the D face value of the note. I say "necessarily" for the bank made no attempt to prove this by evidence. It must, if the bank are to succeed, be a case of the thing speaking for itself. I have to deal with this in some little detail, because it appears to me that with the disappearance of reason 16 there disappeared also the bank's only basis for claiming the face value of the notes, without giving affirmative evidence of the damage which they had sustained.

E What then was the obligation which the bank incurred? Leading counsel for Messrs. Waterlow, in the course of an admirable argument which leaves me much in his debt, defined this obligation with, I think, complete accuracy. It is threefold, namely (i) To give in exchange a note or notes of equivalent face value each carrying a similar obligation. (ii) If and when it is hereafter decreed that the notes are to be redeemed in gold, then on demand such quantity of gold as may be decreed. (iii) If and when it is here-F after decreed that some new form of currency shall be legal tender, and that the bank's notes are to be paid in such currency, then on demand to pay the proper amount of such currency. The problem then is to quantify those obligations in terms of money. What is the sum which will compensate the bank for being forced to undertake those obligations? How much worse off is the bank likely to be by having to fulfil them? To say that by having to fulfil them the bank will necessarily be worse off by the face G value of each note given in exchange for a Marang note seems to me, with all respect to those who think otherwise, manifestly impossible. Such a conclusion should surely be based upon some evidence. Could any evidence hope to establish it? For myself I can see no such possibility. The first obligation carries no loss to the bank except the cost of providing the new note. The second obligation is so far removed from actuality that both the courts below treat it as a nominal matter. The third obligation is purely H contingent and even hypothetical. But let me again remind the House that even if some appreciable degree of damage could arise to the bank by the assumption of this threefold obligation, it was incumbent on the bank to prove it. This task they never attempted.

It was, however, argued that damage had accrued to the bank in other ways by reason of their having been forced to issue notes, getting nothing in return. It was said that I the bank had assumed an obligation, getting nothing in return. That is true. It was then said that the value of that obligation was the value of the note in the market, namely, 500 escudos. The same argument assumed another form, namely, that the sum in sterling which the bank claimed to recover from Waterlows was the exact amount which it would have cost Waterlows at the relevant date to purchase 209,718 notes in order that the bank's liability thereon might be cancelled. When the value of the obligation is alleged to be the value of the note, that can only mean that that is the value to the note-holder of the fulfilment by the bank of their obligation. It by no means follows that 500 escudos represents the cost to the bank of that fulfilment. But in assessing damages for a breach of contract the question is not what sum will it cost the defendant to repair his breach, but what loss has the plaintiff sustained by reason of the defendant's breach. In many cases, possibly in most cases, the answer to each question would be the same sum. It would be the same here if reason No. 16 were true, and if the bank had really parted with 500 escudos with each note issued in exchange for a Marang note. Further, it was argued that in respect of each note so issued the bank had lost the consideration which they would have received if they had issued the note for the purposes of their banking business. There is no ground for assuming that all or indeed any of the notes would have been issued for this purpose rather than for government purposes. Assuming, however, this fact in the bank's favour, this argument as it appears to me adds nothing. It only means that the bank have assumed a liability without receiving any consideration. The true question still remains; what damage have they suffered by assuming the liability which each issue involves?

Another argument centred in the allegation that each note issued in exchange for a Marang note, being legal currency, could be applied by the holder and must be accepted by the bank in payment of a debt due to the bank, although at the time of its issue nothing had been received by the bank. True; but this consideration will not per se justify the view that the bank must necessarily be worse off by the face value of every note so issued; for who can say that all or any or how many notes so issued, will be so applied? The bank are affected once and for all by the fact, and only by the fact, that at the moment of issue of the note in exchange for the Marang note they assumed the threefold obligation described above; and we come back always to the same question: What sum represents the damage suffered by the bank in December, 1925, when they assumed that obligation? Finally, it was urged that if and when the bank went into liquidation, and the assets of the bank were realised and applied in payment of their creditors, the increased liability assumed in December, 1925, would necessarily occasion a diminution of the surplus (if any) available for the shareholders. This, indeed, was the argument of Dr. Ulrich in the witness-box. Few events are less likely to happen; but if this event ever did happen as described, and the creditors were paid in full, the shareholders would not necessarily suffer a loss. For, according to one theory, with the increase of the number of escudos in circulation there follows an automatic decrease in the value of escudos and an automatic increase in the value of assets measured in terms of escudos. But though this argument might be advanced in support of a claim to some damage beyond the cost of printing, it appears to me to be of no assistance towards establishing the bank's proposition that the measure of their present damages must be the face value of the notes. When all is said and done the position is this. The bank make no claim based on curtailment of their powers of issue, or based on loss of profitable business. They make no claim for damages resulting from the introduction of 209,718 Marang notes into the existing currency of 1,704 million escudos. They make one claim only, namely, that every time they issued a good note in exchange for a Marang note they suffered damage to the extent of 500 escudos. In support of that claim they offered no evidence; they pinned their faith to the proposition contained in reason No. 16. When that is shown to be false, nothing remains to support their claim.

One of your Lordships in his speech has, in effect, accused those of us who differ from him in this case, of upsetting a number of authorities governing our commercial law. Personally, I am unconscious of any such assault upon authority. I am only conscious of deciding that the bank have not proved that they have suffered the enormous damages which they claim to recover from Waterlows. I confess, however, that I derive some consolation from the knowledge that, in this alleged act of violence I am abetted by one whose pre-eminence as a commercial lawyer is both well established and long established. Upon this part of the case I am in agreement with the view expressed by Scrutton, L.J., namely, that the judgment of Wright, J., should be set aside and judgment entered for the bank for the sum of £8,922. I would, accordingly, allow the appeal of Waterlows and dismiss the bank's appeal. A majority of your Lordships, however, think otherwise and are of opinion that the bank have proved that in issuing a good note in exchange for a Marang note they suffered immediate damage to the amount of 500 escudos. Waterlows upon that footing are primâ facie liable to the bank

A in the sum of 104,859,000 escudos or (converted into sterling at the appropriate rate and date) £1,092,281. This, indeed, would appear to be something in the nature of a windfall for the bank; for the introduction into a total issue of 1,704 million escudos of less than 105 million bastard escudos will have resulted in the bank recovering a sum amounting to more than seven times their paid-up share capital.

There remains the question whether in the circumstances of this case a date can be B fixed by reference to which the bank were not entitled to charge Waterlows with the damage sustained by reason of the exchange of good notes for Marang notes subsequently thereto. WRIGHT, J., fixed such a date as Dec. 16, 1925. GREER and SLESSER, L.JJ., fixed it as Dec. 9, 1925. SCRUTTON, L.J., fixed it as Dec. 26, 1925, being the date which by the bank's public notice, issued in concert with the government, was fixed as the last day on which Vasco da Gama 500 escudo notes would be exchanged. Upon this part C of the case I do not intend to trouble the House. At this point my dissent comes to an end, and we all find ourselves in agreement with SCRUTTON, L.J.

The circumstances of this case are very exceptional. The forged notes only fail to be real because their printing was unauthorised. They were printed from the bank's own plates. Long before there was any possibility of detection they had been circulating in large quantities. Numbers of them may have obtained the status of validity D by having been received and re-issued by the bank and its numerous branches. There was no possibility of ascertaining which Marang notes had in this way acquired enforceable rights. This feature of re-issue strikes me as being of overriding importance. In these circumstances I am of opinion that it cannot be effectively contended either that the bank should not (down to and including Dec. 26, 1925) have honoured all Marang notes, or that such damages as flowed from that course of action are not damages which E fall within the test of *Hadley* v. *Baxendale* (3) and for which Waterlows are liable.

LORD MACMILLAN.—There is already on record, in the admirable judgment of WRIGHT, J., an adequate account of the fraud perpetrated by Marang and his fellow conspirators on Messrs. Waterlow & Co. and the Bank of Portugal. It is, therefore, unnecessary to detain your Lordships by recounting afresh the dramatic circumstances F of a crime for which in the ingenuity and audacity of its conception and execution it would be difficult to find a parallel. The present appeals are concerned with the civil consequences of that crime, and, in particular, with the estimation and attribution of the loss which it has occasioned. As regards Messrs. Waterlow & Sons, the result of the fraud practised upon them was to cause them, without the authority of the bank, to print 580,000 Bank of Portugal notes of 500 escudos each of the Vasco da Gama type G from the plates which were in their possession as the bank's printers, and to place these unauthorised notes at the disposal of the conspirators. As regards the bank, the result of the fraud was the debasing of the currency of Portugal, for the validity of which the bank as the central bank of issue of the country was responsible, by the introduction into it by the conspirators of a large number of these spurious notes. It was conceded by Messrs. Waterlow & Sons that it was an implied term of the contractual relationship H subsisting between the bank and themselves that they should not print notes from the plates in their possession except on the direct orders of the bank. As they, in fact, printed and delivered 580,000 notes to the conspirators without any order from the bank, there can be no question, and it was, indeed, frankly admitted by Messrs. Waterlow & Sons that their action in so doing constituted a breach of their duty to the bank. For any loss attributable in law to this breach of duty which the bank can prove that I it has suffered Messrs. Waterlow & Sons admit liability. The debate at your Lordships' Bar consequently centred round the problem: What loss for which Messrs. Waterlow & Sons are legally responsible has the Bank of Portugal sustained by reason of the unauthorised printing and introduction into the currency of Portugal of the spurious notes in question?

Now, it was admitted that the bank, on discovering that a large number of spurious notes had been surreptitiously introduced into the currency of Portugal, was not only entitled, but was bound in its own and the public interest, to adopt remedial measures for the protection of the currency. The step which it took was to publish at once a notice intimating that it had resolved to withdraw from circulation the entire vitiated issue of 500 escudos Vasco da Gama notes in the hands of the public, and on their presentation at the head office or branches of the bank to give other notes in exchange for them. In pursuance of this notification the bank honoured all the 500 escudos Vasco da Gama notes which were presented to it for exchange, spurious and genuine alike. That the withdrawal of the whole issue was a reasonable, and, indeed, the only practicable, step for the bank to take in order to remedy the situation which had arisen was hardly contested by Messrs. Waterlow & Sons. They directed their criticism rather to the way in which the bank carried out its policy. In the first place, they argued that the bank acted precipitately and that if it had delayed the announcement of the withdrawal of the notes for a short time the means of discriminating between the spurious and the genuine notes, which admittedly the bank did not at first possess, would have been available to it and it could have refused to honour the notes ascertained to be spurious. In the next place, they argued that if the bank had at first no alternative but to honour spurious and genuine notes alike by reason of its inability to distinguish between them it should have ceased to honour the spurious notes whenever it had acquired, or could have acquired, the means of discrimination. Neither of these criticisms of the bank's action is, in my opinion, warranted. The bank, in my view, was justified in taking immediate action when it did, for the fact of the existence in the currency of a large number of spurious notes became a matter of public knowledge almost simultaneously with its discovery by the bank, and if a panic was to be averted it was essential to take action at once. I equally think that, having properly announced the withdrawal of the notes and its intention to honour all such notes in the hands of the public, it was not possible for the bank to alter its policy until a reasonable time had been given to the public to effect the exchange. To have honoured the spurious notes so long as it could not tell them from the genuine notes, and then to cease to honour them when it acquired or might have acquired the means of discrimination, would have created a second panic, and such a course of conduct on the part of the bank would have been grossly unfair. If the only way to avoid a panic was to honour good and bad notes alike, as I think in the circumstances it was, the bank's ability to distinguish between them becomes an irrelevant consideration. Moreover, the bank was quite unable to say with regard to any particular spurious note presented to it whether it had not itself unwittingly re-issued it into circulation and so become responsible for it.

I confess I am not disposed to regard with much sympathy the criticism which Messrs. Waterlow & Sons have directed at the bank's action. Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken. On this part of the case I find myself in agreement with the reasoning of SCRUTTON, L.J. In my opinion, the action of the bank in honouring all notes of the type in question, genuine and spurious alike, between Dec. 7 and Dec. 26, 1925, was reasonable and justifiable in the circumstances, and Messrs. Waterlow & Sons ought to be held responsible for whatever loss was occasioned to the bank by the adoption of that policy. I have taken Dec. 26 as the limiting date, for that was the date which the bank itself fixed and I think that it was proper to specify a time-limit for the presentation and exchange of the notes. In so far as the bank voluntarily continued to honour notes presented after Dec. 26 I am of opinion that it should not be allowed to lay the cost of doing so to the charge of Messrs. Waterlow & Sons.

The problem thus now narrows itself to the ascertainment of the loss which the bank incurred by reason of its having honoured spurious 500 escudo notes of the Vasco da

A Gama type between Dec. 7 and Dec. 26, 1925. In all 799,190 of the notes, including both the genuine and the spurious ones, were withdrawn from circulation. This figure includes those withdrawn after Dec. 26. Of the 799,190 notes it has been ascertained that 209,718 or 26·241 per cent. were spurious. Up to Dec. 26 the total number withdrawn was 791,533. If the percentage of 26·241 be applied to this figure the result is that between Dec. 7 and Dec. 25, 207,706 may be taken as the number of spurious notes
B which the bank honoured between these dates. Consequently, the loss which the bank is entitled to attribute to Messrs. Waterlow & Sons' breach of contract is the loss which it incurred by issuing good notes in exchange for 207,706 spurious notes. That is the measure in law of the liability of Messrs. Waterlow & Sons to the bank.

The problem of assessing this loss necessitates an excursion into the controversial region of banking finance. What the bank actually did was to give good and valid
C notes in exchange for entirely worthless notes. What loss did this occasion to the bank? On the one hand, it is submitted that all that the bank lost was the negligible cost in paper and printing of the good notes which it gave in exchange for the spurious notes. On the other hand, it is submitted that the bank lost the full face value of these good notes so given in exchange. Your Lordships were presented with a choice between these two extremes. No possible middle course was suggested. Which is right? If
D neither were held to be right, the action would have to be dismissed, for neither evidence nor argument was adduced in support of any alternative other than the two I have stated.

The argument which was presented with admirable lucidity and much cogency by leading counsel for Messrs. Waterlow & Sons, and which prevailed with SCRUTTON, L.J., in the Court of Appeal, and has also prevailed with two of your Lordships, is certainly
E attractive. The Bank of Portugal, so runs the argument, is a bank of issue, that is to say, it can create and issue notes at its discretion up to the maximum which the law of Portugal, embodied in appropriate ordinances, permits. It costs the bank nothing to create and issue its notes beyond the cost of the paper and printing. True, when the bank issues one of its notes it incurs an obligation to the holder of it. But, inasmuch as the paper currency of Portugal is not convertible, or, in other words, does not entitle
F the holder to claim payment of its face value from the bank in gold at a fixed rate, the only obligation which the bank incurs when it issues a note is to give on demand another note in exchange for it. Thus, the bank can always honour its obligation to the holders of its notes at the trivial cost of printing new notes. A promissory note which is perpetually renewable has theoretically no value because it is never payable. The bank has consequently only sacrificed some stationery. In my opinion, this argument is
G fallacious. It overlooks a cardinal fact that a note when issued by the Bank of Portugal becomes by the mere fact of its issue legal tender for the sum which it bears on its face. The issued note represents so much purchasing power in terms of commodities. It can be used by the holder of it to purchase at current prices any commodity in the market, including gold and securities. It can equally be used by the bank to purchase commodities, including gold and securities, or to discharge debts due by it. It must be
H accepted by the bank in discharge of debts due to it. All this is quite irrespective of the convertibility of the note. With all respect to the contrary view, it is, in my opinion, quite an irrelevant circumstance for the present purpose that the holder of a Bank of Portugal note is not entitled to demand for it from the bank a fixed amount of gold. Gold, after all, is only a medium of exchange. Its special importance as such arises from its universal acceptability and the stability of its value. A bank of issue which
I undertakes to pay its notes in gold undertakes to give in exchange for them a commodity of universally recognised value, and, therefore, a paper currency backed by gold possesses a high value in exchange; it is in effect as good as gold. On the other hand, a paper currency which the bank issuing it does not undertake to pay in gold has necessarily a lower value in exchange; its purchasing power is not measurable in terms of a universally accepted standard, but depends on the credit of the issuing bank. In the present case the low value in exchange of the 500 escudos note of the Bank of Portugal reflects its inconvertibility; its purchasing power is correspondingly diminished. The bank gets less value for the notes which it issued than it would get if they were

convertible in gold. In the course of the debate counsel for Messrs. Waterlow, in answer to a question from me, admitted that, if the notes of the bank had been payable in gold, the liability of his clients would have been measurable in terms of their face value. This admission, in my view, was really inconsistent with his argument which, whether it be well founded or not, seems to me to be unaffected by the convertibility or inconvertibility of the notes. Whether its notes are convertible or not a bank of issue in issuing them incurs only the cost of paper and printing; the difference consists in the purchasing power which they represent according as they are the equivalent of so much gold, i.e., of a universally acceptable medium of exchange, or only of so much of the bank's credit, a particular medium of exchange whose value may vary between being as good as gold or as worthless as dross. If the notes of the Bank of Portugal had been convertible, the liability of Messrs. Waterlow & Sons would have been for the value of convertible notes, i.e., for notes of a higher exchange value, instead of for the value of inconvertible notes, i.e., for notes of a lower exchange value.

Much stress was laid by Messrs. Waterlow & Sons on the fact that in the bank's own hands its notes were mere chattels possessing only the value of the paper and printing and that if by a fire in its premises its whole stock of notes were burnt it would lose no more than their chattel value, whereas if the bank's notes were destroyed by fire while in the possession of a member of the public a loss represented by their face value would be incurred. That is true, but the argument disregards again the value of the note-issuing power of the bank which enables it to confer on the paper which it issues the quality of legal tender, the quality of possessing purchasing power to the amount indicated on its face. The bank only issues notes in exchange for value, and the value of its notes in turn reflects the value which it receives in exchange for them. Herein lies the answer to the point advanced on behalf of Messrs. Waterlow & Sons that, inasmuch as the bank issues the bulk of its notes on the call of the government on unremunerative terms, it cannot be said that the bank, if it had itself issued the spurious notes, would necessarily have received full value for them; they might have been included in an unremunerative issue to the government. The answer, it seems to me, is that the circumstance that a large number of its notes are issued to the government in exchange for government paper on unremunerative terms has for its result that the assets on which the paper currency of Portugal is based are by so much the less valuable as a basis of credit, and that the currency has a correspondingly less value in exchange. Messrs. Waterlow & Sons get the benefit in the depreciated value of the escudos they have to pay.

It remains to notice an ingenious argument that the only effect of the increase of the currency of Portugal by the introduction of the spurious notes was to diminish the value of each unit of the currency and so to increase correspondingly the value in terms of that currency of all the assets in the country. Thus, any loss occasioned to the bank by the introduction of the spurious notes would be compensated by an equivalent appreciation of its assets. This is said to be the result of what is known as the quantity theory of money. I am not concerned to discuss the validity of this theory. I should doubt if it is applicable in the case of a surreptitious dose of excess notes and where, as here, the excess notes, as soon as their existence was known, were at once withdrawn, but in any case it is sufficient for the present purpose to point out that there is no evidence of any depreciation of the currency having occurred in consequence of the introduction of the spurious notes and no evidence of the bank having been compensated for issuing gratuitously over 200,000 of its notes by an equivalent appreciation of its assets. This argument, it may be remarked, would appear to be equally applicable in the case of a convertible currency.

On the whole matter, accordingly, I reach the conclusion that the bank, being compelled to issue for nothing notes for which if it had issued them in ordinary course it would have received value corresponding to the purchasing power of the number of escudos which they represented, has suffered loss to the extent of the face value of these notes.

I now proceed to work out the practical result. The spurious notes honoured by the bank between Dec. 7 and 26 amounted to 207,706, which, at 500 escudos each, gives a total of 103,853,000 escudos, equivalent, at ninety-six escudos to the pound sterling, being the agreed current rate of exchange at the time, to £1,081,802. To this must be added £6,541, being the cost of the genuine notes rendered useless by their withdrawal from circulation, bringing out the total liability of Messrs. Waterlow & Sons at £1,088,343. The bank agreed that a claim of £2,381 which it had originally made for the cost of the good notes given in exchange for the spurious ones, and which WRIGHT, J., took into account, could not receive effect if the bank was awarded the value of the spurious notes. For the sum of £1,088,343 the bank would, accordingly, be entitled to judgment were it not for the fact that it has already received from the liquidators of the Banco Angola e Metropole, the organisation set up by the conspirators for the purpose of utilising the spurious notes, a sum equivalent to £413,430, and have also estimated that they will receive from this source a further sum of £75,000, making in all £488,430. A question has been raised as to the manner in which credit should be given for this sum. There are various ways in which it may be treated: (i) it may simply be deducted from the sum of £1,088,343 for which Messrs. Waterlow & Sons are liable, leaving £599,913 as the sum for which judgment should be pronounced; (ii) inasmuch as the bank's total loss (apart from the cost of printing notes) amounted to £1,092,281, being the sterling equivalent of 209,718 spurious notes, and as the £488,430 represents a partial recovery against this sum, a proportion of the £488,430 in the ratio of 207,706 (being the number of spurious notes in respect of which Messrs. Waterlow & Sons have been found liable) to 209,718 (being the total number of spurious notes honoured), or, in other words, 99·04 of the £488,430 or £483,741 should be deducted from the sum of £1,088,343, leaving £604,602 as the sum for which judgment should be pronounced; or (iii) the sum of £488,430 should be deducted from the bank's total loss of £1,098,822 (being the loss on 209,718 spurious notes plus the cost of genuine notes rendered useless), leaving £610,392, and as this sum is well within the total sum of £1,088,343 for which Messrs. Waterlow & Sons are liable, judgment should be pronounced for £610,392. Messrs. Waterlow & Sons contend for the first method, WRIGHT, J., adopted the second, and the Bank contend for the third, quoting in support *The Morgengry* (2). The differences in result are relatively unimportant in view of the magnitude of the sums involved, and I have found the question a troublesome one, but I have come to the conclusion that the third method is the right one. Having recovered part of their total loss from the perpetrators of the fraud, and having established liability for more than the balance of their total loss against Messrs. Waterlow & Sons, the bank are, in my view, entitled to avail themselves of Messrs. Waterlow & Sons' liability up to the extent of the balance of their total loss, and so to secure from the combined sources complete indemnity.

In parting from the case I cannot refrain from observing that the fact that a sum of nearly half a million pounds has been recovered by the bank from the conspirators gives occasion for a comment on the leading contention of Messrs. Waterlow & Sons that the bank lost nothing by issuing its good notes in exchange for spurious ones. The conspirators constituted themselves an illegal bank of issue for the spurious notes which cost them nothing but the cost of paper and printing, yet they seem to have made half a million sterling, and probably much more, by the issue of these notes. Why, it occurs to me to ask, should it be said that the bank would not equally have received value in return if it had issued a corresponding number of genuine notes in ordinary course, and that it has been deprived of nothing by having had to issue them gratuitously? I am, accordingly, in favour of dismissing Messrs. Waterlow & Sons' appeal, allowing the bank's appeal and directing judgment to be pronounced against Messrs. Waterlow & Sons for the sum of £610,392.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Travers-Smith, Braithwaite & Co.*; *Johnson, Jecks & Colclough.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HALL *v.* BROOKLANDS AUTO-RACING CLUB

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), May 30, 31, June 1, 2, 20, 1932]

[Reported [1933] 1 K.B. 205; 101 L.J.K.B. 679; 147 L.T. 404; 48 T.L.R. 546]

Contract—Dangerous sport—Safety of spectator—Warranty by promoter of sport—Risk taken by spectator.

Where the occupier of premises agrees for reward that a person shall have the right to enter his premises to see some game or sporting event the contract between the parties (in the absence of provision to the contrary) contains an implied warranty, not that the premises are safe, but that reasonable skill and care has been used to make them safe, and also an implied term by which the spectator agrees to take the risk of an unlikely and improbable accident occurring during the game or event as a result of which he suffers damage. The occupier is not under any obligation to provide safety in all circumstances, but only to provide against damage to spectators which any reasonable occupier in his position would have anticipated as likely to happen.

The plaintiff paid for admission to the defendants' premises to witness motor-car races run on a course managed by the defendants. While watching the races he met with injuries due to the fact that one of the cars left the track as the result of being in collision with another car and crashed through the railing behind which the plaintiff was standing. Evidence was given that this occasion was the first during the twenty-three years during which the track had been in use on which a car had left the track and gone through the railings at the point in question, and, further, that the circumstances of the collision between the two cars were most unusual. In an action by the plaintiff for personal injuries,

Held: the danger was not one which the defendants ought to have anticipated, and, further, the plaintiff must be taken to have agreed to take the risk of such an accident happening, and, therefore, the action failed.

Notes. This case must now be read in the light of the provisions of the Occupiers' Liability Act, 1957: 37 HALSBURY'S STATUTES (2nd Edn.) 379.

Distinguished: *Shore* v. *Ministry of Works*, [1950] 2 All E.R. 228. Referred to: *Weigall* v. *Westminster Hospital*, [1936] 1 All E.R. 232; *Fryer* v. *Salford Corpn.*, [1937] 1 All E.R. 617; *Woodman* v. *Richardson and Concrete, Ltd.*, [1937] 3 All E.R. 866; *Campbell* v. *Shelbourne Hotel, Ltd.*, [1939] 2 K.B. 534.

As to negligence with regard to property generally, see 23 HALSBURY'S LAWS (2nd Edn.) 596 et seq., 719, and for cases see 36 DIGEST (Repl.) 45 et seq. (as to spectators 59–61).

Cases referred to:

(1) *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274; Har. & Ruth. 243; 35 L.J.C.P. 184; 14 L.T. 484; 12 Jur. N.S. 432; 14 W.R. 586; affirmed (1867), L.R. 2 C.P. 311; 36 L.J.C.P. 181; 16 L.T. 293; 31 J.P. 390; 15 W.R. 434, Ex.Ch.; 36 Digest (Repl.) 46, *246*.

(2) *Redhead* v. *Midland Rail. Co.* (1869), 9 B. & S. 519; 20 L.T. 628; sub nom. *Readhead* v. *Midland Rail. Co.*, L.R. 4 Q.B. 379; 38 L.J.Q.B. 169; 17 W.R. 737, Ex.Ch.; 8 Digest (Repl.) 75, *496*.

(3) *Behn* v. *Burness* (1863), 3 B. & S. 751; 2 New Rep. 184; 32 L.J.Q.B. 204; 8 L.T. 207; 9 Jur. N.S. 620; 11 W.R. 496; 1 Mar. L.C. 329; 122 E.R. 281, Ex.Ch.; 12 Digest (Repl.) 470, *3508*.

(4) *Re an Arbitration between Comptoir Commercial Anversois and Power, Son & Co.*, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 36 T.L.R. 101, C.A.; 12 Digest (Repl.) 449, *3389*.

(5) *Tournier* v. *National Provincial and Union Bank of England,* [1924] 1 K.B. 461; 93 L.J.K.B. 449; 130 L.T. 682; 40 T.L.R. 214; 68 Sol. Jo. 441; 29 Com. Cas. 129, C.A.; Digest Supp.

(6) *Elder, Dempster & Co.* v. *Paterson, Zochonis & Co., Griffiths Lewis Steam Navigation Co.* v. *Paterson, Zochonis & Co.,* [1924] A.C. 522; 93 L.J.K.B. 625; 131 L.T. 449; 40 T.L.R. 464; 68 Sol. Jo. 497; 16 Asp.M.L.C. 351; 29 Com. Cas. 340, H.L.; 41 Digest 478, *3118.*

(7) *Parnaby* v. *Lancaster Canal Co., Lancaster Canal Co.* v. *Parnaby* (1839), 11 Ad. & El. 223; 1 Ry. & Can. Cas. 696; 3 Per. & Dav. 162; 9 L.J.Ex. 338; 113 E.R. 400, Ex.Ch.; 36 Digest (Repl.) 57, *311.*

(8) *Mersey Docks Trustees* v. *Gibbs, Mersey Docks Trustees* v. *Penhallow* (1866), L.R. 1 H.L. 93; 11 H.L. Cas. 686; 35 L.J.Ex. 225; 14 L.T. 677; 30 J.P. 467; 12 Jur. N.S. 571; 14 W.R. 872; 2 Mar. L.C. 353; 11 E.R. 1500, H.L.; 36 Digest (Repl.) 25, *111.*

(9) *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501; 10 B. & S. 950; 39 L.J.Q.B. 291; 23 L.T. 466; 18 W.R. 1205, Ex.Ch.; 34 Digest 166, *1296.*

(10) *Cox* v. *Coulson,* [1916] 2 K.B. 177; 85 L.J.K.B. 1081; 114 L.T. 599; 32 T.L.R. 406; 60 Sol. Jo. 402, C.A.; 36 Digest (Repl.) 59, *319.*

(11) *Norman* v. *Great Western Rail. Co.,* [1915] 1 K.B. 584; 84 L.J.K.B. 598; 112 L.T. 266; 31 T.L.R. 53, C.A.; 2 Digest 221, *139.*

(12) *Pidington* v. *Hastings* (1932), The Times, March 12.

(13) *Hamlyn & Co.* v. *Wood & Co.,* [1891] 2 Q.B. 488; 60 L.J.Q.B. 734; 65 L.T. 286; 40 W.R. 24; 7 T.L.R. 731, C.A.; 12 Digest (Repl.) 684, *5266.*

(14) *Dahl* v. *Nelson, Donkin* v. *Co.* (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 29 W.R. 543; 4 Asp.M.L.C. 392, H.L.; 41 Digest 517, *3471.*

(15) *Maclenan* v. *Segar,* [1917] 2 K.B. 325; 86 L.J.K.B. 1113; 117 L.T. 376; 33 T.L.R. 351; 36 Digest (Repl.) 196, *1033.*

(16) *Brannigen* v. *Harrington* (1921), 37 T.L.R. 349; 36 Digest (Repl.) 57, *307.*

(17) *Welsh* v. *Canterbury and Paragon, Ltd.* (1894), 10 T.L.R. 478; 42 Digest 909, *52.*

(18) *Lax and another* v. *Darlington Corpn.* (1879), 5 Ex.D. 28; 49 L.J.Q.B. 105; 41 L.T. 489; 44 J.P. 312; 28 W.R. 221, C.A.; 2 Digest 219, *134.*

Appeal from the verdict and judgment in an action tried before McCardie, J., and a special jury.

The plaintiff, Christopher Hall, claimed damages against the defendants for personal injuries which, he alleged, he had suffered through the negligence of the defendants. The defendants were the Brooklands Estate Co., of Weybridge, Surrey (sued as the Brooklands Auto-Racing Club), the owners of Brooklands motor-racing track, and the drivers of three motor cars. The plaintiff's case was that when he was a spectator watching races at Brooklands, which were being run under the auspices of the Junior Car Club, on May 9, 1930, he met with injuries, suffering damage which the jury estimated at the sum of £988. He had taken a ticket at the gate for which he paid 3s. and which entitled him to take up his position on any part of the ground except such parts as were reserved to members of the defendant club. He took up his position to watch one of the races on the finishing straight three or four yards from the railing, which was 4 ft. 6 in. high. In front of the railing was a concrete kerb 6 in. high, behind which came 4 ft. 5 in. of grass. The competitors in the race which he was watching drove their cars in a circuit round the course, which included the finishing straight. As the plaintiff was watching the race, the incident which resulted in his suffering injury occurred. Four cars were concerned—a 7 h.p. Austin, which was in front; an Alfa Romeo, a little behind the Austin; a Talbot, which was being driven very nearly in the wake of the Alfa Romeo; and a second Talbot, about a car's length from the other Talbot. According to the evidence, the first Talbot turned suddenly to the right and collided with the second Talbot, with the result that the leading Talbot rose in the air, and then went through or over the railing, killing some people who were near the railing and causing serious injury to the plaintiff. The defendants denied that they had been guilty of any negligence or breach of duty. The two questions left to the jury were:

(i) Did the defendant company omit any and what reasonable precautions for the safety of the spectators? The jury's answer to the question was "Yes," and they enumerated the matters on which they founded their answer, namely: Failure to exhibit warning notices generally; failure to increase the height of barrier or number of barriers in view of the increased speed of cars at the present day; failure to keep spectators at a safe distance from the track; and failure to realise that the position of the accident was at the fastest part of the course and that special protection there was necessary. (ii) Was the defendant company guilty of any and what negligence whereby injury was caused to the plaintiff? The jury answered "Yes" to this second question, adding:

> "The defendant company, being owners of premises used for the carrying on of a highly dangerous sport, at which accidents had happened and were likely to happen again, by advertisement and otherwise invited the public to collect and to witness that highly dangerous sport, and failed, by notices or otherwise, to give warning of or protection from the dangers arising from the sport."

In reply to McCardie, J., they added that they meant their second answer to include the reasons enumerated in their first. They returned a verdict against the Brooklands Auto-Racing Club and assessed the damages at £988 and judgment was entered, accordingly, for the plaintiff. They found in favour of the drivers of the cars in question. The Brooklands Auto-Racing Club appealed.

Schiller, K.C., *Doughty, K.C.*, and *H. D. Samuels* for the defendants.
Serjeant Sullivan, K.C., and *Martin O'Connor* for the plaintiff.
A. M. Wallace for an interested party.

Cur. adv. vult.

June 20. The following judgments were read.

SCRUTTON, L.J.—A spectator at a motor race meeting at Brooklands was injured by a car which came through the railing dividing the track from the space appropriated to spectators. He sued (i) the company owning the track, and (ii) the drivers and owners of the two cars that by colliding caused the car that did the injury to deviate. The jury found that the drivers and car-owners were not negligent, and the plaintiff does not appeal from the judgment in their favour. As to the first defendant, the race meeting was being held by another body, to whom the first defendant had in effect let the track. But counsel for the first defendant accepted liability, if any, for this other body. I only mention this, because it must not be taken that when a landlord lets his premises to a tenant, who produces therein an entertainment, the landlord is necessarily liable for damage caused by the tenant's entertainment.

The question of the liability of the Brooklands company raises questions which are of general application to any cases where landowners admit for payment to their land persons who desire to witness sports or competitions carried on thereon, if those sports may involve risk of danger to persons witnessing them. A spectator at Lord's or the Oval runs the risk of being hit by a cricket ball, or coming into collision with a fielder running hard to stop a ball from going over the boundary, and himself tumbling over the boundary in doing so. Spectators at football or hockey or polo matches run similar risks both from the ball and from collisions with players or polo ponies. Spectators who pay for admission to golf courses to witness important matches, though they keep beyond the boundaries required by the stewards, run the risk of the players slicing or pulling balls which may hit them with considerable velocity and damage. Those who pay for admission or seats in stands at a flying meeting run a risk of the performing aeroplanes falling on their heads. What is the liability of the person taking payment for permission to view these various sports?

The facts relevant to this particular case are hardly in dispute. The racing course at Brooklands is a kind of oval over two miles round, including at one part a long straight stretch over a hundred feet wide. On the right-hand side, where many spectators stand, the course was in 1930 bounded by a concrete kerb 6 in. high, on the far side of the kerb was 4 ft. 5 in. of grass, and then an iron railing 4 ft. 6 in. high, the nature of which can be seen from a photograph showing the fence when it was not injured, and two more showing the damage at the scene of the accident. The photographs also show the ground where spectators can watch the races, rising uphill to various stands in which, if they wish, they can sit. They are absolutely safe in the greater part of this ground, but, naturally, they like to get as near the racing as they can and they place themselves along the railing. On the day of the racing, a long distance competition was in progress under handicap. There were coming along the straight a small Austin car ahead, and, gaining on it, three larger cars, an Alfa Romeo in front, and behind it on each side, a Talbot, numbered 22, on the left, and a Talbot, numbered 21, on the right or behind the Alfa Romeo. Lord Howe, called by the plaintiff, described the position as he saw it from the left of the track. The police inspector, standing on the bridge over the track which the cars were approaching, says that Talbot 22 was on the near side (left) of the track. The Alfa Romeo was a car's length in front of Talbot 22 and a car's width from its off side. Talbot 21 was running to the right of the Alfa Romeo, with its near side in line with the off wheels of the Romeo, and, he thought, 20 ft. behind it. Obviously this witness would be in a better position to judge of the lateral positions of the cars on the track than of their positions up and down the track. There is apparently an advantage to be got by running behind or at the tail of a car, in that the first car exercises suction on the following car which enables that car to keep its position with less strain on its engine. There was conflicting evidence whether one or both of the Talbots in that position were or were not "slip-streaming," as the process of running at the tail of a car is called. Mr. Davis, a very experienced racing man, says that, if Lord Howe's evidence is correct, these cars were not slip-streaming. The driver of Talbot 21 thinks he was getting the benefit of the suction of the Romeo. There is no rule against slip-streaming, but some drivers do not like it.

The small Austin ahead was going at the rate of eighty-five miles an hour, the bunch of approaching cars were catching it up at 103 miles an hour, and all the cars were approaching a sharp bend to the left which would be better taken from the right of the straight track. In these circumstances, Talbot 22 on the left of the group appears to have swerved or directed its course to the right, and the hub of its off hind wheel touched the hub of the near front wheel of Talbot 21, with the most startling result. Lord Howe says:

> "The blow appeared to throw Talbot 22 through the air and it appeared to me to land almost on top of the spectators and the railings. . . . The car was literally thrown through the air."

Mrs. Hedinger, a racing driver called by the plaintiff, who saw the accident, says Talbot 21 hit Talbot 22 in the centre on the off side, "threw the first one (22) into the railings," and itself bounced and fell over on the track. The police inspector, standing on the bridge crossing the track and watching the approaching cars, says:

> "I saw 21 and 22 swerve to the off side of the track; 22 went up into the air and struck the top of the railings. It turned completely upside down and lay in the enclosure. I saw it distinctly in the air. . . . The leap of the car took place before the kerb was reached."

Three witnesses—two called by the plaintiff—speak of the extraordinary leap in the air; no witness contradicts it; no witness says that the kerb was struck. There is no suggestion that anything was wrong with the track itself as distinguished from its boundaries. As to these boundaries, the plaintiff's witness, Lord Howe, says:

> "I think the Brooklands racing track is very well protected, as well protected as it reasonably could be expected to be. I do not think that any barrier would have prevented this car getting into the crowd."

At the time of the accident—May, 1930—Brooklands track had been in use for races since 1907, and it is not disputed that this accident was the first time when any spectator had been injured by a car leaving the track. Further, the evidence is undisputed that no car in the straight had ever gone through the railings. One car (Mr. Cook's) had hit them and bulged them, but not gone through them; another car (Mr. Harvey's) had apparently in a skid hit them, but not damaged them. Both these cars were at the time engaged in a race for fancy driving, in which the cars came down the straight and turned at an angle of 180 degrees round a tub in the centre of the straight, a manœuvre which would involve running near the railings before you reached the tub. A third car, an Austin, in practice struck the kerb and turned over, but did not apparently hit the railings. Cars had gone through the railings on the sloping and curved banking, and on bends, but none on the straight, and there was uncontradicted evidence that no collision between cars had ever caused damage in the twenty-three years' history of the track.

On this state of facts, practically undisputed, two questions arise: (i) What is the duty of the defendant company, who take money from the spectator for their permission to him to view the racing on their premises? (ii) This duty being ascertained, was there evidence on which a jury could reasonably find that the defendants had not complied with it?

The authorities are not clear on the answer to be given to the first question. Anyone who reads the discussion of the difficulties involved, in Salmond on Torts (7th Edn.) 446 to 466, in Smith's Leading Cases, note to *Indermaur* v. *Dames* (1), and in an article on the Duty of Invitors (L.Q.R. Vol. 32, p. 255), will be convinced of this. There are doubts whether an invitee on payment is entitled only to the same care as Willes, J., formulates in *Indermaur* v. *Dames* (1), a duty to warn of traps, or whether he is further entitled to have the premises for which he pays reasonably safe. There is a further doubt whether on payment you are entitled to have reasonable safety, as an absolute promise, or only, as in *Redhead* v. *Midland Rail. Co.* (2), reasonable care to guard against dangers which the landowner or owner of a chattel may know or with reasonable care should foresee. There is further the question whether, when there is nothing but payment, the implied term in the contract must take account of the knowledge of the person paying, or of a reasonable spectator, of the risks which are involved in watching the particular spectacle, such as the risks of being hit by a cricket ball at Lord's, or the risks in a flying exhibition at Hendon of an aeroplane falling on your head. There must be an implied term in the contract where you simply pay your money and pass through a turnstile. On the authorities the term to be implied in a contract is for the court, not for the jury. In *Behn* v. *Burness* (3) the Court of Exchequer Chamber laid down that the court was to determine whether a term of the contract was a condition precedent, a matter of implication, the jury finding any facts in dispute. The Court of Appeal has twice lately stated that terms to be implied are for the court and not for the jury: *Re an Arbitration between Comptoir Commercial Anversois and Power, Son & Co.* (4), *Tournier* v. *National Provincial and Union Bank of England, Ltd.* (5), per Atkin, L.J. ([1924] 1 K.B. at pp. 483 to 485). Further, in my view, where the defendant has protection under a contract, it is not permissible to disregard the contract and allege a wider liability in tort: *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co., Ltd.* (6), per Lord Cave ([1924] A.C. at p. 533), Lord Finlay ([1924] A.C. at p. 547), Lord Sumner ([1924] A.C. at p. 564).

What, then, is the term to be implied on payment to see a spectacle, the nature of which is known to all people of ordinary intelligence who go to see it? A large number of authorities were cited to us. In my opinion, it is sufficient to start with the decision of the Exchequer Chamber in *Lancaster Canal Co.* v. *Parnaby* (7), approved by the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (8). Lord Wensleydale in that case expresses himself thus (L.R. 1 H.L. at p. 123):

> "My Lords, the Court of Exchequer Chamber in both these cases founded its judgment on that of the Exchequer Chamber in the case of *Lancaster Canal Co.* v. *Parnaby* (7), in which case there was a company incorporated by Act of Parliament, for the purpose of maintaining a canal, to be opened for the use of the public on payment of rates which the canal company might receive for its own benefit (that is, the profits were to be divided amongst the shareholders), and the court held that the common law imposed a duty on the proprietors not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care so long as they kept it open for the use of all that might navigate it, that they might navigate

> A it without damage to their lives or property. Of the propriety of this decision there could be no doubt, where the profits were received for the benefit of the company."

This is not an absolute warranty of safety, but a promise to use reasonable care to ensure safety. What is reasonable care would depend on the perils which might be B reasonably expected to occur, and the extent to which the ordinary spectator might be expected to appreciate and take risk of such perils. Illustrations are the risk of being hit by a cricket ball at Lord's or the Oval, where any ordinary spectator, in my view, expects and takes the risk of a ball being hit with considerable force among the spectators, and does not expect any structure which will prevent any ball from reaching the spectators. An even more common case is what may be seen all over the country C every Saturday afternoon, spectators admitted for payment to a field to witness a football or hockey match and standing along a line near the touch-line. No one expects the persons receiving payment to erect such structures or nets that no spectator can be hit by a ball kicked or hit violently from the field of play towards the spectators. The field is safe to stand on, and the spectators take the risk of the game.

The difference between dangers of the place and dangers of the entertainment is D shown by the two cases of *Francis* v. *Cockrell* (9) and *Cox* v. *Coulson* (10). In *Francis* v. *Cockrell* (9) the person taking payment for admission to a stand was held liable for the negligent and improper construction of the stand whereby it fell, though he did not know of it. It would have been different if the stand was an uncovered stand and the person paying caught a bad cold through sitting in winter in such a stand. The stand afforded no protection against weather, but the spectator accepted the obvious risk E arising from such lack of protection. In *Cox* v. *Coulson* (10) the defendant took money for admission to a theatre, where a travelling company was performing. The plaintiff, a spectator, was injured by a cartridge fired from a pistol. The county court judge laid down on the lines of *Parnaby's Case* (7) a principle which the Court of Appeal held to be too wide. SWINFEN EADY, L.J., said ([1916] 2 K.B. at p. 181):

> F "The defendant must also be taken to have contracted to take due care that the premises should be reasonably safe for persons using them in the customary manner and with reasonable care: *Francis* v. *Cockrell* (9), *Norman* v. *Great Western Rail. Co.* (11). The defendant does not absolutely warrant the security of his premises: *Redhead* v. *Midland Rail. Co.* (2). He does, however, warrant, not only that there shall be due care on the part of himself and his servants, but also that there shall G be due care on the part of any independent contractor who may have been employed by him in the construction or repair of the premises. The principle is that where a legal duty is incumbent on a person, that duty is not discharged by employing a contractor who imperfectly performs it. This, however, only deals with the premises, and the accident did not happen through any defect in the premises. Is there, then, to be implied, in the contract between the plaintiff and the defendant, H any term with regard to the play apart from the premises in which the play is to be performed? The play involved the use of firearms, and according to the evidence included a scene in which a wireless station was defended against an enemy; the performers were dressed as soldiers and were shooting with revolvers. Such a scene, properly performed and without negligence, would be free from danger, but injury would be likely to result from it unless care was taken in loading and using I the firearms. The county court judge held that it was an implied term of the contract between the defendant and the playgoer that all persons connected with the performance of the play should exercise reasonable care so that the members of the audience should not be exposed to any danger which could be avoided by the exercise of such reasonable care. In my opinion this is too wide, and there is no authority and no principle upon which so extended a liability can be said to rest upon a person who, for reward, agrees that others shall enter his premises and witness the performance of a play there. Upon this footing the defendant would be liable for any negligence of the performers as if they were his servants."

Again he says ([1916] 2 K.B. at p. 183): A

> "If there are incidents in a play which are intrinsically dangerous unless carefully performed, especially if they involve the use of firearms, and which the manager knew or ought to have known of, then, in my opinion, it is an implied term of the contract between the playgoer and the other contracting party that such contracting party will use reasonable care and diligence to see that such incidents are performed without risk to the playgoer. He is not, however, under liability B for any accident which he could not have prevented by the exercise of reasonable care or supervision, but which happens through some carelessness or want of skill on the part of a member of the company. He does not warrant that there shall be no such negligence or want of skill. His liability is that of an invitor towards an invitee as expressed in *Indermaur* v. *Dames* (1) and in *Norman* v. *Great Western Rail. Co.* (11), per BUCKLEY, L.J. ([1915] 1 K.B. at p. 592): C
>
>> 'The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know. If the danger is not such that he ought to know of it, his liability does not extend to it.' "

I think to all these statements there must be added a term that there is no obligation to protect against a danger incident to the entertainment which any reasonable spectator foresees and of which he takes the risk. D

The learned judge, of whose summing up no complaint is made, as it is obviously a summing-up in favour of the defendant company, put two questions to the jury as against the company. With due respect to him, I do not understand why two questions were put, as they appear to me to be substantially the same question. They were:

> "(i) Did the defendant company omit any and what reasonable precautions for the safety of the spectators?" E

To this the jury answered:

> "Yes. Failure to exhibit warning notices generally. Failure to increase height of barrier or number of barriers in view of the increased speed of cars. Failure to keep spectators at a safe distance from the track. Failure to realise that the position of the accident was the fastest part of the course and that special precaution was necessary." F
>
> "(ii) Was the defendant company guilty of any and what negligence whereby injury was caused to the plaintiff?"

To this the jury answered:

> "Yes. The defendant company, being owners of premises used for the carrying on of a highly dangerous sport, at which accidents had happened and were likely to G happen again, by advertisement and otherwise invited the public to collect and to witness that highly dangerous sport, and failed, by notices or otherwise, to give warning of or protection from the dangers arising from the sport and as in answer to question No. (i)."

They further found that the drivers of the two cars which collided were not guilty of negligence. H

In view of the admitted facts, in my opinion, there was no evidence to justify the answers of the jury. In view of the position of motors and motor racing at the present day, I cannot think it is a failure to use reasonable care or negligence not to inform spectators of a motor race that with cars running at a rate of a hundred miles per hour there is a risk of cars skidding or leaving the track, especially when for twenty-three years no such car has reached a spectator. Again, when, for the same period of time, I no car had broken through the railing, I cannot think that reasonable care required a strengthening of the barrier against a danger which had never happened in twenty-three years. The learned judge, in declining to enter judgment for the defendant company, gave no reasons. I think his summing-up shows that he himself would not have given the same answers as the jury. The decision of LORD HEWART, C.J., in entering judgment for the owners of Ranelagh, when a polo pony ran through a hedge and injured a spectator is in accordance with the result I have arrived at, though he did not give reasons for his decision: *Pidington* v. *Hastings* (12).

A In my opinion, the findings of the jury and the judgment for the plaintiff should be set aside and judgment entered for the defendant company, with costs here and below.

GREER, L.J.—On Friday, May 9, 1930, the plaintiff, then a student at the Royal Naval College at Greenwich, being the owner of an Alvis car, and, consequently, interested in the racing qualities of that make of car, went with some friends to see the
B races at Brooklands which were being run under the auspices of the Junior Car Club on the course occupied and managed by the defendants, the Brooklands Auto-Racing Club. While watching one of the races he met with injuries, suffering damage which the jury have estimated at the sum of £988. He took a ticket at the gate, for which he paid 3s. and which entitled him to take up his position on any part of the ground except such parts as were reserved to members of the defendant club. There were no terms of
C contract expressed on the ticket for which he paid, and the contract between him and the defendants is necessarily to be implied from the circumstances of the case. He took up his position to watch one of the races three or four yards from the railing, two-thirds of the way along that part of the course indicated on the map, which was given in evidence by the terms "the finishing straight." The competitors in the race which he was watching drove their cars in a circuit round the course which included the
D finishing straight. As the plaintiff was watching the race a most extraordinary and unlikely event, which no one would have anticipated, happened. Four cars were concerned: a 7 h.p. Austin, which was in front; an Alfa Romeo, which was a little behind the Austin; a Talbot, No. 22, which was being driven very nearly in the wake of the Alfa Romeo, and at less than a car's length from it; and a second Talbot, No. 21, which was about the same distance behind the Talbot, No. 22.

E According to the evidence called by the plaintiff and given by Lord Howe, the first Talbot, No. 22, turned very suddenly, almost as if at right angles and as if it had braked suddenly, and the second Talbot, No. 21, hit the first Talbot on the off side, with the result that the leading Talbot seemed to leap right into the air, and then went through or over the railing, killed some people who were near the railing, and caused serious injury to the plaintiff and others. In cross-examination Lord Howe said:

> F "I very much doubt whether any barrier or railing in the ordinary way would have prevented the accident occurring, because it seemed to me that the car was literally thrown through the air."

Lord Howe is a well-known racing expert and had been taking part in the race in question, but at the time was at the pits a little distance from where the accident happened. The plaintiff himself was unable to give any account as to how the accident
G happened, but he said in cross-examination that it never occurred to him that there might be danger, and that he never thought that the railing would be hit straight by the car. No other evidence was given on behalf of the plaintiff by persons who saw the accident as to the way in which it happened, so far as it is relevant to the case against the defendant club, though evidence was given blaming the drivers of the cars for racing in the position they were—so close together that they could not successfully deal
H with any emergency that arose. At the place where the accident happened there was a red line 17 ft. from the kerb, within which cars were expected to keep, except when passing other cars. At the end of this 17 ft. there was a kerb 6 in. high, and 4 ft. 6 in. from the kerb there was a railing at which the public could stand. It was not expected by the defendants that cars would ever get beyond the railing. The railing was there for the purpose of keeping the spectators off the track. The plaintiff also called a Mr.
I Watson, an expert motor engineer and driver with thirty years' experience of driving, and three years' experience of driving in races. In his view, it was dangerous for the cars to be driven in the position in which the three cars in question were being driven at the pace at which they were driven, which was about a hundred miles per hour before they braked. There was, in his judgment, risk of skidding, of tyres coming off, or bursting, steering going wrong, and of loss of control, and he considered that the rails were not strong enough to resist an attack by one of the cars at high speed, and the kerb was useless, and he himself thought the place was unsafe, and always stood on the hill at some distance away to watch the racing. No evidence was given on behalf of

the plaintiff as to any previous accident at this part of the track, except by Lord Howe, who in cross-examination stated that on one occasion a car driven by Mr. Cook skidded and struck the rails but did not go through.

At the end of the plaintiff's evidence, it was contended for the defendants that there was no evidence on which it could be held that the accident happened through any breach of duty by the defendants to the plaintiff. The argument was twofold—(i) that the accident was of such an extraordinary character that it was not negligence on the part of the defendants to have failed to anticipate and provide against the kind of accident which happened on the day in question, and occasioned the damage of which the plaintiff complained, and (ii) it was contended that the defendants were not liable because on the implied terms of the contract made by the taking of the ticket the plaintiff took the risk of such accidents as might conceivably happen, notwithstanding that all usual precautions had been taken by the defendants. The learned judge declined to stop the case, and the defendants then called their witnesses.

The first witness was Mr. MacConnell, a mechanical and consulting automobile engineer employed by the defendants, who gave evidence to the effect that barriers were not usually provided on racing tracks, that this was the first accident at Brooklands at which a spectator was injured, that never before had a car gone off the track on the straight. By that I understand he did not mean that no car had ever got beyond the rails. He also said that if the car hit the rails at right angles no rail would stop it, nor if it hit the rails at an acute angle. He intimated that, in his view, cars might be so close together that if something happened they might be smashed up through sudden braking, swerving, or tyres coming off. The width of the track, he stated, at the point in question was 105 ft. He had never known of a single collision between two cars on the track, or of a wheel coming off, at Brooklands. He expressed the view that reasonable precautions had been taken for spectators, and that no barrier was reasonably required on the straight. Mr. Bradley, the clerk of the course, gave further particulars about the accident to Mr. Cook, who, he said, shot across the track and hit the railings, which bulged, but no one was hurt, and that in his experience he had only known of one spectator being injured, and that was a lady who walked across the track. Important evidence was given for the defendants by Mr. Sydney Davis with reference to the previous accidents. It seems that on the occasion of Mr. Cook's accident, and that to another car, a race of a special kind was taking place in which the cars had to turn rapidly round a tub and go back again towards the fork and then round again, but that he had never known or heard of an accident by a car striking the railings when it was making a straight drive down the finishing straight. In one of the cases Gordon England's Austin struck the kerb and the car turned over, remaining on the border without striking the rails. He described another accident to an Alvis which was similar to Mr. Cook's, though, apparently, the Alvis did not do more than touch the rails. There was evidence, which the plaintiff much relied on, of precautions that had been taken after the accident by putting up a barrier composed of sleepers close to the kerb, which would, of course, add to the power of the kerb to keep cars on the track, but in Mr. Davis's opinion it would have had no effect in preventing the accident which had happened to the plaintiff on the occasion when he was injured.

As the case which we are considering is one in which there was a contractual relationship between the plaintiff and the defendants, the first thing to be determined is what was the implied contract between the parties? There can be no doubt that this is a question of law for the court, and not a question for the jury, there being no relevant facts in dispute: see *Re an Arbitration between Comptoir Commercial Anversois and Power, Son & Co.* (4), and *Tournier* v. *National Provincial and Union Bank of England, Ltd.* (5), especially per ATKIN, L.J. ([1924] 1 K.B. at p. 483). The judgment of ATKIN, L.J., on that page contains a compendious statement of the rules by which the court should be guided. He says that these are

> "contained in passages from the judgments of LORD ESHER in *Hamlyn & Co.* v. *Wood & Co.* (13), and of LORD WATSON in *Dahl & Co.* v. *Nelson, Donkin & Co.* (14), cited by BANKES, L.J. The principle is stated by SCRUTTON, L.J., in words substantially to the same effect: 'The court,' he says,

> A 'and not the jury, are the tribunal to find such a term; they ought not to imply a term merely because it would be a reasonable term to include if the parties had thought about the matter, or because one party, if he had thought about the matter, would not have made the contract unless the term was included; it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its B necessity was so obvious that it was taken for granted.'"

The decisions leave no doubt that in the contract which was made by the plaintiff there was an implied term that the defendants warranted not only that due care had been taken on the part of the defendants and their servants to make the place reasonably safe, but also that due care had been taken by any independent contractors whom they C had employed to lay out the course on which these races took place: see *Francis* v. *Cockrell* (9), *Cox* v. *Coulson* (10), and *Maclenan* v. *Segar* (15) a decision of McCARDIE, J., where, McCARDIE, J., after examining the cases, accurately states the law as follows ([1917] 2 K.B. at p. 332):

> "Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract D between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair, or maintenance of the premises."

E It is clear law that there is no absolute warranty that the premises are safe, but only that reasonable skill and care have been used to make them safe. But the question arises whether the term I have mentioned is the only term to be implied as between a spectator who takes a ticket to see a cricket match, a race, or other spectacle, which in certain events may be attended by a risk of danger. In my judgment, both parties must have intended that the person paying for his licence to see a cricket match, or a F race, takes upon himself the risk of unlikely and improbable accidents, provided that there has not been on the part of the occupier a failure to take usual precautions. I do not think it can be said that the content of the contract made with every person who takes a ticket is different. I think it must be the same, and it must be judged by what any reasonable member of the public must have intended should be the terms of the contract. The person concerned is sometimes described as "the man in the street," G or "the man in the Clapham omnibus," or, as I recently read in an American author, "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves." Such a man taking a ticket to see a cricket match at Lord's would know quite well that he was not going to be encased in a steel frame which would protect him from the one in a million chance of a cricket ball dropping on his head. In the same way, the same man taking a ticket to see the Derby would know quite well that H there would be no provision to prevent a horse which got out of hand from getting among the spectators, and would quite understand that he was himself bearing the risk of any such possible, but improbable, accident happening to himself. In my opinion, in the same way such a man taking a ticket to see motor races would know quite well that no barrier would be provided which would be sufficient to protect him in the possible, but highly improbable, event of a car charging the barrier and getting I through to the spectators. The risk of such an event would be so remote that he would quite understand that no provision would be made to prevent it happening, and that he would take the risk of any such accident. I think that counsel for the defendants was quite right in his argument before the learned judge in laying stress on the arguments based on the implied contract between the parties.

In my judgment, there was an implied term in the contract between the plaintiff and the defendants under which the plaintiff agreed to take the risk of the kind of accident that happened in the present case, but if I should be wrong about this, I am prepared to hold that there was no evidence that the defendants failed to take reasonable care to make their premises reasonably safe for spectators. I do not think the defendants are under any obligation to provide safety in all circumstances, but only to provide against damage to spectators which any reasonable occupier in their position would have anticipated as likely to happen. I agree that they ought not to be held liable, because after the event they took precautions which would prevent any argument in the future that after experience of an accident they would have failed in their duty if they had taken no additional precautions at all. In all probability the jury attached too much weight to the fact that after the accident these additional precautions were taken.

The jury's answer to the second question is based on a finding that the defendants failed to take reasonable precautions, by notice or otherwise, to protect the plaintiff from dangers arising from a highly dangerous sport. Having regard to the nature of the action, this must mean a sport highly dangerous to the spectators. Such a finding is not supported by the evidence in the case, but on the contrary is, in my judgment, directly in the teeth of the evidence. Since the course was opened for racing in 1907, up to the date of the accident in which the plaintiff was injured, races had been going on, and though obviously races at the high speed at which cars have been able to run in recent years are indeed highly dangerous to the competitors, there was no evidence whatever that such races had become highly dangerous to spectators watching the races in the part of the ground where the plaintiff stationed himself. In these circumstances, it does not seem to me that the jury were justified in finding that the accident to the plaintiff, and the injury that he suffered, were due to any want of reasonable care on the part of the defendants towards him, the defendants having for a long period of time had experience that the races could be carried on under the existing arrangements without any accident happening to any of the spectators, except in one case where it was due to the default of a spectator herself in wrongfully crossing the track. It seems to me that the jury were not entitled to find that there had been any breach of the defendants' duty to exercise by themselves, their servants, or by independent contractors reasonable care to secure the safety of spectators in the position in which the plaintiff was at the time of the accident. No reasonable body of men could be expected to anticipate the extraordinary events that happened at the material time, and led to consequences that could not reasonably be anticipated, that is to say, the mounting of a car on to and over the railings, in effect, a car directly charging and jumping the railings and overturning among the spectators.

I am, accordingly, of opinion, for the reasons stated, that there was no evidence on which a jury could properly have found a verdict for the plaintiff, and judgment must be entered for the defendants, with costs here and below.

SLESSER, L.J.—In this case the plaintiff was an invitee for consideration to the Brooklands racing track and premises, of which premises the defendants, the Brooklands Auto-Racing Club, were the owners. The defendants assume all liability for their lessees; my judgment is given on this assumption. The contract, so far as it was evidenced by the ticket of admission, contained no written terms. Its terms and implications are, therefore, to be construed by the court: *Tournier* v. *National Provincial and Union Bank of England, Ltd.* (5).

The facts of the accident which occurred on those premises and injured the plaintiff disclose a most unusual series of events. The accident took place on a part of the racing track known as the "straight," and the evidence which was given in the case shows that on only three previous occasions has a racing car met with an accident on that part of the track. In none of these was a spectator injured. In the present case, however, a motor car, after coming in contact with another with which it was racing, left the track altogether, appears to have leapt into the air and, in the opinion of Lord Howe, was actually in the air for about a dozen yards and went over the top of some rails, which were by the side of the track. These rails, which were between the plaintiff and the track, had in the past, in two of the three previous accidents at this point, although not erected for the purpose, proved sufficient to keep the car from any spectators who might be standing by it. In the third case the car did not hit the rails at all, but, in the present one, the rails being struck upon the top, collapsed, the car turned somersault, and fell and killed or injured many people.

The jury were asked questions at the trial as follows:

> "(i) Did the defendant company omit any and what reasonable precautions for the safety of the spectators? [Answer.] Yes. Failure to exhibit warning notices generally. Failure to increase height of barrier or number of barriers in view of the increased speed of cars. Failure to keep spectators at a safe distance from the track. Failure to realise that the position of the accident was the fastest part of the course and that special precaution was necessary. (ii) Was the defendant company guilty of any and what negligence whereby injury was caused to the plaintiff? [Answer.] Yes. The defendant company, being owners of premises used for the carrying on of a highly dangerous sport, at which accidents had happened and were likely to happen again, by advertisement and otherwise invited the public to collect and to witness that highly dangerous sport, and failed, by notices or otherwise, to give warning of or protection from the dangers arising from the sport, and as in answer to question No. (i)."

Judgment was entered against these defendants for £988. The defendants appeal.

In my opinion, the liability in this case arises out of contract and, despite certain obiter dicta to the contrary, I think that it is the better opinion that even in cases where there are no higher terms expressly imported, where for reward persons are invited to use premises, the duty upon the invitors is higher than in the case where the action is merely founded in tort. The contrast is as follows: As regards cases like the present, where the action is founded in contract, I think that it is the duty of the invitors to show that degree of care stated by Tindal, C.J., in *Lancaster Canal Co.* v. *Parnaby* (7) (11 A. & E. at p. 243), approved by the House of Lords in *Mersey Docks Trustees* v. *Gibbs* (8), to the following effect, namely, to take reasonable care that the public may use the premises without danger to their lives or property. In the case of tortious liability, the obligation is, to quote Willes, J., in *Indermaur* v. *Dames* (1) (L.R. 1 C.P. at p. 288), approved in the Exchequer Chamber, that the occupier of a building owes a duty to persons resorting thereto in the course of business upon his invitation to use reasonable care to prevent damage from unusual danger which he knows, or ought to know.

In the present case, the relation being contractual, I would apply the former of these tests and ask whether there was, in the circumstances, evidence on which the jury could find that the defendants have failed to take reasonable care that the plaintiff might use the premises without danger to his life or limb. This test of the obligation of the invitors on this basis appears to me to involve two considerations. First, the consideration whether the misadventure was of so unusual and unexpected a kind that it could not reasonably have been expected, and, secondly, whether, if it could have been so expected, the defendants have used that reasonable care which the law requires of them to see that the plaintiff might use the premises without danger. Even in cases of contract it must be remembered that the defendants are not insurers of absolute safety. In *Redhead* v. *Midland Rail. Co.* (2) it was said that

> "an obligation to use all due and proper care is founded on reasons obvious to all, but to impose a burden of a warranty that everything [the passenger uses will] be absolutely free from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing":

per Montague Smith, J. (L.R. 2 Q.B. at p. 385). The principle that an invitor or carrier does not warrant freedom from defects which no skill could detect applies equally to the case of an accident which no foresight could assume or guard against. In other words, whatever obligation there may be to guard against accident which may reasonably be assumed possibly to happen, there cannot be an obligation to guard against that which cannot reasonably be assumed to be likely to happen. Nemo tenetur ad impossibilia.

If further authority be needed for this proposition, it is to be found in *Cox* v.

Coulson (10), where it was held that the defendant, the lessee of a theatre, owed the plaintiff, one of the audience, a duty to use reasonable care that she was not to be exposed to unusual danger, the existence of which the defendant either knew or ought to have known, but not to such risk of unusual danger as the defendant could not reasonably have anticipated.

In the cases where the inquiry has been whether reasonable precautions have been taken against danger it has always been assumed that the danger is one which the defendant either knew or ought to have known. Such is *Brannigen* v. *Harrington* (16), a case of the collapse of the ceiling of a restaurant: *Welsh* v. *Canterbury and Paragon* (17), a case where a tight-rope walker dropped a chair from the tight-rope upon the plaintiff's wife; *Lax and another* v. *Darlington Corpn.* (18), where a cow belonging to the plaintiff attempted to jump a railing belonging to the defendants, the owners of a cattle market —all cases where the unusual danger was one which the defendants either knew or ought to have known might happen.

In the present case no specific question was asked of the jury on this head. The nearest finding is that to the effect that the defendant company, being owners of premises used for the carrying on of a highly dangerous sport on which accidents had happened and were likely to happen, by advertisement and otherwise invited the public to collect and witness a highly dangerous sport. It may well be that the sport was highly dangerous and that accidents had happened and were likely to happen, but the evidence completely fails to show that any accident of the kind which gave rise to the injuries of the plaintiff in the present case had ever happened. Indeed, as I have already said, when accidents had happened on the "straight," the railings had proved a sufficient guard, and as to the finding that such an accident as the present was likely to happen, I can find no evidence on which the jury could have come to such a conclusion. All that is known is that since the opening of the track no such accident had ever happened. I do not think, however, that the jury intended to discriminate between one class of accident and another. They appear to have assumed that the sport, being dangerous, every kind of accident must be assumed to be a possibility, and this I think vitiates their finding when they come to consider whether the company have omitted any and what reasonable precautions for the safety of spectators.

> "If the danger is not such that he [the defendant] ought to know of it, his liability does not extend to it":

per Buckley, L.J., in *Norman* v. *Great Western Rail. Co.* (11) ([1915] 1 K.B. at p. 592).

On the first essential question, therefore, I have come to the conclusion that there was no evidence that this unusual danger was one of which the defendants ought to have known. I doubt if the jury have specifically considered this question, but, in any event, my conclusion would lead to the allowance of this appeal.

As I have arrived at this conclusion, it becomes unnecessary to consider whether the precautions taken by the defendant company for the safety of the spectators were or were not sufficient. If I am wrong in my view, and the danger of a car leaping into the air over the railings was one which the defendants ought to have anticipated, I think there was some evidence on which the jury would be entitled to find as they did and to say that the failure to increase the height of the barrier or number of barriers, to exhibit warning notices and to keep spectators at a safe distance from the track, would all be precautions which they might reasonably find to be necessary. Were I to be of opinion that the danger was one which the defendants ought to have known, I should not have disturbed the finding of the jury. But no person can be under a legal obligation to guard against that which he has no legal duty to anticipate, unless, indeed, he is an insurer of the absolute safety of his invitees. The authorities on this point admit of no doubt. The obligation is to guard against dangers which might reasonably be anticipated—not against all and every danger. For this reason, I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors: *William Charles Crocker*; *Bryan O'Connor & Co.*; *Ernest Bevir & Son.*

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

CHAPMAN *v.* ELLESMERE AND OTHERS

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), February 22, 23, 24, 25, 26, March 22, 1932]

[Reported [1932] 2 K.B. 431; 101 L.J.K.B. 376; 146 L.T. 538; 48 T.L.R. 309; 76 Sol. Jo. 248]

Libel—Privilege—Qualified privilege—Domestic tribunal—Publication of decision—Sectional organ accepted by parties as means of publication—No privilege for general publication.

The stewards of the Jockey Club held an inquiry into the running of a horse, Don Pat, which had won a race at Kempton Park, and, after hearing the evidence and the plaintiff, who was the trainer of the horse, issued a statement that they were satisfied that a drug had been administered to the horse for the purpose of the race and that they "disqualified the horse for this race and for all future races under their rules and warned C.C. [the plaintiff], the trainer of the horse, off Newmarket Heath." At the inquiry the stewards made it plain that they did not attribute the doping of the horse to the plaintiff, but told him that they considered that he was responsible for its running. By r. 17 of the Rules of Racing the stewards were given the power of granting and withdrawing or suspending trainers' licences, of warning any person off the turf, and of publishing their decisions in the "Racing Calendar." The licence granted by them to the plaintiff provided by cl. 1 that the licence was subject to the Rules of Racing, and under cl. 3 the licence might be withdrawn or suspended by them, and the decision to withdraw or suspend it might be published in the "Racing Calendar." The defendants, W. & Sons, as agents of the stewards, communicated the statement to news agencies, who circulated it to newspapers, one of which, also a defendant, published it. The statement was also published in the "Racing Calendar." The plaintiff claimed damages against the stewards and the other defendants for libel, pleading that the statement meant, and was understood to mean, that he himself had drugged Don Pat. At the trial the learned judge ruled that there was no evidence of malice on the part of any of the defendants.

Held: (i) although it was impossible to say that by reason of the general public interest in racing the publication in the "Racing Calendar" was not excessive, and although the "Racing Calendar" might come into the hands of the general public and there was no protection for a general publication in a case where there was only a sectional interest in the matter published and a consequential duty to inform only part of the public, yet it had been accepted as part of the terms and conditions on which the plaintiff held his licence that the "Racing Calendar" should be the means whereby communication of matters of interest or importance to those engaged in horse racing should be made by the stewards, and, therefore, the publication to the "Racing Calendar" by the stewards and their agents was made on a privileged occasion and in the absence of proof of malice was privileged, and the plaintiff's claim in respect of it failed.

(ii) there was no duty on the stewards or their agents to publish the statement to the news agencies and no duty on the newspaper to publish it to their readers, and, therefore, those publications were not made on a privileged occasion.

Per ROMER, L.J.: The privilege given by the common law to reports of proceedings before a court of justice open to the public does not extend to a proceeding before a domestic tribunal such as the stewards of the Jockey Club.

Notes. Considered *Standen* v. *South Essex Recorders, Ltd.* (1934), 50 T.L.R. 365; *Russell* v. *Duke of Norfolk*, [1949] 1 All E. R. 109.

As to the defence of qualified privilege, see 20 HALSBURY'S LAWS (2nd Edn.) 464, 465, 468 et seq., and for cases see 32 DIGEST 112 et seq.

Cases referred to:

(1) *Toogood* v. *Spyring* (1834), 1 Cr.M. & R. 181; 4 Tyr. 582; 3 L.J.Ex. 347; 149 E.R. 1044; 32 Digest 117, *1489*.

(2) *Cookson* v. *Harewood*, [1932] 2 K.B. 478, n.; 101 L.J.K.B. 394, n.; 146 L.T. 550, n., C.A.; Digest Supp.

(3) *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; 58 L.J.Q.B. 606; 61 L.T. 585; 54 J.P. 36; 37 W.R. 771; 5 T.L.R. 651, C.A.; 2 Digest 128, *1597*.

(4) *Dawkins* v. *Antrobus* (1881), 17 Ch.D. 615; 44 L.T. 557; 29 W.R. 511, C.A.; 8 Digest (Repl.) 652, *21*.

(5) *Maclean* v. *Workers' Union*, [1929] 1 Ch. 602; 98 L.J.Ch. 293; 141 L.T. 83; 45 T.L.R. 256; 73 Sol. Jo. 190; 43 Digest 101, *1046*.

(6) *Wright* v. *Woodgate* (1835), 2 Cr.M. & R. 573; 1 Gale 329; Tyr. & Gr. 12; 150 E.R. 244; 32 Digest 132, *1635*.

(7) *Adam* v. *Ward* (1915), 31 T.L.R. 299; affirmed, [1917] A.C. 309; 86 L.J.K.B. 849; 117 L.T. 34; 33 T.L.R. 277, H.L.; 32 Digest 129, *1608*.

(8) *Hope* v. *L'Anson and Weatherby* (1901), 18 T.L.R. 201, C.A.; 32 Digest 103, *1345*.

(9) *Brown* v. *Croome* (1817), 2 Stark. 297; 171 E.R. 652; Digest Supp.

(10) *Stuart* v. *Bell*, [1891] 2 Q.B. 341; 60 L.J.Q.B. 577; 64 L.T. 633; 39 W.R. 612; 7 T.L.R. 502, C.A.; 32 Digest 122, *1545*.

(11) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 36 Digest (Repl.) 154, *812*.

(12) *Delany* v. *Jones* (1803), 4 Esp. 191; 32 Digest 133, *1638*.

(13) *Greenlands, Ltd.* v. *Wilmshurst and London Association for Protection of Trade*, [1913] 3 K.B. 507; 109 L.T. 487, C.A.; reversed sub nom. *London Association for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A.C. 15; 85 L.J.K.B. 698; 114 L.T. 434; 32 T.L.R. 281; 60 Sol. Jo. 272, H.L.; 32 Digest 120, *1521*.

(14) *Clark* v. *Newsam* (1847), 1 Exch. 131; 16 L.J.Ex. 296; 9 L.T.O.S. 199; 11 J.P. 840; 17 Digest (Repl.) 176, *704*.

(15) *Maxwell* v. *Keun*, [1928] 1 K.B. 645; 97 L.J.K.B. 305; 138 L.T. 310; 44 T.L.R. 100; 72 Sol. Jo. 48, C.A.; Digest Supp.

Appeal by the defendants, the stewards of the Jockey Club, Messrs. Weatherby & Sons, and the Times Publishing Co., Ltd., from an order of HORRIDGE, J., and verdict in an action tried by him and a special jury.

The facts are fully stated in the judgment of the Master of the Rolls.

Norman Birkett, K.C., *Geoffrey Lawrence, K.C.*, and *Harold Murphy* for the stewards of the Jockey Club and Messrs. Weatherby & Sons.

Stuart Bevan, K.C., *Wilfrid Lewis*, and *J. P. Ashworth* for the Times Publishing Co., Ltd.

Sir Patrick Hastings, K.C., *Pritt, K.C.*, and *Harold Simmonds* for the plaintiff.

Cur. adv. vult.

March 22. The following judgments were read.

LORD HANWORTH, M.R.—This appeal is from a judgment entered for the plaintiff by HORRIDGE, J., after a trial before him with a special jury. The appeal is presented on behalf of all the defendants and raises a number of points, some of which are particular to the respective defendants.

The main facts are not in dispute. The plaintiff, Charles Chapman, at the time material to the incidents hereinafter related, was a trainer of racehorses at Lavant, near Chichester. Among the horses under his care in his stable was one named Don Pat, belonging to Mr. C. B. Rowe, which ran in a race for, and succeeded in winning, the Bedfont Plate High Weight Handicap at a race meeting held at Kempton Park, Middlesex, on Aug. 13, 1930. The running of the horse on that

A occasion attracted the attention of the stewards of the meeting, who ordered, under r. 14 of the rules hereinafter mentioned, an examination of the horse to be made, and adequate specimens were taken of the horse's saliva and sweat, which were sent for examination by Dr. Lander, the specialist who makes examinations of such exhibits for the Jockey Club. Upon applying the usual chemical analysis and tests, Dr. Lander found that the horse had been drugged, or "doped," with a B stimulant known as caffein, and that a fairly big dose had been administered. The Kempton Park stewards held a preliminary investigation on Sept. 13, and Dr. Lander was called before them and gave evidence as above, and after hearing the evidence of the persons who took the swabs, in addition to that of the owner and trainer, they decided that a case had been made out for the consideration of the stewards of the Jockey Club and sent the case accordingly to that body. The C stewards of the Jockey Club sat to hear the case in London on Sept. 29, and the three defendants, Lord Rosebery, Lord Harewood, and Lord Ellesmere, were the stewards before whom it came, Lord Rosebery acting as chairman. The case was fully investigated. The plaintiff gave evidence and called several witnesses, including those who looked after Don Pat, and those who were responsible for the transit of the horse to Kempton Park. The plaintiff was present throughout the D inquiry; after which the stewards considered their decision and the words in which it was to be expressed. The terms of their decision were as follows:

> "The stewards of the Jockey Club (Lord Ellesmere acting for Lord Zetland), after further investigation, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified the horse for this race and for all future races under their rules, and warned E C. Chapman, the trainer of the horse, off Newmarket Heath."

Kempton Park is licensed for racing under r. 41 (a) of the Rules of Racing; and the rules and orders of the Jockey Club, which it is agreed apply to the racing there held, are binding upon all those who take part in it. Rule 66 declares the various disqualifications of horses from racing, and by the last clause:

> F "Any horse which has been the subject of fraudulent practice may, at the discretion of the stewards of the Jockey Club, be disqualified for such time and for such races as they shall determine."

Further, by the same rule, no horse is qualified to run unless trained by a licensed trainer, and the horse is also disqualified if and so long as he is in the stable of, or under the care and management of, a disqualified person, after such disqualification G of such person has been twice published in the "Racing Calendar." Rule 176 prohibits the administration of drugs or stimulants to a horse by any method, and imposes a penalty for such an offence. By r. 102 every trainer of a horse running under the rules must obtain an annual licence from the stewards of the Jockey Club. The plaintiff's licence was issued to him on March 13, 1930. It is made subject to the Rules of Racing for the time being, and cl. 3 of it is as follows:

> H "A trainer's licence may be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension may be published in the "Racing Calendar," for any reason which may seem proper to them, and they shall not be bound to state their reasons."

A trainer is thus submitted to the jurisdiction and decision of the stewards.

I It is not in doubt that Don Pat was drugged when he ran his race for the Bedfont Plate, and that this corrupt act brought the matter within the jurisdiction of the stewards of the Jockey Club, and that it was part of their duty to investigate and decide what should be done in the matter. The best evidence that the inquiry was held fairly and of the responsibility of the trainer in respect of a horse found to have been doped is to be found in the evidence of the plaintiff recorded by the learned judge:

> "I am, as a trainer of horses, absolutely responsible to the stewards of the Jockey Club. As to any horse under my care I should be the person from

> whom the stewards would require an explanation. I should regard myself as responsible to the stewards for all horses in my training. I take it for granted and fully believe that Don Pat was doped, and heavily doped. Doping is a very serious fraud on all racegoers. Very serious fraud on the owners of other horses and to the horses themselves. Absolutely very seriously damaging to the sport of horse racing. The authorities should take every step to stamp out doping from races. I was treated by the stewards with every courtesy. My witnesses were called and examined by the stewards, and I did not fully appreciate what I could ask them. Every opportunity was given me to call witnesses I desired. I was asked on one or two occasions if I had anything more to say. I think the stewards wished to give me every opportunity of dealing with every part of the case. . . . I had every opportunity of elucidating the points I wished to make. I was never stopped. I had a patient and fair hearing of all the matters I desired to put forward. . . . There was a publication in the 'Racing Calendar.' I should say definitely, yes, that the 'Racing Calendar' circulated mostly among racing people. That is, as far as I know, the publication in which the decisions of the Jockey Club are printed."

The chairman gave evidence that in coming to their decision they acted as a judicial body upon the evidence laid before them. The terms of their decision as stated orally to the plaintiff vary slightly from the terms in the record, but the three stewards said that the final words were chosen as being more favourable to the plaintiff, the earlier words used—"We consider you as trainer were directly responsible for the care of the horse"—seeming to indicate a closer personal responsibility upon the plaintiff than the later. Whereas the reference to the plaintiff, simpliciter as trainer, was said to indicate that it was as trainer that the sentence fell upon him.

After this decision had been reached and communicated to the plaintiff, the defendants, Weatherby & Sons, in the ordinary course of their routine as agents for the Jockey Club, communicated the decision in its full terms, as well as an account of its origin from the action of the Kempton Park stewards, and the reference by them to the stewards of the Jockey Club, to the news agencies, who circulated it as a matter of public interest to the newspapers, with the consequence that the defendants, the Times Publishing Co., Ltd., published the information in the issue of "The Times" on Sept. 30, as an announcement "from Our Racing Correspondent." On Oct. 2, the "Racing Calendar," for the publication of which the responsibility is attached to Messrs. Weatherby and the three stewards, who are defendants, published under a heading "Jockey Club Notices," the decision of the stewards as above stated. The publication in "The Times" and in the "Racing Calendar" was not otherwise than in a form which correctly related the matter before the stewards of the Jockey Club and the terms of their actual decision thereon.

On Oct. 16, 1930, the plaintiff issued his writ against the five defendants, claiming damages for libel. In the statement of claim the responsibility, as now material, is distributed as follows: The defendants—the Earls of Rosebery, Harewood, and Ellesmere—are sued as stewards of the Jockey Club who are the proprietors of the "Racing Calendar"; Messrs. Weatherby as printers and publishers of the "Racing Calendar"; the Times Publishing Co., Ltd., as proprietors, printers and publishers of "The Times." In para. 3 of the statement of claim the complaint is of the issue to and publication by the defendants other than the Times Publishing Co., Ltd., of the stewards' decision to the Press agencies. In para. 4 all the defendants are charged with responsibility for the publication in "The Times" on Sept. 30. In para. 5, the defendants, other than the Times Publishing Co., Ltd., are charged with responsibility for the announcement in the "Racing Calendar" on Oct. 2. The innuendo alleged was that the words complained of meant, and were understood to mean, that the plaintiff had administered or caused to be administered a drug to Don Pat, and had been guilty of the criminal offence of cruelty to the horse, and was unfit to be a trainer of racehorses, and had acted dishonestly and was guilty of

A some corrupt practice. Each one of these charges is serious in itself, and necessarily of deep importance to the plaintiff as a trainer of racehorses. It will be observed that no suggestion is made of contesting the decision of the stewards of the Jockey Club. That remains unchallenged.

Rule 17 of the Rules of Racing is as follows:

> B "The stewards of the Jockey Club have power, at their discretion, to grant and to withdraw licences to officials, trainers, jockeys, and racecourses; to refuse to allow any person to act or continue as an authorised agent; to fix the dates on which all meetings shall be held; to make inquiry into, and deal with, any matters relating to racing; and to warn any person off Newmarket Heath; and to authorise the publication in the 'Racing Calendar' of their decisions respecting any of the above matters."

C That rule, to which must be added cl. 3 of the conditions under which the plaintiff held his licence as a trainer, rendered the decision itself of the stewards beyond challenge, for it was given judicially, as the plaintiff himself says, upon a matter of grave importance to racing, after the plaintiff had had a patient and fair hearing. No charge of improper conduct is made against the stewards. The charge is as to D the terms in which their decision was framed, which it is claimed left it open for an innuendo to be placed upon it, and a deduction to be drawn, that it intended to convey a charge that the plaintiff had himself administered the drug or dope to the horse, and complaint is made of the fact that it was not expressly stated that no personal charge was made against the plaintiff. All the three stewards were called. They repudiated this intention and meaning. They said they had no feeling of any E kind against the plaintiff. They said they had not thought that he administered the drug, and affirmed that they had used the words "the trainer of the horse" for the purpose of showing that their decision related to him as trainer and responsible as such—no less and no more.

The defendants, the three stewards and Messrs. Weatherby's, in their defence admitted the three publications by them and pleaded privilege relating to a matter F of public interest to the public who had a common interest with them. Further, that a special privilege attached to the publication in the "Racing Calendar," under the terms of r. 17 above, and cl. 3 of the trainer's licence, and also that the words published, without the innuendo, were true. The Times Publishing Co., Ltd., pleaded that the words as published, without any innuendo, were true, and relied upon the privilege arising from the matter being one of public interest.

G The learned judge at the trial decided to let all the evidence be concluded before he ruled upon the points of law submitted to him. He then held that the occasions of the publications complained of in paras. 3, 4, and 5 of the statement of claim were none of them privileged. He held that there was no evidence of malice, and he asked the following questions of the jury, to which their answers are now added:

> "(i) Are the words set out in paras. 3 and 5 of the statement of claim true in H their natural meaning?—No. (ii) Do these words mean that the plaintiff was a party to the actual doping of Don Pat?—Yes. (iii) Are the words set out in para. 4 true in their natural meaning?—No. (iv) Do those words mean that the plaintiff was a party to the actual doping of Don Pat?—Yes. (v) Damages under para. 3—£3,000. (vi) Damages under para. 4.—£3,000. (vii) Damages under para. 5.—£10,000."

I Thereupon he entered judgment against the three stewards and Weatherby's for £13,000 and against the Times Publishing Co., Ltd., and the other defendants for the further sum of £3,000. All the defendants appeal, the Times Publishing Co., Ltd., being separately represented.

I pause for a moment to consider the meaning of these findings of the jury. In saying that the words set out in paras. 3, 4, and 5, of the statement of claim, are not true in their natural meaning, it is obvious that the jury regarded the statement that the trainer was warned off Newmarket Heath, which was, of course, literally true, as involving an innuendo, the innuendo being, as appears from the answers themselves, that the plaintiff had been a party to the actual doping of Don Pat. In this meaning the words were confessedly untrue, for no one of the defendants ever intended to come to such a conclusion, or to use the words which could carry such an interpretation. It is at this point, then, that the defence of privilege becomes important, and must be considered in reference to each paragraph of the statement of claim. It was of deep importance to persons interested in horse racing—and they are many—to know that a certain horse had been found to be doped, and that the responsibility in respect of this had been visited upon the trainer. The plaintiff's own testimony, which I have referred to above, makes this plain, and also acknowledges that the "Racing Calendar" is the place where decisions of the Jockey Club are printed.

But the defence of privilege for the publication in the "Racing Calendar"—that is, as in para. 5—does not rest only upon the above general considerations. It appears to have been accepted by the terms and conditions on which the plaintiff held his licence, and to which he was a party, that the "Racing Calendar" should be the means whereby communications of matters of interest or importance to those who are engaged in horse racing should be conveyed. Rule 17 in terms authorises the stewards, "at their discretion" to authorise the publication in the "Racing Calendar" of their decisions respecting any of the above matters—words which fully cover the publication complained of. Let me add that cl. 3 of the trainer's licence in terms authorises the withdrawal of a trainer's licence in the "Racing Calendar," and r. 66 (3) (a) points the necessity of some recognised vehicle of communication by which knowledge can become imputed to another for an infringement of that rule, and indicates the "Racing Calendar" as the appropriate means for the purpose. The difficulty of making much out of this publication in the "Racing Calendar," published as it was two days after the publication in "The Times," had occurred to the plaintiff's counsel when opening the case. For when referring to the effect of r. 17 he said:

> "I am going to relieve your mind altogether of this point about the 'Racing Calendar,' because that goes only to a few limited racing people. It is the publication to the world of which I complain."

Again, at the conclusion of the evidence, he repeated:

> "May I just say with regard to it, that it seems to me the publication in para. 5 must have a less serious consequence in its nature than the larger publication in paras. 3 and 4, because the words are the same, and the publication under para. 5 is limited."

It seems clear, therefore, that this publication by virtue of its date, and the columns in which it appeared, was not relied upon on behalf of the plaintiff as of the same importance as the words complained of in paras. 3 and 4. It is argued that the plea of privilege is lost because the right to publish in the "Racing Calendar" as the proper paper to receive and make public the result of the stewards' inquiry can only relate to what is true, and the jury have found the words used conveyed an untrue signification. This argument does not prevail with me. What was published was the decision of an agreed domestic tribunal in the terms reached by that tribunal. It was for that tribunal to embody its decision in its own terms, provided it acted bona fide, honestly intending to act in accordance with its determination. If it does this, I do think that after the communication has been published in the course of the ordinary duty of the tribunal, the privilege will be lost because a jury put a different interpretation upon the words used, from that honestly intended by the tribunal and which the words simpliciter convey: see *Toogood* v. *Spyring* (1) (1 Cr.M. & R. at p. 193). The matter was within the jurisdiction of the stewards, and, if the inquiry is conducted fairly and properly there is no appeal from their decision. They must formulate that decision. It cannot be treated as untrue or malicious because some critic would prefer to draw it in other terms and to add words excluding something which persons outside the jurisdiction of the tribunal read into the actual judgment given.

A *Cookson* v. *Harewood* (2) fell to be decided upon issues somewhat different from the present, but I agree with the observations of SCRUTTON, L.J., in the course of his judgment upon that case, and I do not agree with the view presented by the learned judge to the jury. The domestic tribunal uses terms which are intended to convey the proper meaning to those who understand the terms and have knowledge of the jurisdiction exercised. It does not establish a good cause of action to B prove that by some others, outside and beyond, one or other different meanings are placed upon the words used for which a responsibility is sought to be charged upon the members of the domestic tribunal. This principle is of far-reaching importance. Many disputes are settled by arbitration, by tribunals in particular trades, in trade unions, and in societies of many kinds. It would be indeed of serious import if the terms used by the agreed tribunal are to be conned over again by others outside, C and a liability imposed upon the members of the tribunal for words used, because of an omission that the others would prefer to have seen introduced; provided always that the conduct of the tribunal has been honest and bona fide and not open to question or review: see *Allbutt* v. *General Council of Medical Education and Registration* (3); *Dawkins* v. *Antrobus* (4); and *Maclean* v. *Workers' Union* (5). The words of PARKE, B., in *Wright* v. *Woodgate* (6) (2 Cr.M. & R. at p. 577) state D the principle:

> "The occasion on which the communication was made rebuts the inference primâ facie arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact."

"The occasion is privileged, the communication is protected," says LORD SHAW in E *Adam* v. *Ward* (7) ([1917] A.C. at p. 348).

It seems, therefore, that privilege attached on the above grounds to the publications in the "Racing Calendar." *Hope* v. *L'Anson and Weatherby* (8) does not cover the present facts. That case was decided before r. 17 was in its present form, and the matter complained of and its possible interest as a racing matter to others, was very different from that to be dealt with in the present case.

F The learned judge ruled that there was no evidence of malice on which an issue should have been left to the jury. It is to be observed that the learned judge did not rule upon this point till after the whole of the evidence had been concluded. He had seen all the defendants in the witness-box and heard them cross-examined, and I confess that I should hesitate to differ from the judge who tried the case on such a point; but, after considering all the evidence, I have reached the same con- G clusion. There is, in my judgment, no evidence of malice. The result is that upon this issue of para. 5 there must be judgment entered for all the first four defendants.

But it is not possible to leave this point without some further consideration, for it has an important bearing upon the other parts of the case. How came it that the jury who had been told of the lesser importance of the publication in para. 5 H gave such large damages for the publication in the "Racing Calendar"? The learned judge in the course of his summing-up explicitly told the jury that

> "at the time the libel—if they thought it was a libel—was published, the plaintiff was already a man who had been warned off the turf. There is no power to question that decision, and to that extent he was at that time a I damaged man. . . . You must realise that what is complained of here is not the action of the Jockey Club in warning him off (because they are the sole judges of that). The action here is one for libel in publishing of him what it is said was not the decision of the Jockey Club."

The jury intervened in the course of their deliberations to ask the learned judge:

> "In assessing damages against the 'Racing Calendar' we wish to know if it is the property of the Jockey Club. If not, can we assess damages against the latter?"

And the answer was given:

> "There is no claim against the 'Racing Calendar' itself, but against the defendants other than 'The Times' for publishing the words complained of in the 'Racing Calendar.' "

Counsel for the plaintiff in the course of his final speech had said this:

> "You will have the words before you in their simplest form, and I am sure his Lordship will tell you that, without in the slightest degree attacking the honour or honesty of any one of the stewards (which I expressly disclaimed at the outset and which I repeat), I do attack most gravely the fact that having done this injustice, they have raised no finger to put it right."

This relates to two meetings which are legitimately, up to a point, put before the jury and much emphasised. The first was this. Two evening newspapers were produced, the "Evening News" and the "Evening Standard," and it was suggested to each of the stewards that they had seen them, which they each and all denied; and further that if they had seen them, there was opportunity, or indeed a duty upon them, to contradict what it was inferred (for, of course, the papers, after the answers, were not, and could not, be put in evidence) was contained in those newspapers. In spite of this denial and the repeated statement that the honesty of the stewards was not attacked, the incident of the evening papers was the subject of comment:

> "I may unwittingly have known that there are in the world (and you might be among them) a body of gentlemen who live in such seclusion and so remote from the activities of the world that such things as evening papers are comparatively unknown to them; and, I suppose, if I were asking a jury composed of Lord Harewood, Lord Rosebery, and others like them to look at a paragraph out of an evening paper, I might even have to explain to them by way of preliminary observation that an evening newspaper was a newspaper published in the evening which most people read."

The other was this. Some months after the pleadings were closed, as they were in January, 1931, the Duke of Richmond and Gordon wrote a letter on June 9, 1931, to Lord Rosebery asking that the latter should grant an interview to the plaintiff and have a talk with him. Lord Rosebery replied that, after thinking over what the duke had suggested about an interview with him, he had come to the conclusion that

> "it is impossible for me to see him. You see, he is bringing an action against me, and, until that case has been heard, it would not be right for me to see him. I should not be acting fairly or honourably towards my fellow stewards, nor towards the Jockey Club as a whole, if I were to do so. I am sure you will understand this point of view."

The reply, dated June 16, accepted that view:

> "I expect you are right. What C.C. wanted was to ask whether it couldn't be intimated through the Press that he had been warned off for negligence and not for doping, but I agree that until this action is heard, it would be unwise to have any private discussion between the opposing parties."

Adverse comment, however, was made against all the defendants upon this incident, which seems to have followed the usual rules under which litigation is conducted. Further, it was suggested that after these letters had passed opportunity was taken to amend the defence by introducing a justification of the words used in their ordinary signification. There was nothing in this latter point, for it appeared that the plaintiff, on July 2, obtained leave to amend his statement of claim by adding a further number of innuendoes of a more intensive nature, with the consequence that liberty was reserved to the defendants to amend their defence, and they did so, no doubt upon advice given by their professional advisers. These incidents bulked large in the speech of the plaintiff's counsel:

> A "I do attack most gravely the fact that having done this injustice they have raised no finger to put it right. I ask you by your verdict to mark the gravest view which ought to be taken of the conduct of these gentlemen in publishing this libel and leaving it uncontradicted in the public Press to-day."

Counsel told us that the jury under these incentives became "hysterical" in the box, and he thus explained the verdict for £10,000 damages. It is impossible to B hold that this figure could have been given upon a just estimate of the matters proper for their consideration, or upon any basis which recognised the conclusive character of the actual decision of the stewards. It would seem from its magnitude that the jury were moved by other considerations. They may have misunderstood the invitation of the plaintiff's counsel to find it a pleasant thing to right all which had been done to the plaintiff "as far as now appears without any justification C whatever." That invitation related, of course, to matters subsequent to the decision of the stewards, but its wide terms may have been misinterpreted.

While, as I have stated, judgment must be entered upon this head, para. 5, for the defendants, it leaves a doubt or blur upon the verdict in respect of paras. 3 and 4. The first of these relates to the publication by Messrs. Weatherby, who are the agents of the three stewards, to the news agencies—the latter to the pub- D lication in "The Times." The judge had to decide and did decide that in law the words were capable of a defamatory meaning, and, of course, left the question whether they did bear the meaning imputed to them by the innuendo to the jury. But he rightly cautioned them:

> "But you must bear in mind in this case that when that publication had been made the plaintiff had been rightly at that time warned off the turf, that they E had a perfect right to warn him off the turf, and that their decision was final."

This caution seems to have been overlooked by the jury. If the words are held to bear the meaning suggested in the innuendo, they were not chosen by Messrs. Weatherby, who forwarded the announcement to the news agencies, or by "The Times." These latter merely received them, and did not alter or enhance F their purport by any journalistic device. It seems out of proportion to this tort that £3,000 should be awarded in respect of each of these publications and cumulatively £6,000 on these two heads against all the defendants. Messrs. Weatherby were not referred to at the trial. Their conduct was not canvassed. "Nobody said anything to me about Weatherby's," is the comment of the learned judge after the verdict. It seems that the verdict and judgment in respect of both these G paragraphs must be set aside.

There remains the question whether the plea of privilege can afford protection to the defendants in respect of these paragraphs. It is said that it was a matter of public interest, that it was the duty of the news agencies and of "The Times" to give to their clients and readers information that was of interest to all racing people, to all the betting public, to all who stand outside these two classes, but yet take H an interest in the sport of horse racing, and, in particular, in the maintenance of its honour and freedom from corrupt practices—the practice of drugging horses for races having at that time attracted much attention. These are strong arguments. But, though the vehicle of the public Press has been held to be a proper and protected one so as to defeat a claim for libel where it has been used "as the only effective mode" to answer a charge which had already received as wide a circula- I tion: see *Adam* v. *Ward* (7); *Brown* v. *Croome* (9) (2 Stark. at p. 301); there is no authority which protects the statement in the newspaper where it is made, not in answer, but as a fresh item on which a general interest, as distinguished from a particular interest already aroused, prevails. BUCKLEY, L.J., in *Adam* v. *Ward* (7) stated a proposition (31 T.L.R. at p. 304), which was approved in the House of Lords ([1917] A.C. at p. 322), stated as follows:

> "If the matter is of public interest and the party who published it owes a duty to communicate it to the public, the publication is privileged, and in this sense duty means not a duty as matter of law, but, to quote LINDLEY, L.J.'s words

> in *Stuart* v. *Bell* (10) ([1891] 2 Q.B. at p. 350), 'a duty recognised by English people of ordinary intelligence and moral principle.' "

But these words must be taken in relation to the facts of the case. It appears to me that the learned judge meant by the words "matter is of public interest" has already become of public interest. The duty cannot arise in respect of a matter not yet made public to all.

For these reasons it seems that the right course will be to direct a new trial as to paras. 3 and 4. The jury should be directed that they cannot impeach the decision which was reached; that the publication was in the ordinary course of the news agencies' and newspapers' business; and was one which must in any case have become known to a very large circle through the protected publication of the "Racing Calendar" on Oct. 2. The appeal will be allowed with costs. Judgment must be entered for the defendants with costs upon the issue at the trial as to para. 5, and a new trial ordered as to paras. 3 and 4, the costs of those issues at the trial before HORRIDGE, J., to be in the discretion of the judge before whom the new trial takes place.

SLESSER, L.J.—On Sept. 29, 1930, there was held before the stewards of an association known as the Jockey Club an inquiry into the alleged drugging of a horse called Don Pat, and also into the responsibility of the trainer of the horse, Mr. Charles Chapman, who is the plaintiff. This case is not directly concerned with that inquiry, but, in so far as the alleged libels complained of arise out of reports of the findings of that inquiry, it is convenient to state certain matters which explain how the inquiry into the position of Mr. Chapman came to be held.

On March 13, 1930, Mr. Chapman received from the stewards of the Jockey Club what is known as a trainer's licence to train horses to run under the Rules of Racing during the year 1930. The licence was expressed to be subject to conditions, the first of which was that the licence was issued subject to the Rules of Racing for the time being. Clause 3 provided that a trainer's licence might be withdrawn or suspended by the stewards of the Jockey Club in their absolute discretion, and such withdrawal or suspension might be published in the "Racing Calendar," the recognised organ of the Jockey Club, for any reason which might seem proper to them, and that the stewards should not be bound to state their reasons. The legal relation between Mr. Chapman and the Jockey Club primarily depended upon this licence whereby he agreed to be subject to the Rules of Racing for the time being; that is to the Rules of Racing of the Jockey Club.

The most important rule with which we are here concerned is r. 17, which is to the following effect:

> "The stewards of the Jockey Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, and racecourses; to refuse to allow any person to act or continue as an authorised agent; to fix the dates on which all meetings shall be held; to make inquiry into and deal with, any matters relating to racing, and to warn any person off Newmarket Heath; and to authorise the publication in the "Racing Calendar" of their decisions respecting any of the above matters."

At the inquiry, Mr. Chapman duly appeared before the stewards, the Earls of Ellesmere, Harewood, and Rosebery, the Earl of Rosebery being in the chair, and he was confronted with evidence that his horse had been found drugged, which evidence he did not dispute. It is not seriously suggested that the inquiry was conducted in anything other than a proper manner. Though it was faintly urged that an inquiry continued in his absence, an inspection of the report of the proceedings satisfied me that this was not so. The plaintiff himself said, in cross-examination:

> "I was treated by the stewards with every courtesy, my witnesses were called and examined by the stewards, and I did not fully appreciate what I could ask them. Every opportunity was given me to call witnesses I desired. I was

A asked on one or two occasions if I had anything more to say. I think the stewards wished to give me every opportunity of dealing with every part of the case. I had every opportunity of elucidating the points I wished to make. I was never stopped, I had a patient and fair hearing of all the matters I desired to put forward."

B Mr. Chapman was subsequently called back into the room and Lord Rosebery told him that the stewards would have to withdraw his licence and warn him off Newmarket Heath. The report of the inquiry was fully considered at the trial, and it is common ground that the decision arrived at was based upon the view that, in the stewards' opinion a trainer is directly responsible for the care of his horse and that the plaintiff was guilty of a dereliction of duty, and not upon any finding that the C plaintiff had himself drugged the horse or caused it to be drugged. The actual language used by Lord Rosebery, the chairman, to Mr. Chapman in giving his decision was this:

> "We have given the most careful thought to this case. We have come to the conclusion that Don Pat was doped, and he is disqualified for life. We consider you, as trainer, were directly responsible for the care of the horse. Your D licence to train is revoked, and you are warned off Newmarket Heath."

It is not necessary, at this stage, to say anything more about the inquiry, but on the same date, namely, Sept. 29, 1930, Mr. Thomas Shears, a telephonist employed by the Exchange Telegraph Company, received a message by telephone from Messrs. Weatherby that they had got a statement for publication in the Press, and E they were asked to send for it, which they did. This statement, which was subsequently published to three news agencies, is the libel complained. It is in the following terms:

> "The acting stewards of the Kempton Park Second Summer Meeting (Major Mark Weyland, Sir William Cooke, and the Hon. T. Egerton) met on Sept. 13 to receive the result of the examination which they had ordered to be made of F Don Pat after winning the Bedfont Highweight Handicap. Having interviewed Mr. Rowe, the owner of Don Pat, and C. Chapman [meaning the plaintiff], the trainer, they referred the case to the stewards of the Jockey Club. The stewards of the Jockey Club (Lord Ellesmere acting for Lord Zetland), after further investigation, satisfied themselves that a drug had been administered to the horse for the purpose of the race in question. They disqualified G the horse for this race, and for all future races under their rules, and warned C. Chapman, the trainer of the horse, off Newmarket Heath."

A similar statement was published in "The Times" newspaper by the Times Publishing Co., Ltd., on Sept. 30, 1930, under the heading, "Racing. Another Trainer Warned Off. The Doping of Don Pat." The same statement appeared in the "Racing Calendar" on Oct. 2, 1930. No point is made of the existence of the H heading of "The Times," and throughout the trial the impeached statements, whether published to the news agencies or in "The Times" or in the "Racing Calendar," were treated as identical.

By para. 7 of the statement of claim it was alleged that the words complained of meant, and were understood to mean, that the plaintiff (a) had administered or caused to be administered a drug to the said horse; and/or (b) had been guilty of I the criminal offence of cruelty to the said horse; and/or (c) was unfit to be a trainer of racehorses; and/or (d) had acted in a dishonest manner; and/or (e) had been guilty of some corrupt or fraudulent practice; and/or (f) was incompetent or negligent; and/or (g) was a person whom no owner of racehorses ought to trust or employ; and/or (h) was an undesirable person to have on racecourses, and unfit to associate with gentlemen of the turf. This allegation was denied in para. 6 of the defence, where it was stated that the words did not mean and were not understood to mean what was alleged. The paragraph further said that the said words are not capable of the said meanings or of any other actionable or defamatory meaning.

By para. 7 of the defence it was pleaded that the said words without the said meanings are not libellous, and by para. 7a it was contended that the said words according to their natural ordinary signification and without the said meanings were true. At the end of the trial there was left to the jury this question among others: "Are the words set out in paras. 3 and 5 of the statement of claim [that is, the statement complained of] true in their ordinary meaning?"—Answer: "No." "Do the words mean that the plaintiff was a party to the doping of Don Pat?"—Answer: "Yes."

In my view, it was not possible, on the language as published, for the jury to return an answer that the words were not true in their natural meaning. If I analyse the notice, I find that the first three paragraphs are an exact historical statement of what happened at the inquiry before the stewards of the Jockey Club and of what happened at a preceding inquiry, to which I have not had occasion to refer, namely, one before the stewards of the Kempton Park Summer Meeting, where the horse competed. The last paragraph of the statement, of which alone complaint is made, that the stewards of the Jockey Club "disqualify the horse for the race and for all future races under their rules," so far as regards the words in their natural meaning were true and the statement continued, "and warn C. Chapman, the trainer of the horse, off Newmarket Heath." These words in their natural meaning were also true. When the jury were asked the question: "Do these words mean that the plaintiff was a party to the actual doping of Don Pat?" they were in my view not finding the words in their natural meaning true, but accepting the innuendo pleaded in para. 7 of the statement of claim which I have set out. I think it important at the outset to say that, in my judgment, the finding that the words were untrue to be supported must be based solely upon an innuendo and not upon the natural meaning of the words which is an accurate state of historic fact.

The learned judge, in summing up to the jury, said:

> "The first matter which you will have to deal with and really the only matter, is whether these words are, in their ordinary meaning, true. When you write something of a person it is not what you intend to say, it is what you do say that matters, and the test of what you have said is what any reasonably-minded person reading that would say it meant."

He went on to say this:

> "But I want to give you one slight qualification of it, and it is this, that if it bears an innocent meaning and at the same time a libellous meaning can be taken out of it, you must not necessarily apply the libellous meaning to it; you must test it by whether or not a reasonably-minded person reading it would say that the libellous meaning is one which ordinary people would put on it."

He quotes with approval the language of LORD HALSBURY, where he states:

> "It is not enough to say that by some person or another the words might be understood in a defamatory sense. The test in these cases is this: Is the meaning sought to be attributed to the language alleged to be libellous one which is a reasonable natural or necessary interpretation of its terms? It is unreasonable that when you have a number of good interpretations the only bad one should be seized upon to give a defamatory sense to the document. Therefore, what you have to ask yourselves here is: Would a reasonably-minded person reading this document say that it meant that Mr. Chapman had been warned off the turf because he himself had been a party to the doping of Don Pat?"

It is quite clear that the statement itself does not say this, but merely to relate what happened at the inquiry, and the decision thereon and the direction of the learned judge, which I have quoted, indicates again to my mind that on this point he was really asking the jury whether they would or would not find the truth of the innuendo pleaded. The whole matter appears to me to turn upon innuendo and not upon the natural meaning of the words. And the finding of the jury is confused by their failure to recognise this fact. The importance of this conclusion in the present case is greatest in connection with the "Racing Calendar" for reasons which I now state.

The defendants, in addition to saying that the words are true in their natural meaning and are not capable of being defamatory in that meaning, have pleaded the defence of privilege, and, further, as regards one publication of the defendants other than "The Times"—that in the "Racing Calendar"—they say that the plaintiff, by his assenting as a condition to the granting of a licence that he would be bound by the rules of racing, has agreed to the publication of the results of the stewards' decisions in the "Racing Calendar," and cannot be heard to complain of a tort to which he himself has assented. I propose to deal with this case of the publication in the "Racing Calendar" first, as it presents certain peculiar features which do not apply in the case of the other publications with regard to the assent of the plaintiff to the publication. This defence is based upon the doctrine volenti non fit injuria. In the words of SALMOND ON TORTS, 7th Edn., p. 58:

> "No act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it: volenti non fit injuria. No man can enforce a right which he has voluntarily waived or abandoned":

see *Smith* v. *Baker* (11), a case of negligence to which the principle has been expressly applied, but it is of general application. The argument of counsel for the plaintiff to avoid the consequence of the apparent consent to publication in the "Racing Calendar" is as follows: He says that the plaintiff has only consented to the publication of the decision of the stewards, which I have quoted but repeat, that they "considered the plaintiff as trainer directly responsible for the care of the horse," that is to say, to a finding that he was under a duty to see that the horse was not drugged, which duty he failed to perform. Counsel points out that the jury, by finding that the statement in the "Racing Calendar" meant that the plaintiff was a party to the actual drugging of Don Pat, is a statement, as the jury have construed it, which is not the publication of the decisions of the stewards, in that the stewards, to put it briefly, held that the plaintiff was negligent in not preventing the drugging of the horse, whereas the publication alleged that he had actually drugged it. It is on this matter that the conclusion at which I have already arrived that the finding of the jury is directed to an innuendo and is not a finding as to the actual meaning of the words, becomes so material, for if the plaintiff assented to a report of the decisions of the stewards and they used words which were not a report of that decision, counsel's argument would have great weight; but if, on the other hand, in fact they did report the actual decision but in such a way that the jury say that it was to be understood to mean something other than the actual decision, that is a risk which the plaintiff, by agreeing to a report of the decision, has elected to run.

The matter is not free from authority. In *Cookson* v. *Harewood* (2), which was heard by SCRUTTON, GREER, L.JJ., and myself on Oct. 19, 1931, a very similar rule to the one here under consideration provided that the stewards could in their absolute discretion warn off any person from all racecourses where the rules were enforced without assigning any reason for so doing, and by a further rule it was recognised that the fact of his being warned off might be published in the "Racing Calendar." An inquiry was held by the stewards of the Pony Turf Club, and Mr. Cookson was warned off all courses under their control in accordance with r. 170—a rule, namely, similar to r. 17 in the present case. This statement was subsequently published in the "Racing Calendar," and an action for libel was thereupon instituted. SCRUTTON, L.J., quoted the words which appeared in the "Racing Calendar," which were as follows:

> "Notice.—As a result of an inquiry held by the stewards of the Pony Turf Club, the following person was warned off all courses under their control in accordance with r. 170: Ernest Sawrey Cookson."

His Lordship continued:

> "That is the libel. It is perfectly obvious that that is quite true, every word of it. The stewards did hold an inquiry on the date mentioned, and they did at that inquiry come to a decision that Ernest Sawrey Cookson should be warned off all courses under their control in accordance with r. 170. The plaintiff by applying for a licence and acting as an official under Pony Turf Club Rules is bound by the rules to accept the decision of the stewards. . . . From that point of view . . . questions about innuendoes are quite beside the mark. If you get a true statement and an authority to publish the true statement, it does not matter in the least what people will understand what it means. The plaintiff has submitted to the jurisdiction."

The other members of the court dealt with other matters which arose in that case on the discrepancy of certain answers returned by the jury, but clearly agreed with the view on the matter here material expressed by Scrutton, L.J. Indeed, counsel for the plaintiff scarcely disputes that if the defamatory matter here can only be sustained by innuendo the plaintiff has assented to the publication. His case is that the words in their natural meaning are defamatory and so not a true report of the decision, but, for myself, for the reasons I have given, I think the case can only be based on innuendo, and, applying the doctrine of volenti non fit injuria, I hold that the plaintiff must fail in respect of the publication in the "Racing Calendar" by reason of his assent thereto.

The second ground on which the publication in the "Racing Calendar" is defended is based upon privilege. This defence raises problems of considerable difficulty. The "Racing Calendar," according to the evidence of the plaintiff, circulates mostly among racing people, it is the publication in which the decisions of the Jockey Club are printed, but it is registered as a newspaper and can be obtained at a high price by the general public. It was contended before us that racing has now become so much a matter of general interest that the requirements of privilege for publication in a newspaper are satisfied—that is to say, that there was not here any unnecessary publicity given to the findings, and that the defendants did no more than their duty in giving this wide publicity to the public who are so widely interested.

In the words of Lord Loreburn in *Adam* v. *Ward* (7) ([1917] A.C. at p. 321):

> "A man ought not to be protected if he publishes what is in fact untrue of someone else when there is no occasion for his doing so."

In that case there had been a confidential report made with regard to the plaintiff by his senior to the general officer commanding which ultimately reached the War Office, and as a result of various considerations, the plaintiff was placed on the retired list upon half-pay. He then became a member of the House of Commons and made a speech with reference to his rights and injuries as he conceived them. The Army Council then issued through the Press a letter which the plaintiff complained of as a libel upon him, with regard to which he sued the secretary to the Army Council. The defendant pleaded privilege, and the House of Lords decided that, having regard to the publicity which had taken place through the Parliamentary debate, and having regard to the general interest which the subject may be assumed to have in the Army, the publication was not excessive. Lord Dunedin ([1917] A.C. at p. 322) in terms approves the reasons given in the Court of Appeal by Buckley, L.J., and a reference to the report of the case in the Court of Appeal (31 T.L.R. at p. 304) shows that Buckley, L.J., had said that:

> "The public interested in this matter is not, I think, confined to the public in the United Kingdom; it extends to all those who are interested in matters vitally affecting the military forces of the Crown. This extends to all subjects of the Crown. Further, the plaintiff's speech was delivered in such circumstances that it might well reach all such members of the public as would be reached by the publication made of the defendant's libel."

The next case to which I will refer on the matter of excessive publication is that of *Allbutt* v. *General Council of Medical Education and Registration* (3). In that case the General Council, who are a statutory body, after a proper inquiry, adjudged a medical practitioner to be guilty of misconduct in a professional respect, and published the minutes of the council containing a statement to that effect. The book in which these minutes were published was obtainable by the public, but the public was held to be privileged I think, because, in the language of Lopes, L.J. (23 Q.B.D. at p. 409), the public were clearly interested. The preamble of the Act states that it is expedient that persons requiring medical aid should be able to distinguish qualified from unqualified practitioners. And in my view the finding of the court in that case that the privilege was not exceeded is due to the peculiar statutory obligations of the medical council and to the general public interest in the qualification of doctors.

I find it impossible to say that publication in the "Racing Calendar" was not excessive by reason of the general public interest in racing. It is true that one witness said that interest in racing had greatly increased, but he also said that the interest in golf, filming, motoring, and broadcasting had increased. If we are to speculate about the respective interests in various subjects every time a plea of privilege is urged in the case of general newspaper publications the time of the courts will be very fully occupied. I am unable to find in the authorities any reason to suppose that the law has protected a general publication in cases where there is only a sectional interest and a consequential duty to inform only a part of the public. This was the view indicated as regards this very publication in *Hope* v. *L'Anson and Weatherby* (8), where Lord Collins, M.R., said (18 T.L.R. at p. 205):

> "The decisions were not of such general public interest as to make the occasion privileged; the decisions are of interest to a section of the public—those interested in racing matters—but they were not of interest to the public as a whole."

Nevertheless, for a different reason, I have come to the conclusion that the defendants may plead privilege here. The reason is that the parties have chosen of their own accord to make the "Racing Calendar" a means of communication between the racing public and the Jockey Club. The licence itself, cl. 3, and a number of the Rules of Racing, make this quite clear. Rule 1 states in fact that the "Racing Calendar" and its component parts are works published by authority of the Jockey Club. Rule 17 has already been mentioned, and it authorises not only publication in the "Racing Calendar" of cases of persons warned off Newmarket Heath, but also of all the other decisions of the stewards of the Jockey Club, such as licences, agencies, dates of meetings, and generally their decisions to make inquiry into and deal with any matters relating to racing. I find that the "Racing Calendar" is also referred to in r. 66 as a means of stating that a horse is not qualified to be entered or run in any race, and I think, therefore, that the plaintiff cannot be heard to say that to publish decisions in the "Racing Calendar" generally is not within the ordinary duty of the stewards of the Jockey Club.

In the well-known case of *Toogood* v. *Spyring* (1), Parke, B., said (1 Cr.M. & R. at p. 193): Statements

> "made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned,"

are privileged. In *Brown* v. *Croome* (9), Lord Ellenborough indicated that if it could be shown that an advertisement in a newspaper was the only possible means of making known certain circumstances, that might be sufficient to vindicate the mode. So also in *Delany* v. *Jones* (12), it was held that an advertisement published in a newspaper conveying an injurious imputation is not libel if done bona fide and with a view of obtaining information on the subject alluded to in the advertisement by a person really interested in the discovery. This also was a dictum of Lord Ellenborough. I do not quote these old cases as binding authority, but rather to support the view to which I have come independently of them to the effect that where there is only one reasonably possible mode of communication in all the circumstances, the use of that mode is privileged when it is consented to by the plaintiff himself.

I think in all the circumstances, although the "Racing Calendar" might come into the hands of persons not interested in racing, yet, on a reasonable view of the duty of the defendants to keep racing free from impropriety and to protect horses from cruelty, they were entitled to publish their decisions in their own organ even if that organ was not prevented by them from coming into the hands of the public. For this reason also, therefore, I do not think that so much of the judgment as concerns the publication in the "Racing Calendar" can be supported. It will be noted that since the decision in *L'Anson's Case* (8), the power to publish decisions in the "Racing Calendar" has been added in express terms to r. 17.

As regards the publication to the news agencies and to "The Times," for both of which the defendants other than the Times Publishing Co., Ltd., are attacked, and as regards the liability of the Times Publishing Co., Ltd., itself, my decision that there is no general interest to the public or duty owed to the public to publish matter which concerned a section of the public only, which decision I have already indicated in connection with one of the proposed grounds for privilege in the case of the "Racing Calendar" necessarily deprives all publications other than that of the "Racing Calendar" of privilege, and, therefore, apart from the publication in the "Racing Calendar," which is protected for the two peculiar reasons which I have stated, there is, if the finding of the jury can be supported, no defence to the action against any of the defendants in any matter other than the publication in the "Racing Calendar."

Lastly, the learned judge noted that there was no evidence of malice. I agree; there was absolutely none.

There remains, however, the important question of damages. The jury in respect of the publications to the news agencies and to "The Times" respectively, returned the damages at £3,000 in each case. In the case of "The Times," the Times Publishing Co., Ltd., would be liable as well as the other defendants as joint tortfeasors. In the case of the publication to the news agencies, the defendants other than "The Times" would alone be liable. But before I discuss the appeal as regards these damages, I would say a word as to the £10,000 found by the jury as damages in respect of the publication in the "Racing Calendar." The question of the propriety of these damages has now strictly become unnecessary to consider, but although I think that judgment should be entered for the defendants in respect of the publication in the "Racing Calendar," I think it right to add a few words to indicate that, in my opinion, in any event, this award of the jury could not be supported. Counsel for the plaintiff in his speech to us argued that we should not find these damages to be excessive. He defended them as punitive damages, properly awarded because the stewards had taken no steps to correct the misunderstanding produced by their statement, which the jury have found to have meant that the plaintiff had drugged a horse. He said that the stewards had suggested that they did their best to correct the misunderstanding, but under cross-examination it did not appear that they had done anything. He said that when certain newspapers were proffered to them they denied that they had seen the particular issues put to them. This, said counsel, was a complete surprise, and he had suggested to the jury that the stewards were not frank in the matter. Moreover, he said it was to be noted that at the very time when Lord Rosebery was refusing the Duke of Richmond's request, on behalf of the plaintiff, to correct any misunderstanding as to the meaning of the statements published, the stewards' defence was being amended by pleading the words in the statement of claim in their natural meaning did not mean that the plaintiff had drugged the horse.

Dealing with these matters in order, several of them are open to criticism. First, counsel himself had said to the jury that he did not suggest that the stewards were not frank in denying that they had seen certain newspapers, and there was

A no evidence to question their statement on this matter. Secondly, as regards the amendment of pleading, it appeared on investigation that the defendants' amendment in which they pleaded the partial justification was occasioned by an amendment of the plaintiff himself, which was made pursuant to an order by the master on July 2, 1931, whereas the amendment of the defendants was not made until July 20, 1931, and, in any event, in para. 7 of the defence, before there was any B amendment the defendants had pleaded, that the said words without the said meanings (that is the meanings imputed to the words by the statements of claim) were no libel. Thirdly, as there was no reason to suppose that the defendants had seen any misinterpretation of the language to exist on any large scale, and, as Lord Harewood had stated that he had put it right wherever he found the statement misconstrued, I cannot see how the jury were justified in giving punitive C damages for want of an explanation subsequent to the inquiry by the stewards of their published statement. Finally, on this head I have come to the conclusion that the action of the jury can be explained, in part by their failure to distinguish between such injury as the plaintiff may have suffered as the result of the decision in the inquiry and the injury which he is alleged to have suffered through the publications, although it is true they were directed by the judge not to make such a D confusion. The fact that at a certain stage in their deliberations they sent for the pleadings and sent a communication to the judge to this effect that

> "in assessing damages against the "Racing Calendar," we wish to know if it is the property of the Jockey Club. If not, can we assess damages against the latter? We have not been provided with the statement of claim,"

E all indicate that they were seeking to penalise the Jockey Club for their general behaviour which the jury appeared to have disliked.

But, apart from these considerations, there is a serious question of principle involved in the assessment of these damages. Whatever might be the view of the jury as to the behaviour of the stewards, there can be no suggestion that there was any ground against Messrs. Weatherby, their co-defendants, for assessing punitive F damages against them. Damages against joint tortfeasors cannot be divided. The jury have no power to apportion the damages, and, if they did so, judgment cannot be entered against the several defendants for the amount so apportioned: *Greenlands, Ltd.* v. *Wilmshurst and London Association for the Protection of Trade* (13). But this does not dispose of the matter, for though there must be one set of damages against joint tortfeasors, the authorities go to show that such damages are G not to be assessed according to the act of the most guilty or the most innocent of the defendants, but according to the aggregate of injury received from their common act: *Clark* v. *Newsam* (14), as was said by ALDERSON, B., in that case (1 Exch. at p. 140):

> "The true criterion of damage is the whole injury which the plaintiff has sustained from the joint act of trespass."

H This principle has been recently applied by AVORY, J., in *Maxwell* v. *Keun* (15), and should have been applied in the present case. Whatever the result might have been, the jury should have been told to consider, in any event, the innocence of Messrs. Weatherby and to have taken into account their innocence as well as the conduct of the stewards and so have arrived at one resultant sum. The failure to do this, in my judgment, is another reason why their award of damages of £10,000 I cannot stand in any event. Finally, there is to be considered the position as to damages against all the defendants in respect of the publication in "The Times" of £3,000 and against all the defendants other than "The Times" in respect of the publication to the news agencies also of £3,000. In my view, the assessment of damages against the defendants other than "The Times" must be treated as being infected by the error of the jury in respect of the damages for publication in the "Racing Calendar." If the jury wished to give punitive damages in respect of the "Racing Calendar," they may also have included punitive damages in the case of the conduct of the stewards in the other publications; for all of these the stewards were equally responsible and the liability of "The Times" as joint tortfeasors in A their case is in part dependent upon the liability of the other defendants. The observations which I have made as to the neglect of the jury to consider the innocence of Messrs. Weatherby in their resultant damage apply equally to their failure to consider the position of "The Times" as joint tortfeasors with the stewards and Messrs. Weatherby. My conclusion is that the whole question of damage must be re-considered in a new trial excluding the case of the publication in the "Racing B Calendar," which I have held to be both consented to by the plaintiff and privileged.

Finally, I have to consider whether the new trial should be limited to the question of damages or whether the whole matter in so far as it has not here been disposed of should go for a new trial. The error in seeking to put a different natural meaning upon the words complained of instead of asking whether or not the words complained of properly supported the innuendoes pleaded is radical and in C itself is a justification for a new trial. The whole matter has become so confused that I do not think that this court should in any way limit the issues which may properly be put before another jury. In the result, therefore, I hold that this appeal succeeds, that a new trial should be ordered on the issues of the publication to the news agencies and to "The Times," and that the defendants other than "The Times" newspaper wholly succeed on the issue of the publication in the "Racing D Calendar," and that, consequently, this matter should not go for a new trial. I agree with the judgment of my Lord with regard to the order as to costs.

ROMER, L.J.—I agree with the order that has been read out by the Master of the Rolls, and will state as shortly as possible my reasons for doing so.

In my opinion, the stewards of the Jockey Club and Messrs. Weatherby are pro- E tected from liability in respect of the publication in the "Racing Calendar" upon the ground that it was made upon a privileged occasion. I cannot myself doubt that the stewards owe a duty to all persons interested in racing under the rules of the Jockey Club to keep them informed of their decisions arrived at upon the matters that from time to time are brought before them in accordance with those rules. Nor can I doubt, in view of the provisions of r. 17, that as between the F stewards and persons who submit themselves to the rules, the "Racing Calendar" is the proper medium for communicating those decisions. If this be so, the fact, if fact it be, that the communication is made in terms that are defamatory seems to me from the point of view of privilege to be immaterial, in the absence, of course, of malice. The defence of privilege is only required where the communication is defamatory. The question, as I regard it, is not whether, having regard G to r. 17, the plaintiff assented to the particular communication made through the "Racing Calendar" so as to enable the defence of volenti non fit injuria to be raised, but whether the plaintiff assented to the "Racing Calendar" being used in general as the medium for informing the racing public of matters which the stewards owe a duty to communicate to them. As, in my opinion, the plaintiff did so assent, the occasion on which this particular communication was made H rebuts the inference (to use the language of PARKE, B.) primâ facie arising from the fact that the statement, in the view of the jury, was prejudicial to the character of the plaintiff. Judgment should, therefore, be entered for the stewards and Messrs. Weatherby in respect of the publication in the "Racing Calendar," unless there was some evidence of malice to go to the jury. HORRIDGE, J., who had all the evidence before him, ruled that there was none, and I should hesitate long I before venturing to differ from so experienced a judge upon such a question. But counsel for the plaintiff expressly stated that he did not question the honesty or honour of the stewards, and how a man who makes a defamatory statement maliciously, even giving to that word its wider legal sense, can be described as either honest or honourable, is not very easy to see.

As regards the publication to and in "The Times," and to the Press agencies, the defence of privilege cannot, I think, prevail. So far as regards the stewards, such a publication seems to me to go beyond any duty that they owed to anyone. So far as regards the Times Publishing Co., Ltd., it may in one sense be true to say that they owe a duty to their readers to publish any and every item of news that may interest them. But this is not such a duty as makes every communication in their paper relating to a matter of public interest a privileged one. If it were, the power of the Press to libel public men with impunity would in the absence of malice be almost unlimited. Nor, indeed, did counsel on their behalf put his claims so high. He founded their claim to privilege, as I understand him, upon certain observations made by GREER, L.J., in *Cookson* v. *Harewood* (2). In the course of his judgment in that case the lord justice said this:

> "In my judgment anyone who knows that a man has been convicted of larceny at a criminal trial before a court of competent jurisdiction is entitled to say, without being sued for slander or libel, that that man has in fact been convicted. It seems to me that, if a man submits to a domestic tribunal, equally any person is entitled to record the fact that that domestic tribunal decided against him. If it is a question relating to a school, and a boy is expelled by the competent authority, I think that anyone can say, without being sued for slander or libel, that the boy was, in fact, expelled. The same thing would apply to expulsion from a club. When a man subjects himself to a domestic tribunal he must be in exactly the same position as regards complaining of a record of that domestic tribunal as every citizen who has to submit to the lawful tribunals of the country."

If these observations are intended to extend to domestic tribunals the privilege given by the common law to reports of proceedings before a court of justice open to the public, I am, with all respects to the learned lord justice, unable to agree with them. For the ground of the common law privilege seems to be that, as the public are entitled to be present, they are entitled to be informed of what has taken place in their absence. I know of no authority for extending the privilege to a proceeding before a domestic tribunal such as the stewards of the Jockey Club, and, in my opinion, it cannot be so extended. For these reasons it seems to me that the defence of privilege fails as to the publications in "The Times" and to the Press agencies.

In these circumstances the question arises whether in respect of these publications the verdict of the jury should be allowed to stand or whether there should be a new trial. In my opinion, there ought to be a new trial. The jury had been told, in effect, by counsel for the plaintiff that from the point of view of the plaintiff these two publications were of far greater importance than the publication in the "Racing Calendar." The jury, nevertheless, awarded £3,000 in respect of each of the more harmful publications, and £10,000 in respect of the less important one. It was suggested on behalf of the plaintiff that this latter sum included vindictive damages, which I understand to mean damages awarded against the defendant stewards by way of punishment in addition to the damages actually sustained by the plaintiff. What act of omission on the part of the stewards called for vindictive damages has never been made very plain to me. It was said that they refused to accede to a request on the part of the plaintiff, conveyed to Lord Rosebery by the Duke of Richmond, to publish a statement to the effect that they did not charge him with being a party to the "doping" of Don Pat, and had merely warned him off the turf for negligence in his capacity of trainer of the horse. It would not, however, have been reasonable to expect them to publish a statement without adding that they never had suggested anything to the contrary. The action was at this time pending, and the principal issue in the action was whether the publications complained did or did not contain a suggestion to the contrary. In those circumstances the publication of the statement with the addition would have been highly improper. To ask for the statement without the addition would have been unreasonable. It was further suggested that the publications complained of in the action had conveyed to a number of newspapers, in particular certain evening newspapers, much the same meaning that was alleged by way of innuendo in the statement of claim, and that the stewards had never taken the trouble to put the newspapers right. In the course of Lord Harewood's cross-examination he was asked this question: "Are you aware that every evening newspaper in London misconstrued the notice you sent out?" This question was naturally objected to and was disallowed. But thereupon (and, of course, quite legitimately) various papers were put to him and subsequently both to Lord Rosebery and Lord Ellesmere. None of these three witnesses had, however, seen any of these papers before, and their contents were, therefore, never in evidence. We are told, nevertheless, that when these three stewards denied having seen any of the newspapers produced by counsel the jury became "furious" and "hysterical." If this fury and hysteria completely wore themselves out in awarding the £10,000, the matter from the point of view of damages is not of any importance as we are directing judgment to be entered for the defendant stewards and Messrs. Weatherby in respect of the "Racing Calendar" publication. But we have no sure ground for thinking that the excitement engendered in the minds of the jury by the omission of these three gentlemen to read the particular papers in question, and the jury's desire to punish them is not, to some extent, reflected in their award of the two sums of £3,000. It seems to me essential, therefore, that the question of damages for the publications in "The Times" and to the Press agencies should be re-considered by a new jury. For the excitement appears to me to have been quite unwarranted, and I can see no real justification for punishing these gentlemen whose honour and honesty are not questioned. It is, moreover, to be observed that Messrs. Weatherby & Sons have also been made liable for the two sums of £3,000 without, apparently, their position having been considered by the jury at all. We have the statement of the learned judge himself that no one had said anything to him about Messrs. Weatherby until after the verdict. If nothing was said to him about them, it may be assumed that nothing was said to the jury.

But I do not think that the amount of damages is the only thing that should be re-tried. The question of libel or no libel should also be submitted to a new jury. And for this reason. The cross-examination as to the newspapers to which I have already referred, must indubitably, though I have no doubt quite unintentionally, have left in the minds of the jury the conviction that every evening newspaper in London or many of them, and also some morning newspapers, had put upon the words complained of the meaning that the jury were being asked by the plaintiff to attribute to them. Of this fact, however, there was no evidence whatsoever. I am afraid, too, that from the concluding speech for the plaintiff the jury may have obtained the impression that it was not until about June, 1931, that the stewards themselves put forward the view that they had never alleged that the plaintiff had "doped" Don Pat. In a letter to the Duke of Richmond, Lord Rosebery said that as far as he knew the stewards had never said that Chapman doped the horse. In commenting upon this, counsel said: "That was on June 19. After that somebody thought, 'Well, if that is your view we had better put it in our defence. If they had not put that in there would have been no defence. It was only last July that they thought of this defence, namely, that there is an innocent meaning to these words." These observations were due to a misapprehension as to the reason why the statement of defence was amended, and as to the contents of that document in its original state. In all these circumstances, however, it is, in my opinion, eminently desirable that there should be a new trial of the question as to the meaning to be attributed to the words of the publications complained of.

Order accordingly.

Solicitors: *Charles Russell & Co.*; *Soames, Edwards, & Jones*; *Windybank, Samuel, & Lawrence.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

BACK (INSPECTOR OF TAXES) *v.* WHITLOCK

[King's Bench Division (Rowlatt, J.), March 9, 1932]

[Reported [1932] 1 K.B. 747; 101 L.J.K.B. 698; 147 L.T. 172; 48 T.L.R. 289; 76 Sol. Jo. 272; 16 Tax Cas. 723]

Income Tax—New resident—Income from same source in previous year—When income "first arose"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case V, r.* 1—*Finance Act*, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 29 (1) (*b*) (*ii*).

W., who had been resident abroad for many years, took up his permanent residence in this country on April 7, 1927. During the financial year April 6, 1927, to April 5, 1928, his income from foreign investments, namely, investments in Malayan securities, was £5,261. During the financial year April 6, 1928, to April 5, 1929, although his holdings in foreign investments were the same as in the previous year, the income thereof dropped to £2,988. He was assessed to income tax for the year 1928–29 in the sum of £5,261, namely, on the computation of his income for the previous year 1927–28 in accordance with s. 29 (1) of the Finance Act, 1926. Section 29 (1) (b) (ii) [now the Income Tax Act, 1952, s. 133 (1) (b)] governed the assessment. Section 29 (1) is as follows: "(b) In the case of income tax chargeable under . . . Case V of Sched. D . . . (ii) where the income first arose on some day in the year preceding the year of assessment other than the sixth of April, income tax shall be computed on the income of the year of assessment."

Held: W. was rightly assessed to income tax in respect of the foreign investments for the year 1928–29 on the computation of his income therefrom in the previous year 1927–28, because, although the residence in this country began during the year 1927–28, nevertheless the income from foreign investments did not arise in that year, but arose when it first arose as an income previous to that year.

Fry v. *Burma Corpn.* (1), [1930] 1 K.B. 249, applied.

Notes. The tax Acts referred to in this report have been replaced by the Income Tax Act, 1952, s. 133 (1) of which replaced s. 29 (1) (b) of the Finance Act, 1926.

Referred to: *Carter* v. *Sharon*, [1936] 1 All E.R. 720; *Elmhirst* v. *I.R. Comrs.*, [1937] 2 All E.R. 349.

As to when income arises, see 20 Halsbury's Laws (3rd Edn.) 105, para. 189, text and note (i); as to setting up and commencing business, see ibid. 129–130, para. 230; and as to when a person formerly resident abroad becomes resident in the United Kingdom, see ibid. 274, para. 493, text and note (s). For the Income Tax Act, 1952, s. 133 (1), see 31 Halsbury's Statutes (2nd Edn.) 130.

Cases referred to:

(1) *Fry* v. *Burma Corpn.*, [1930] 1 K.B. 249; 98 L.J.K.B. 693; 141 L.T. 361, C.A.; affirmed, [1930] A.C. 321; 99 L.J.K.B. 305; 142 L.T. 609; 15 Tax Cas. 113, H.L.; Digest Supp.

(2) *Ormond Investment Co.* v. *Betts*, [1928] A.C. 143; 97 L.J.K.B. 342; 138 L.T. 600; 13 Tax Cas. 400, H.L.; Digest Supp.

(3) *Colquhoun* v. *Brooks* (1889), 14 App. Cas. 493; 59 L.J.Q.B. 53; 61 L.T. 518; 54 J.P. 277; 38 W.R. 289; 5 T.L.R. 728; 2 Tax Cas. 490, H.L.; 28 Digest 79, *433*.

(4) *Singer* v. *Williams*, [1921] 1 A.C. 41; 89 L.J.K.B. 1218; 123 L.T. 625; 36 T.L.R. 659; 64 Sol. Jo. 569; 7 Tax Cas. 419, H.L.; 28 Digest 78, *430*.

(5) *Baker* v. *Archer-Shee*, [1927] A.C. 844; 96 L.J.K.B. 803; 137 L.T. 762; 43 T.L.R. 758; 71 Sol. Jo. 727, H.L.; Digest Supp.

(6) *Bradbury* v. *English Sewing Cotton Co.*, [1923] A.C. 744; 92 L.J.K.B. 736; 129 L.T. 546; 39 T.L.R. 590; 67 Sol. Jo. 678; 8 Tax Cas. 481, H.L.; 28 Digest 81, *445*.

(7) *Simpson* v. *Maurice's Executors* (1929), 45 T.L.R. 581; 14 Tax Cas. 580, C.A.; Digest Supp.

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the General Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Dacorum in the County of Hertford held on the 9th day of April, 1931, for the purpose of hearing appeals, Mark Kingsley Whitlock (hereinafter called "the taxpayer") appealed against an assessment to income tax under Case V of Sched. D in respect of income arising from foreign possessions for the year ending April 5, 1929, made upon him under the provisions of the Income Tax Acts.

The following facts were admitted or proved:

(a) The taxpayer having resided in the Straits Settlements for many years, came to and took up his permanent residence in England on April 7, 1927.

(b) While residing in the Straits Settlements, the taxpayer was in receipt of an income from stocks, shares, and rents arising in the Straits Settlements, which income continued after his arrival in England.

(c) The holdings of the taxpayer in Malayan investments were substantially the same in the income tax year 1928–29 as they had been in the income tax years 1925–26, 1926–27, and 1927–28.

(d) The gross income arising from such stocks, shares, and rents in the income tax year 1927–28 amounted to £5,261, and in the income tax year 1928–29 to £2,988.

(e) the taxpayer was assessed to income tax for the income tax year 1927–28 in the sum of £5,261 and for the income tax year 1928–29 in the same sum, no inquiry having been made by the income tax authorities as to his income for the income tax year 1926–27.

It was agreed that Sched. D 2 and r. 1 of Case V of Sched. D of the Income Tax Act, 1918, as amended by the Finance Act, 1926, s. 29, governed the assessment.

It was contended on behalf of the taxpayer:

(a) That under s. 29 (1) (b) (ii) of the Finance Act, 1926, the income in question first arose as income arising from possessions out of the United Kingdom on April 7, 1927, when the taxpayer first resided in England.

(b) That the assessment for the income tax year 1928–29 should accordingly be in the sum of £2,988, which was the taxpayer's actual income for that year.

(c) That the contention now advanced by the revenue Commissioners was inconsistent with the view taken by them when causing the taxpayer to be assessed for 1927–28 in the sum of £5,261.

It was contended on behalf of the inspector of taxes:

(a) That the said income of the taxpayer did not first arise within the meaning of s. 29 (1) (b) (ii) of the Finance Act, 1926, on his first taking up his residence in England, but first arose to him while he was resident in the Straits Settlements.

(b) That the assessment for the income tax year 1928–29 was correctly made on the full amount of the profits or gains or income of the year preceding the year of assessment in accordance with s. 29 (1) of the Finance Act, 1926.

It was admitted by the inspector of taxes that if his contentions were upheld the assessment for 1927–28 would require to be adjusted to the amount of the income for the year 1926–27.

The Commissioners were referred to the following cases in the course of argument: *Ormond Investment Co.* v. *Betts* (2); *Fry* v. *Burma Corpn.* (1); *Colquhoun* v. *Brooks* (3); *Singer* v. *Williams* (4); *Baker* v. *Archer-Shee* (5); *Bradbury* v. *English Sewing Cotton Co., Ltd.* (6); and *Simpson* v. *Maurice's Executors* (7).

Having considered the evidence and arguments adduced before them, the Commissioners decided as follows:

1. That on April 7, 1927, the taxpayer first became chargeable to income tax in England.

2. That the taxpayer was in receipt of an income from stocks, shares and rents arising from investments in Malaya during the income tax years 1926–27, 1927–28, and 1928–29.

3. That the whole of the income in question fell within r. 1 of Case V of Sched. D of the Income Tax Act, 1918.

4. That the said income first arose within the meaning of s. 29 (1) (b) (ii) of the Finance Act, 1926, on April 7, 1927.

5. That the assessment for the income tax year 1928–29 should accordingly have been made on the full amount of the income arising within that year, namely, £2,988.

The inspector of taxes immediately after the determination of the appeal declared to the Commissioners his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the inspector of taxes.

Cyril King for the taxpayer.

ROWLATT, J.—It seems to me, upon the authority of *Fry* v. *Burma Corpn.* (1), that there is only one course open to me in this case. The position is that the taxpayer here, who had been previously resident abroad, came to this country on April 7 one year, two days after the financial year had begun; and from that date he is found to have been resident in this country.

When he came here he remained the possessor of an income from foreign possessions which he had possessed before he came here. The possessions were the same, the investments were the same, so it is found in the case.

Now the question arises whether he is to be treated as having had an income from foreign possession first arising when he came to reside here, because if it then first arose, the adjustments and apportionments—which I need not specify, they are very well understood—under s. 29 of the Act of 1926 become applicable. As I understand it, there is no question under the Income Tax Acts of any apportionment or adjustment for income tax in time, with regard to the date when a person became resident and so became taxable. The only adjustments, as I understand it, are adjustments with reference to the time when the income began—I use that neutral word. So that, if the taxpayer had come here on April 3, instead of on April 7, so as to have only two days in the year, instead of 364 days, his position would have been the same. I observe that in the *Burma Corpn. Case* (1), Lord Warrington treats the question as still open whether in that case, although the company must be treated as not having set up their business within the year, they could not have their income apportioned for income tax purposes by reason of the fact that they became resident only within the year, but I frankly do not know to what principle of income tax law the noble Lord was referring.

Here I simply have to consider the question whether this income first arose within the year of assessment. It does not matter that the taxpayer's residence first began as such in the year of assessment. The *Burma Corpn. Case* (1) lays down quite clearly that it does not matter whether the residence began in the year of assessment or not; the question is did the income from foreign possession arise within the year? I cannot see how I can possibly draw a distinction. Clause (a) refers to the profits of a trade or profession which has been set up or commenced in the year preceding the year of assessment and clause (b) refers to income first arising in the year of assessment, and so on. In the *Burma Corpn. Case* (1) it was held with reference to trade that the Act was speaking of trade in the ordinary sense of the word; and that if the trade was the same, it did not matter when the exercise of the trade swam into the purview of the Income Tax Acts at all. It was the same trade. How can I avoid applying precisely the same reasoning to words which are really as parallel as they can be, having regard to the different subject they are speaking of? I must regard the income as first arising when it first arose as an income, and not as first arising with regard to the time when the possessor of it swam into the purview of the Income Tax Acts. It seems to me that the things are as parallel as they can be.

I think this point is a very much more important one than seems to have been thought in certain quarters, but I can see very curious consequences which will happen to many people, for and against the revenue arising out of this principle. But there it is; I can only give one decision, and that is what I have expressed.

The appeal must be allowed. I do not think it ought to be allowed with costs, having regard to the fact that the revenue took the other ground in the first instance. It is understood that the adjustment of the assessment for the previous year will be made.

Solicitors: *Solicitor of Inland Revenue*; *Waller, Mager, & Cobbett.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re GEORGE INGLEFIELD, LTD.

[CHANCERY DIVISION (Eve, J.), February 11, 12, 16, 1932]

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 26, 1932]

[Reported [1933] Ch. 1; 101 L.J.Ch. 360; 147 L.T. 411; 48 T.L.R. 251, 536; [1931] B. & C.R. 220, Ch.D. & C.A.]

Company—Winding-up—Validity of assignments as against liquidator and creditors—Assignment to finance company of hire-purchase agreements—No notice to hirers—Provision for repayment of any excess of receipts over purchase price by finance company—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 79.

Hire-Purchase—Financing agreement—Assignment of hire-purchase agreements to finance company—No notice to hirers—Provision for repayment by finance company to dealer company of any excess of receipts over purchase price—Validity of assignment as against liquidator and creditors of dealer company—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 79.

By an agreement made between a finance company and a company which dealt in furniture which it sold on hire-purchase, the finance company agreed to purchase from the dealer company all the articles of furniture from time to time let by the dealer company on hire-purchase, together with the benefit of the relevant hire-purchase agreements. The agreement provided that the dealer company should submit each hire-purchase agreement to the finance company for approval, and that, on approving each hire-purchase agreement, the finance company should forward a series of bills of exchange to be accepted by the dealer company equal in number to the instalments payable by the hirer under the hire-purchase agreement. These bills were given only as a collateral security for the performance of the agreement and for 75 per cent. of the purchase price. The purchase price—75 per cent. of which, less a finance charge of an undisclosed amount, was to be paid forthwith by the finance company—was to be equal to the total amount of the instalments payable by the hirer under the hire-purchase agreement. By the agreement the balance of the purchase price was to be paid to the dealer company by the finance company by instalments equal in number to the instalments of rent payable by the hirer, but this balance was in fact retained by the dealer company out of the instalments paid to it by the hirer. No notice of the agreement between the finance company and the dealer company, and of the assignment thereby effected, was to be given to the hirer by the finance company unless there was default by the hirer or the dealer company. Unless and until such default occurred the dealer company was to collect the instalments from the hirer, paying three-quarters of each instalment to the finance company and retaining one-quarter as set out above. Clause 18 of the agreement between the finance company and the dealer company provided that, after the dealer company should have received from the hirers or the finance company payment, in respect of all the hire-purchase agreements included in any assignment by the dealer company to the finance company, of an amount equal to the aggregate amount of the purchase price together with all other sums, if any, then due to the finance company under such agreements, the finance company should allow the dealer company to retain any subsequent payments due from the hirer, and should account to the dealer company for all sums received by it under the said agreements in excess of the said amount. On the voluntary liquidation of the dealer company the assets were insufficient to pay the creditors, and the liquidator contended that the assignments by the dealer company to the finance company were not absolute assignments, but were a mortgage or charge on book debts, and so were void as against him and the creditors for want of registration under s. 93 of the Companies Act, 1908, or s. 79 of the Companies Act, 1929.

Held: registration was not required, and the assignments were, therefore, good as against the liquidator and the creditors, because

(i) no agreement between the finance company and the dealer company, other than the written agreement above referred to, had been proved, and the court, accordingly, had to look only at the documents constituting that agreement to find the substance thereof: *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1) (1887), 35 Ch.D. 191, distinguished; principle stated by Lord Herschell in *Helby* v. *Matthews* (2), [1895] A.C. at p. 475, applied.

(ii) clause 18 merely provided for the way in which the finance company should account to the dealer company in the event of its receiving more than the agreed price, and did not amount to an equity of redemption in any sense of the word.

(iii) the agreement reserved no reversion or equity of redemption to the dealer company, and so the assignments were absolute.

Quære, whether the agreement constituted a charge on book debts within the meaning of s. 79 (1) (e).

Per Lawrence, L.J.: There is nothing to prevent a limited company from selling its assets without giving notice of that sale to the public, or to anyone else, remaining in possession of the assets so sold, with the consent of the buyer, and obtaining credit on the faith of that possession.

Per Romer, L.J.: Essential differences exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgagor is so entitled, until he has been foreclosed. . . . If the mortgagee realises the subject-matter of the mortgage for a sum more than sufficient to repay him with interest and costs . . . he has to account . . . for the surplus. If the purchaser sells . . . and realises a profit . . . he has not to account to the vendor for the profit. If the mortgagee realises the mortgage property for a sum that is insufficient . . . he is entitled to recover from the mortgagor the balance. If one considers the documents . . . it will be found in every one of those three respects the documents bear the attributes of a sale and purchase, and not the attributes of a mortgage or charge.

Decision of Eve, J. (infra), reversed.

Notes. The Companies Act, 1929, has been repealed and replaced by the Companies Act, 1948, s. 95 (1), (2) (e), s. 455 (1) of which make provision for the registration of charges on book debts similar to that contained in s. 79 of the 1929 Act and s. 93 of the 1908 Act.

Considered: *Ashby, Warner & Co.* v. *Simmons*, [1936] 2 All E.R. 697; *Olds Discount Co.* v. *Cohen*, [1938] 3 All E.R. 281, n; *Olds Discount Co.* v. *John Playfair, Ltd.*, [1938] 3 All E.R. 275.

As to the registration of charges on a company's book debts, see 6 Halsbury's Laws (3rd Edn.) 493–494, para. 953; and for cases on the subject see 10 Digest (Repl.) 813–815, *5280–5287*. As to the distinction between hire-purchase agreements and bills of sale, see 19 Halsbury's Laws (3rd Edn.) 512, para. 827; and as to third parties financing hire-purchase agreements, see ibid. 525, para. 843, text and notes (m)–(o). For the Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1887), 35 Ch.D. 191; 55 L.J.Ch. 780; 56 L.T. 755; 35 W.R. 443; 3 T.L.R. 206, C.A.; affirmed sub nom. *Manchester, Sheffield and Lincolnshire Rail Co.* v. *North Central Wagon Co.* (1888), 13 App. Cas. 554; 58 L.J.Ch. 219; 59 L.T. 730; 37 W.R. 305; 4 T.L.R. 28, H.L.; 10 Digest (Repl.) 756, *4918*.

(2) *Helby* v. *Matthews*, [1895] A.C. 471; 64 L.J.Q.B. 465; 72 L.T. 841; 60 J.P. 20; 43 W.R. 561; 11 T.L.R. 446; 11 R. 232, H.L.; 3 Digest 93, *245*.

(3) *Motor Traders' Finance, Ltd.* v. *H. E. Motors, Ltd.* (1926), unreported.

(4) *Yorkshire Railway Wagon Co.* v. *Maclure* (1882), 21 Ch.D. 309; 51 L.J.Ch. 857; 47 L.T. 290; 30 W.R. 761, C.A.; 10 Digest (Repl.) 756, *4917*.

Appeal from a decision of Eve, J., in whose judgment the material clauses in the agreements are set out.

Edward Clayton, K.C., and *Wilfrid M. Hunt* for the liquidator.

Cyril Atkinson, K.C., and *W. N. Stable* for the finance company.

EVE, J.—George Inglefield, Ltd. (hereinafter referred to as "the dealer company"), was incorporated as a private company on Aug. 13, 1915, with a capital of £5,000 in shares of £1 each. It went into voluntary liquidation on Sept. 24, 1931, and its assets are insufficient to pay its creditors in full.

Its business was that of drapers and furnishing and general warehousemen, and consisted largely in letting out furniture under hire-purchase agreements. In order to procure capital for the purpose of providing goods to be so let on hire, the dealer company from time to time entered into a series of agreements with the respondent finance company, the Industrial Discount Co., Ltd., and by this summons the liquidator seeks a declaration that these agreements are void as against him and the dealer company's creditors for want of registration under s. 79 of the Companies Act, 1929, or s. 93 of the Companies (Consolidation) Act, 1908.

His case is that, although these agreements may assume the appearance of being sales and absolute assignments, the transactions were in fact mortgages or charges, and to hold the contrary would be to ignore the substance and give effect to the form.

The finance company do not dispute that the substance of the transaction evidenced by the agreement must be looked at and not its mere words, but, adopting the opening sentence of Lord Herschell's speech in *Helby* v. *Matthews* (2), they maintain that

> "the substance must of course be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement."

Before embarking on the careful examination of the documents which this consideration involves, I desire to read a passage from Lord Macnaghten's speech in the same sense. It sounds a note of warning not altogether inapplicable to the present case. He says ([1895] A.C. at p. 482):

> "The learned counsel for the respondents spoke of dealings of this sort with an air of righteous indignation as if they were traps for the extravagant and the impecunious—mere devices to tempt improvident people into buying things which they do not want, and for which at the time they cannot pay. I think that is going too far. I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side. If the object of desire loses its attractions on closer acquaintance—if faults are developed or defects discovered—if a coveted treasure is becoming a burthen and an encumbrance, it is something, surely, to know that the transaction may be closed at once without further liability and without the payment of any forfeit. If these agreements are objectionable on public grounds, it is for Parliament to interfere. It is not for the court to put a forced or strained construction on a written document or to import a meaning which the parties never dreamed of because it may not wholly approve of transactions of the sort."

Those words were spoken nearly forty years ago, and with the arrival since then of the motor car and aeroplane, wireless installations and gramophones, and the Encyclopædia Britannica, they certainly lose none of their force when applied to the condition of things prevailing to-day.

I turn now to the documents and approach their construction on the footing that the dealer company was engaged in a legitimate business, that the business involved the raising of capital from time to time by the issue of shares or borrowing or by some other lawful means, and that the dealer company was minded to adopt a method by which it would avoid the obligation of registering any of the documents under the Companies Acts. Arguments have been advanced on behalf of the liquidator which would appear to be founded on some suggestion that the dealer company's desire to escape registration was improper and open to suspicion. I do not adopt that view. There are obviously several grounds upon which it might be legitimately explained. It involves expense which would probably have to be borne ultimately by the hirer, publicity to which he might not unnaturally take exception, and disclosure to trade rivals of the names and addresses of customers. One has only to cast one's eye over the schedule to the summons to appreciate these objections, but I do not dwell on these matters, because in my opinion the dealer company was acting within its rights in seeking a means of increasing its available capital without the obligation to register. The respondent finance company was the source to which the dealer company resorted for the money required, and their mutual relationship is embodied in three documents. The first is the hiring agreement that is made between the dealer company therein referred to as "the owners" of the one part and the customer therein referred to as "the hirer" of the other part. Its relevant terms are substantially the same as the agreement under consideration in *Helby* v. *Matthews* (2); the hirer had an option and nothing more, he was not bound to purchase, he obtained possession of the furniture and was entitled to its use so long as he paid the owners the agreed rent on the appropriate days, and he was bound to make these payments so long as he retained possession of the goods. If he continued to make them for the period during which they were stipulated to be payable the furniture then became his property, but he might at any time return the goods, and, upon so doing, he would no longer be liable to make any further payment beyond the instalment then due, and if the goods were returned within a limited period from the commencement of the hiring, an agreed further sum by way of compensation for the depreciation of the goods. There are several other clauses for the preservation of the goods and the protection of the owners, but I do not think I need refer to any of these except No. 12, whereby the owners reserve the right to assign the benefit of and the right in, and remedies under the agreement.

The second document is the agreement between the finance company, therein called "the company" of the one part, and the dealer company, therein called "the dealer" of the other part, whereby, after reciting that the dealer had requested the finance company to purchase from him from time to time such goods as he had let on hire subject to and with the benefit of the hire-purchase agreements relating thereto, and that the finance company had agreed so to do on the terms thereinafter appearing, it was agreed by cl. 1 that during the continuance of that agreement, and subject to the provisions thereinafter contained, the finance company should purchase from the dealer such goods as should have been let on hire by the dealer from time to time on hire-purchase terms, and as the dealer should offer to sell to the finance company, subject to and with the benefit of the hire-purchase agreements relating to such goods respectively.

Clauses 2, 3 and 4 enumerate certain conditions with which the finance company requires the dealer to comply before and on submitting any hire-purchase agreement to the finance company for approval. The submission, which may include more than one hiring agreement, is to constitute an offer to sell, and under cl. 5 within two days the finance company is to notify the dealer which, if any, of the offers it accepts.

Passing over cll. 6, 7 and 8 for the moment, I come to cl. 9, which provides that subject to the provisions of the agreement the price payable by the finance company to the dealer for the goods comprised in any hire-purchase agreement, thereinafter called "the purchase price," shall be such a sum as shall be equal to the total amount payable by the hirer by way of rent under such agreement and not due by the date on which such goods shall have been assigned to the finance company therein called "the date of assignment."

By cl. 10 a first payment of 75 per cent. of the purchase price is to be made forthwith after the finance company shall have received from the dealer certain documents enumerated in cl. 8. The remaining 25 per cent. of the purchase price is to be divided into instalments corresponding in number to the number of instalments of rent payable under the relative hire-purchase agreement and not due at the date of assignment, and the amount of each instalment is to be the difference between the amount payable by the hirer in respect of the corresponding instalments of rent and the amount of the bill of exchange to be delivered by the dealer to the finance company pursuant to cl. 12, and such instalments of the purchase price are to be payable by the finance company to the dealer on the same dates on which the corresponding instalments of rent are payable by the hirer under such hire-purchase agreement.

It cannot be said that the latter part of cl. 10 is easy to translate, but the meaning is this, that 25 per cent. of the purchase price (or whatever be the percentage left after making the payment payable forthwith on the receipt of the documents mentioned in cl. 8) is to be paid by a series of instalments, the amount of each being fixed by dividing the 25 per cent. by the number of instalments payable by the hirer after the date of assignment.

The concrete case put forward by counsel for the finance company clears away much of the obscurity. He takes the case of a hirer of furniture rented at £10 per month for twelve months who has paid two months' rent at the date of assignment. The purchase price to be paid by the finance company for that agreement would be £100, representing the ten instalments which still remain to be paid. Of this purchase price £75 would be paid on the date of assignment, the remaining £25 would be divided by the number of outstanding instalments, ten, and £2 10s. would be thereby fixed as the amount of each monthly instalment payable by the finance company in discharge pro tanto of the 25 per cent. of the purchase price. These monthly instalments of the purchase price were to be payable by the finance company to the dealer on the same dates as those on which the corresponding instalments of rent were payable by the hirer under such hire-purchase agreement, so that in the concrete case I have mentioned the dealer would each month collect £10 from the hirer, hand over £7 10s. to the finance company and retain £2 10s. on account of the purchase price.

By cl. 14 of the contract, the finance company agreed that until the happening of one of the events specified in cll. 19 and 20, in other words, until breach of the hiring agreement on the part of the hirer, or breach of this agreement by the dealer, the finance company would not give notice to the hirer of the goods comprised in any hire-purchase agreement assigned to the finance company under the terms of the agreement, of the purchase of such goods by the finance company, or of the assignment to the finance company of the hire-purchase agreement relating thereto, and would allow the dealer to collect as agent of the finance company the several instalments of rent from time to time payable by the hirer under such hire-purchase agreement, the net result of this clause and the remaining portion of cl. 10 being that 25 per cent. of the purchase price was left to be collected by the dealer by instalments spread over the period between the date of assignment and the expiry of the hiring agreement. By these means the finance company avoided the necessity of finding any part of this 25 per cent. of the purchase price. To revert to counsel's concrete example: The finance company was never under any liability to produce the £25. Their liability was to be discharged by the dealer retaining out of each of the ten instalments he collected from time to time the sum of £2 10s.—25 per cent. of £10—in discharge pro tanto of unpaid purchase money. Nor was the 75 per cent. of the purchase price payable in respect of the documents specified in cl. 8 altogether free from unusual incidents. Amongst the documents specified in cl. 8 are mentioned "bills of exchange drawn as provided in cl. 12 hereof and duly accepted by the dealer." By cl. 6 it is provided that with every notification of acceptance the finance company will forward these bills of exchange to the dealer for acceptance by him, and by cl. 12, in consideration of the undertaking given by the finance company, so long as there is no breach of the hiring agreement or this agreement not to give notice to the hirer of the purchase or assignment, the dealer guarantees to the finance company the payment by the hirer under every hire-purchase agreement assigned to the finance company thereunder of the several instalments of rent payable thereunder on their due dates, and for the purpose of partly securing the payments to the company of the said instalments of rent the dealer is to accept and deliver to the finance company bills of exchange amounting in the aggregate to the first payment payable by the finance company in respect of the goods to which such agreement relates, the number of bills in respect of each hire-purchase agreement to be equal to the number of instalments of rent payable thereunder and not due at the date of assignment thereof, but not to exceed twenty-four, and each bill to be dated seven days after the date on which the corresponding instalment of rent is due, the bills to be accepted by the finance company as collateral only and not to be considered until payment thereof as discharging any liability of the dealer under the agreement.

Referring once more to the concrete case to illustrate the procedure under cl. 12, it comes to this, that on the date of assignment the dealer will hand to the finance company ten acceptances of £7 10s. each payable seven days after the respective dates on which the instalments for rent are payable, the difference between the £7 10s. and the £10 instalment being the £2 10s. retained by the dealer in part payment of 25 per cent. of the purchase money.

Pausing here and treating this document as a contract of sale between vendor and purchaser, what are their respective positions when completion takes place? The purchaser has entered into a contract to purchase a number of sums of money payable in instalments over various periods and to pay a purchase price which is exactly equivalent to the aggregate amount of all such sums. Primâ facie that is a contract out of which he can make nothing, but this result is averted by the introduction into the contract of cl. 11, whereby it is provided that the purchaser shall be entitled to deduct from the first payment of the purchase price a "finance charge" at the finance company's rate for the time being in force. The rate of this finance charge may be changed by the finance company from time to time, but no change in the rate shall be effective as against the dealer until notice thereof in writing shall have been given by the finance company to the dealer.

The vendor parts with the whole of his interest in the chattels the subject of the hiring agreements and in the hiring agreements, he receives 75 per cent. of the purchase price less the finance charge, agrees to accept payment of the remaining 25 per cent. by equal instalments spread over periods corresponding with the duration of the respective hiring agreements, guarantees to the purchaser the payment by the hirer under every hire-purchase agreement assigned to the finance company of the several instalments of rent payable thereunder on their due dates, delivers to the purchaser his acceptances for amounts equivalent to 75 per cent. of all such instalments, and agrees during the continuance of the agreement that he will not, without the consent in writing of the purchaser, enter into any other financing arrangements with regard to the letting on hire-purchase terms of goods dealt in by him.

It is difficult to reconcile these relative positions with the ordinary ones of vendor and purchaser. The purchaser, if the arrangement is worked out, makes no profit out of the subject-matter of the sale, for he pays just as much as he receives, and his sole profit is represented by the finance charge, the rate of which is not disclosed in the documents. The vendor parts with his property for a payment of 75 per cent., less the finance charge, of its value, guarantees that it will realise its full book value, and binds himself so long as the agreement is subsisting not to resort elsewhere for making financial arrangements.

I do not think it is possible to regard this document as a contract of sale and purchase. Its true nature is, I think, disclosed by cl. 18, whereby it is provided that, after the finance company shall have received from the hirer or the dealer in respect of all the hire-purchase agreements comprised in any assignment to the finance company payment (either by way of instalments of rent payable under any hire-purchase agreement or by way of purchase price payable on the early exercise of the option to purchase contained therein or otherwise) of sums to an aggregate amount equal to the aggregate amount of the purchase price together with all other sums, if any, then due to the finance company for interest, damages, costs and expenses under such agreements, the finance company shall allow the dealer to retain all subsequent instalments of rent or other moneys, if any, due from the hirer under such agreements, and shall account to the dealer for all such sums in excess of the said amount as may be received by the company. The provisions of that clause are inconsistent with the idea of a sale, but wholly consistent with the assignment being in the nature of a charge.

In my opinion, according to the true construction of this document, it is a charge on the future instalments payable under the hire-purchase agreements to which it relates to secure the advance of a sum equal to 75 per cent. of such future instalments. The interest on the advance is provided for by the finance charge, the personal covenant is replaced by the guarantee, and the equity to redeem is wrapped up, but not wholly concealed, in cl. 18. The third deed, to which I referred at the beginning of my judgment, is the assignment by which the chattels comprised in the hire-purchase agreements and the full and exclusive benefit of and all rights in and remedies under such agreements were vested in the finance company. It is one of the steps in the transaction, but does not call for any further comment.

Upon the further points raised on behalf of the finance company I entertain no doubt. The rentals reserved under the hire-purchase agreements, though in certain events subject to defeasance, are book debts of the dealer company, and the transaction is one which comes within the mischief of s. 79 of the Companies Act, 1929.

A The liquidator is, in my opinion, entitled to the relief he claims, and the costs must be paid by the finance company.

The finance company appealed.

Cyril Atkinson, K.C., and *W. N. Stable* for the finance company.

Edward Clayton, K.C., and *Wilfrid M. Hunt* for the liquidator.

B **LORD HANWORTH, M.R.**—This is an appeal from a decision of EVE, J., given on an originating summons taken out by the liquidator of George Inglefield, Ltd., the dealer company, seeking that it may be declared that the assignments to, and agreements with, the respondent finance company—the Industrial Discount Co.—affecting, or purporting to affect, goods of the dealer company and sums due, or to become due, to the dealer company as hirers of such goods under hire-purchase C agreements, were, and are, void as against the applicant as liquidator of the dealer company and its creditors for want of registration under s. 79 of the Companies Act, 1929, or the earlier s. 93 of the Companies Consolidation Act, 1908. The section that we have to consider, for they are in pari materia, is now s. 79 of the Companies Act, 1929, which requires registration of charges created by companies registered in England. I need not read its terms. The allegation made by the D liquidator of the dealer company is that certain sums which became due under hire-purchase agreements became due, and were charged, to the finance company by the dealer company, and those ought to have been registered, and as they were not registered they are void as against the liquidator.

I need not recount all the facts, or state the effect of the documents, for those facts and documents have been stated and explained fully and accurately in the E judgment of EVE, J. It is sufficient to indicate that the point arises in this way, that the dealer company were a company carrying on business in furniture, and from time to time they made what are called hire-purchase agreements with their customers, and for the purpose of obtaining money, and treating these contracts that they made as liquid assets, they entered into a contract with the finance company, whereby the finance company agreed to pay over to them sums in accordance F with the agreement made between the finance company and the dealer company.

The argument that was presented on behalf of the liquidator was that, by whatever method or documents the transaction purports to be carried out, it really was a transaction of a charge to the finance company, a loan to the dealer company, upon a security which the dealer company placed under the dominion of the finance company, but in respect of which the dealer company had what amounts to an G equity of redemption, an interest which they had not parted with; it was not in that sense an absolute assignment to the finance company; it was, in truth and in effect, a charge.

It is old law, and plain law, that in transactions of this sort one must consider whether or not the documents really mask the true transaction. If they do merely mask the transaction the court must look at what is the position in substance and H in fact and tear away the mask or cloak that has been put upon the real transaction. In *Helby* v. *Matthews* (2) LORD HERSCHELL states the principle that we have to follow quite closely in the opening sentences of his speech. He says ([1895] A.C. at p. 475):

> "My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the I substance must, of course, be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement,"

and LORD MACNAGHTEN, and the other learned Lords, express in their speeches principles to the same effect. In the present case we have the three documents to which I am going to refer, but not explain in detail, for, as I have said, the explanation is provided in the judgment of EVE, J. There are three documents. The first is what is called the hiring agreement under which the dealer company let out to a hirer certain furniture, and for that hiring, for the benefit of having possession of the furniture, the hirer pays a sum down and a monthly rent. It is in the form which is known as the *Helby* v. *Matthews* (2) form; that is to say, it does not contain any immediate contract on the part of the hirer to purchase the goods. There is only a contract on his part to pay for the hire so long as the hiring continues, but there is a subsequent effective clause whereby, if and when all the hiring money has been paid to the lender, the property in the furniture loaned then passes out and out to the hirer. In *Helby* v. *Matthews* (2) it was determined that, for the purpose of the Factors Act, such a contract was not one where a person had bought, or agreed to buy, goods; it was a contract of hiring. The benefits of that contract were passed by the dealer company to the finance company under these circumstances: An agreement was entered into, elaborate in its terms, between the finance company and the dealer company, the effect of which was that the dealer company passed over solely or assigned to the finance company the goods which were the subject-matter of the hiring agreement, and they passed over and assigned to the finance company this furniture together with the rights which the dealer company has as against the hirer under the contracts of hiring. There is a document before us under which this assignment was carried out. It recites that the dealer has entered into hire-purchase agreements specified in the schedule, and that there was an agreement by the finance company to purchase from the dealer company the goods comprised in such purchase agreements. The operative clause is that the dealer company sold to the finance company such goods and the property in such goods, and that the property passed to and was vested in the finance company, and, at the same time, the dealer company assigned to the finance company the full and exclusive benefit of all rights and remedies under the hire-purchase agreements. Ex facie, that is an absolute assignment to the finance company of the furniture and all the rights in respect of the furniture, held by the dealer company.

We are asked to hold that, on examination of the true agreement between the dealer company and the finance company, it will be found that all that the dealer company did was to give a charge to the finance company. There was no evidence before Eve, J., that the agreement was wholly different from that recorded in the agreements. There was no evidence such as was available in *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Rail. Co.* (1) in which, apart from the documents, there was a contract proved, and so there the documents were invalidated but the independent contract which was proved still stood. We have, therefore, to look at these written documents as containing the contracts made between the parties, and we cannot attribute falsity in the sense that, apart from those documents, there is some other agreement made between the parties. Then, as Lord Herschell says, we have to look at those documents, for it is in them that we must ascertain what the substance of the matter was, and what are the rights and obligations of the parties to be derived from the consideration of the whole agreement as recorded. There is no clause to which one can point which appears to reserve to the dealer company some reversion or equity of redemption. So far as one can look at the clauses, they seem consistent with the out-and-out assignment to the finance company.

Attention has been drawn to the fact that, ex facie, it would look as if the finance company were making no profit in the transaction, and one knows that it is a business transaction. When one does find the device by which the profit is earned by the finance company it is as described in cl. 11 by a deduction from the first payment of the purchase price of a finance charge. Such a term, says the liquidator, savours of a mortgage or charge to the finance company, and not of an out-and-out assignment. In one or two other places reference is made to this finance charge, and it is attributed to that finance charge that there is some indication of the transaction being one of charge and of charge only. Eve, J., found in cl. 18 a factor which was consistent in his mind only with the transaction being one of charge, but I confess that when examined and understood it seems impossible to attribute such an effect to the clause. It says this, that after the finance company

A have received from the hirer, or the dealer, in respect of the hire-purchase agreements all that the company is entitled to receive under the terms of the assignment, there is a provision in this cl. 18 that the finance company shall allow the dealer to retain all the subsequent instalments of rent, or other moneys, if any, due from the hirer, and shall account to the dealer for all such sums. If one approaches cl. 18 without any prejudice, either one way or the other, it really amounts to this B and no more, that when the creditor has been repaid, if it so happens, by the somewhat complex arrangements that have been made, that he shall have been paid more than he is entitled to receive, he will pay that money over to the dealer, because the finance company are not entitled to retain more than they have contracted to be satisfied with in repayment. I cannot find from that clause any sufficient ground for altering the nature of this assignment. It is well to remember C and, indeed, EVE, J., has been careful to point it out, that one ought not to approach these agreements with a sinister view, for he quotes the words of LORD MACNAGHTEN, in which he says that persons who are competent to form an opinion may be allowed to make what agreements they please. He says ([1895] A.C. at p. 482):

> D "I do not see why a person fairly solvent and tolerably prudent should not make himself the owner of a piano or a carriage or anything else by means of periodical payments on such terms as those in question in the present case. The advantages are not all on one side."

I certainly agree with EVE, J., in following the caution administered by LORD MACNAGHTEN.

E There is one other point when one is considering cl. 18, and the like clauses. One may look at the test which was applied in some other cases, and see whether it is applicable here. Our attention was called to a decision given in the House of Lords, and also in this court, in *Motor Traders' Finance, Ltd.* v. *H. E. Motors, Ltd.* (3). In giving my judgment when the matter was in this court, I called attention to the fact that there was in the documents then before the court in that F case a provision whereby a number of transactions were to be grouped together, and there followed an agreement that if there should be any default in the punctual payment by the defendants of any such sum due under any of the hire-purchase agreements, or if the defendants should commit, or suffer to be committed, any breach whatever of any of the hire-purchase agreements or of any term or condition contained in any of them, the plaintiff should be entitled to determine the hiring G forthwith, and to resume possession of all or any of the cars, the subject of all or any of the purchase agreements, and to determine all or any of the agreements. That was a very significant clause, for it gave a power, not merely in respect of the particular motor car, or the furniture, or the subject of the agreement, but it placed the so-called lender in a position whereby he was able to swoop down upon some small default made upon all the articles which were the subject-matter of the H group of agreements. There is no such clause here.

One must bear in mind, when one is asked to attribute to this transaction something different from its apparent nature, that in *Helby* v. *Matthews* (2) the Court of Appeal had held differently to the House of Lords. They had found, reversing the Divisional Court, that the transaction was one in which there was an agreement to sell, subject to a defeasance to be exercised by the plaintiff, that is to say, there I was a contract of sale which was spelt out of the document subject to a defeasance. The House of Lords took the document as it stood, and, taking it in that way, they held that it was not to have attributed to it some different meaning to that which it contained, and, ex facie, it provided only for hiring and not for a sale during its continuance. In *Yorkshire Railway Wagon Co.* v. *Maclure* (4) the parties set out to do what they could not do. They set out to borrow and to lend, and if that transaction had been so carried out it undoubtedly would have been a transaction of loan, and a transaction of charge or mortgage, but, in fact, they altered the terms, and they devised a method whereby there was an immediate payment, which was in a sense the loan that they sought, and a repayment by means of a hiring rent. Lindley, L.J. said (21 Ch.D. at p. 318):

> "The original idea was bona fide dropped, and another method was had recourse to, not for effecting the loan, but for effecting a different transaction, which would answer the purpose of the railway company just as well. All they wanted to do was to get the £30,000. That was the real transaction between the parties, and that transaction was one which was embodied in the deeds upon which this action is brought. If we look on that transaction as the real transaction, upon what ground can we treat it as illegal?"

I call attention to those two cases, showing that, although it had been argued, and, indeed, held in the one case by the Court of Appeal and in the other case by the court of first instance, that the transaction was one in which the documents masked the true transaction, yet the higher court held that the transactions were to be considered of themselves and on their merits, and, so considered, the transaction was one which was legitimate.

I therefore come back to consider these documents as they stand, treating them fairly, and approaching them without a sinister desire to impute to them something which they do not contain. I find that they are documents which permit a hiring in the *Helby* v. *Matthews* (2) form to the hirer with the consequence of there being recurrent payments made to the dealer, and the dealer finds in the finance company a person from whom he can obtain the payment more immediately than he would from the hirer of the sums which represent, as to 75 per cent., the purchase price of the sum to be received under the hiring agreement. There is nothing improper or wrong in going to your banker and obtaining money on documents. There are, no doubt, provisions, as in s. 79, to demand that a charge shall be registered, but if you are outside these clauses which impose a condition as to validity on certain documents, and require registration, you are outside the law. It is not a question of evasion, as I think that Lord Halsbury has said in more than one case. It is not a question of evasion. You are either within the law, or you are without the law, and if you are without the law you remain outside it, and malice is not to be attributed to you because you remain outside the law which does not touch you.

In the present case I do not find in the documents which are before us a means of determining that the transaction was one of charge only, and not an assignment out and out. Following the principles which have been laid down in the cases to which I have referred, there being no evidence of any transaction outside or different from these documents, we must take the documents as they are and construe them, and, doing that, it appears to me that this transaction was one of assignment to the finance company and not merely one of charge. That being so, it becomes unnecessary to discuss the other and subsidiary points which have arisen. Those matters might have been matters for us to consider under sub-cl. (e) of s. 79 if we had held otherwise, but, inasmuch as this transaction is not one of charge, s. 79 does not apply.

For these reasons the appeal from Eve, J., must be allowed, and the answer must be given in the opposite sense in which the question in the originating summons was answered by Eve, J.

LAWRENCE, L.J.—I agree. In the first place it is necessary to bear in mind that in this case no evidence was adduced to show that the transaction as recorded in the documents which the court is asked to construe did not contain a true record of the transaction entered into by the parties, and therefore the only question which the court has to consider is whether the substance of the transaction so recorded is one of sale and purchase, or is one of loan and charge. In the next place it is well to bear in mind that, although the legislature has been careful to safeguard all persons having dealings with a limited company by providing for the registration of any charge which such a company may create on its assets, the legislature has not introduced into the winding-up of companies the bankruptcy rules as to reputed ownership and disposition. As the law stands at present, there is nothing to prevent a limited company from selling its assets without giving notice of that sale to the public, or to anyone else, remaining in possession of the assets so sold, with the consent of the buyer, and obtaining credit on the faith of that possession. If such a state of things requires remedy it is for Parliament to supply the remedy. All that the court has to do, in circumstances such as those to which I have referred, is to ascertain whether there has, in fact, been a sale of the assets, and to give effect to that transaction if that be the case.

In the present case EVE, J., has rightly directed his attention to the consideration of the real question, namely, what is the substance of the bargain as disclosed by the documents before the court? The learned judge, after carefully reviewing the contents of the relevant documents, has come to the conclusion that the agreement between the finance company and the dealer company, on its true construction, constitutes a charge on the future instalments payable under the hire-purchase agreements to which it relates to secure an advance of a sum equal to 75 per cent. of such future instalments. The learned judge has based his decision mainly on the provisions of cl. 18 of the agreement, in which clause he considers that there is wrapped up, but not wholly concealed, an equity of redemption. But for the existence of cl. 18 I do not think that it could reasonably be contended that the agreement discloses a transaction of loan and charge. The substance of the agreement, as I understand it, is that the dealer company sells out and out to the finance company the furniture comprised in certain hiring agreements, together with the benefit of the instalments payable by the hirer under those agreements, coupled with a guarantee by the dealer company that the hirers will pay in full all the instalments which may become payable under those hiring agreements, that guarantee being collaterally secured by the appropriate bills of exchange accepted by the dealer company. The stipulation in the agreement that the finance company is to be entitled to charge what is called a finance charge, and the stipulation that no notice of the sale is to be given to the hirers, except under certain conditions, and, further, the stipulations contained in cl. 18, make it encumbent upon the court to look very narrowly into the agreement in order to see whether it is, in fact, an agreement for a charge under the guise of an agreement for an absolute sale.

Having stated my view of the effect of the agreement, it only remains for me to consider what is the effect of cl. 18. With the greatest respect for the opinion of the learned judge, I do not agree with his view that it partially conceals an equity of redemption. As I understand that clause, it is intended to provide for a case which may well happen of the finance company receiving payment of an instalment due under the hiring agreement, both from the hirer and from the guarantor. If the finance company were to receive such a double payment then it is obvious that under s. 5 of the Mercantile Law Amendment Act the guarantor would be entitled to repayment of the sum which it had paid under its guarantee, and, further, directly the dealer company had paid any sum under its guarantee it would be entitled to stand in the shoes of the finance company in respect of the sum which it had so paid, and have all the rights of the finance company in respect of the instalments which had not been paid by the hirer. In those circumstances we come to cl. 18. The effect of that clause, stated shortly, as I interpret it, is that if the finance company receives payment both by the hirer and by the dealer company under its guarantee, the dealer company is not immediately to have its rights under s. 5 of the Mercantile Law Amendment Act, namely, to enforce its right to repayment, or to enforce its right against the hirer, but the finance company is to be at liberty to retain such a double payment until the total amount payable under the hiring agreement has been received by the finance company, and if the agreement in respect of which such a double payment has been made is one of a group of agreements comprised in a single assignment the dealer company further has no right to receive, or to enforce, its rights as guarantor until the finance company has received the total amounts payable under all the agreements comprised in that assignment. The moment that the finance company has received the full amounts A payable in the one case, or in the other, it has to account to the dealer company for any surplus received by those means, and, in the same way, directly all the payments that ought to have been made under the group of hiring agreements comprised in one assignment have been received it must account to the dealer company for any surplus received by it, and in both cases, after the finance company has B received the full amount it is entitled to, the dealer company, in order to recoup itself in respect of the payments it has made under its guarantee, is entitled to receive the future instalments from the hirers. If that be the true view of cl. 18, it does not amount to an equity of redemption in any sense of the word.

As regards the two other minor matters which I have mentioned, that is to say, the finance charge and that a limited company was to sell its assets without giving C notice to the public, although they may make it necessary to exercise caution in viewing the whole transaction, they are not of themselves sufficient to constitute the agreement a charge. I concur, therefore, with the Master of the Rolls in the view that this agreement is not a charge within the meaning of s. 79 of the Companies Act, and, having arrived at that conclusion, it is unnecessary to decide the further question whether these instalments are book debts within the meaning of D para. (c) of sub-s. (1) of s. 79, and I prefer not to express any opinion upon that point.

ROMER, L.J.—I have come to the same conclusion. Counsel for the liquidator warned us that if we decided this appeal in favour of the finance company, we should be enabling them to evade an Act of Parliament, and I think he also said defeat the Act of Parliament in question. If a man so conducts his affairs that he E proves himself outside the operation of an Act of Parliament, and he may be said either to be evading it, or defeating it, all I can say is that he has done nothing that is unlawful, and he has done nothing that calls for adverse comment from the court. In fact, I think that counsel for the liquidator meant no more than this, that the transaction that we are investigating in the present case is within what is called the mischief of s. 79 of the Companies Act; in other words, to a man who F might be thinking of getting credit from a dealer who was ignorant of this transaction it would be just as harmful as would an unregistered mortgage. If that be so, and for myself I think that it is so, that may afford a very good ground for interference by the legislature, but it affords no reason whatever for attempting to drag the transaction within the operation of the section by calling it something which, in truth, it is not. G

The only question that we have to determine is whether, looking at the question as a matter of substance, and not of form, the finance company has financed the dealers in this case by means of a transaction of mortgage or charge, or by means of a transaction of sale, because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question that we have to determine. H

It appears to me that the transaction admits of a very short answer if one bears in mind the essential differences that exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge the mortgagor is entitled, until he has been foreclosed, to get back the subject-matter I of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realises the subject-matter of the mortgage for a sum more than sufficient to repay him with interest and costs the money that has passed between him and the mortgagor, he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realises a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realises the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to pay the money that has been paid by the mortgagee, or because of the existence of the simple contract debt which is created by the mere fact of the advance by the mortgagee to the mortgagor. He is entitled to recover from the mortgagor the balance. If the purchaser were to re-sell the purchased property at a price which was insufficient to recoup him the money that he paid to the vendor, of course he is not entitled to recover the balance from the vendor.

In this case the subject-matter of the mortgage or charge, or the sale and purchase, whichever it be, is the furniture, stating it quite generally, subject to, and with the benefit of, the hiring agreements. If one considers the documents, which I do not intend to go through again, because they have already been sufficiently gone through, in relation to the three matters that I have mentioned, it will be found that in every one of those three respects the documents bear the attributes of a sale and purchase, and not the attributes of a mortgage or charge.

For these reasons, with great respect to the learned judge who came to an opposite conclusion, I think that I must arrive at the conclusion in this case that the financing has been done by a sale and purchase, and not by a mortgage or charge, and, accordingly, that it is not invalidated by non-registration by reason of s. 79 of the Companies Act. On the question whether, if we had arrived at a different conclusion upon that point, the mortgage or charge would have been one on the book debts of the company, I express no opinion at all.

Appeal allowed.

Solicitors: *Slaughter & May*; *Reynolds & Miles.*

[*Reported by* A. W. CHASTER, ESQ., *and* G. P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

Re BOWMAN. SOUTH SHIELDS (THAMES STREET) CLEARANCE ORDER, 1931

[KING'S BENCH DIVISION (Swift, J.), April 5, 6, 1932]

[Reported [1932] 2 K.B. 621; 101 L.J.K.B. 798; 147 L.T. 150; 96 J.P. 207; 48 T.L.R. 351; 76 Sol. Jo. 273; 30 L.G.R. 245]

Housing—Clearance order—No appeal on ground of mistake of fact—Error in date for vacation of premises affected—Correction by Minister when confirming order—Omission of notes on prescribed form—Housing Act, 1930 (20 *& 21 Geo. 5, c.* 39), *s.* 11 (3), *Sched. I, paras.* 1, 4.

By s. 11 (3) of the Housing Act, 1930: "If any person aggrieved by [a clearance order] desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court . . . (ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant." By Sched. I, para. 1, of the Act, a clearance order made under the Act shall fix the period for vacation of premises for the purposes of demolition to be not less than twenty-eight days from the date on which the order becomes operative, and by para. 4 the order as confirmed by the Minister of Health shall not apply to any building to which it would not have applied if it had been confirmed without modification. In error, a local authority, in making a clearance order, stated that the period for vacating the premises affected was seven days. In confirming the order the Minister of Health modified it (inter alia) to the extent of substituting "twenty-eight days" for "seven days." On the form prescribed by the Minister for the making of the order were instructions to the person who had to fill it up, and a "starred" note calling attention to the right of application to the High Court under s. 11. On an application to the High Court to quash a clearance order on the ground that in the original order by the local authority the period fixed for vacation of the premises was seven days instead of twenty-eight (which period the Minister amended to twenty-eight days when he confirmed the order), and that the "starred" note was omitted altogether,

Held: (i) no appeal under s. 11 (3) lay on the ground that the local authority had come to a wrong conclusion in fact if there were material on which they could base their decision; (ii) the error in the date fixed for the vacation of the premises did not prevent them from being within the order, and the Minister had power to rectify the mistake when confirming the order; (iii) the omission of the "starred" note did not render the order one which was not within the powers of the Act, nor was its effect that a requirement of the Act had not been complied with.

Notes. Section 11 (3) of the Housing Act, 1930, has been replaced by Sched. IV, para. 2, of the Housing Act, 1957, and Sched. I (1) and the proviso to Sched. I (4) of the Act of 1930 by s. 45 (1) and Sched. V, para. 6 (1) of the Act of 1957 respectively. For the form of a demolition order, see now Housing Act (Forms or Orders and Notices) Regulations, 1937 (S.R. & O., 1937, No. 78), Sched., Form No. 13 (as amended by S.I., 1950, No. 363, and S.I., 1954, No. 1632). The powers and duties of the Minister of Health relating to housing have been transferred to the Minister of Housing and Local Government.

Considered: *Falmouth (Well Lane, Sedgmonds Court and Smithwick Hill) Clearance Order, 1936, Halse's Application*, [1937] 3 All E.R. 308; *Halse* v. *Minister of Health* (1937), 35 L.G.R. 421; *Re Ripon (Highfield) Housing Order, 1938, White's and Collins' Applications*, [1939] 3 All E.R. 548. Applied: *Gilbert* v. *Minister of Health* (1945), 109 J.P. 279. Referred to: *Re Mason* (1934), 50 T.L.R. 392; *Stocker* v. *Minister of Health*, [1938] 1 K.B. 655; *Re London County Council (Riley St., Chelsea, No. 1) Order, 1938*, [1945] 2 All E.R. 484; *Robinson* v. *Minister of Town and Country Planning*, [1947] 1 All E.R. 851.

As to demolition orders, see 19 Halsbury's Laws (3rd Edn.) 616 et seq., and for cases see 38 Digest 212 et seq. For Housing Act, 1957, see 37 Halsbury's Statutes (2nd Edn.) 314 et seq.

Cases referred to:

(1) *Minister of Health* v. *R., Ex parte Yaffé*, [1931] A.C. 494; 100 L.J.K.B. 306; 47 T.L.R. 337; 75 Sol. Jo. 232; sub nom. *R.* v. *Minister of Health, Ex parte Yaffé*, 145 L.T. 98; 95 J.P. 125; 29 L.G.R. 305, H.L.; Digest Supp.

(2) *Rayner* v. *Stepney Corpn.*, [1911] 2 Ch. 312; 80 L.J.Ch. 678; 105 L.T. 362; 75 J.P. 468; 27 T.L.R. 512; 10 L.G.R. 307; 38 Digest 212, *471*.

Application under s. 11 of the Housing Act, 1930.

On Jan. 7, 1931, the South Shields Corporation, under s. 1 of the Act, passed a resolution declaring the Thames Street area of South Shields to be a "clearance area." The applicant, William H. Bowman, was the freeholder of two properties and the leaseholder of a number of others owned by the Ecclesiastical Commissioners in that area. On April 17 the corporation made a clearance order in respect of the area, stating that the houses were unfit for human habitation and were to be vacated and pulled down at the expense of the immediate owner and that no building was to be put up again on the area. The order prescribed that the buildings should be vacated on or before the expiration of a period of "seven" days from the date when the order became operative. On April 22 a notice was served on each of the owners and lessees of the buildings affected by it, stating the effect of the order and the fact that it was about to be submitted to the Minister of Health for confirmation. On May 8 the order was submitted to the Minister, and on June 16, 17, and 18 a public inquiry was held at South Shields by one of his officials. The applicant was represented at this inquiry, and objections to the order were made on his behalf. On Oct. 6 the Minister made an order confirming the clearance order, subject to certain modifications, one of which was to substitute twenty-eight days for the seven days specified in the clearance order (thus making the order comply with Sched. I, para. 1, of the Act of 1930), but without excluding any house included in the original order. On Oct. 13 an advertisement was published in a local newspaper, as required by s. 11 (2) of the Act, stating that the order had been confirmed with modifications, and that a copy of the order as confirmed might be inspected at the Town Hall at all reasonable hours, and similar notices were served on all objectors who had appeared at the inquiry. On Nov. 23 a notice of application, and on Dec. 11 an amended notice of application, to the High Court was given by Mr. Bowman, as a person aggrieved by the order, and intimation was given both to the Minister and the corporation. The main grounds of objection were: (i) The order as made by the local authority was not in the prescribed form, since, instead of the statutory twenty-eight days, the days specified for the vacation of most of the applicant's property were only seven. (ii) An essential part of the prescribed form of order was omitted altogether, namely, the "starred" note, which indicated that an application to the High Court might be made with regard to the validity of the order. (iii) The order was not within the powers of the Act on the facts, because (a) inadmissible evidence or extraneous matter was admitted in respect of overcrowding; and (b) properties of the applicant, which did not come under the words of s. 1 of the Act of 1930, or otherwise within the description of s. 1, were not excluded, and the section provided that they should be.

The material sections of the Housing Act, 1930, are set out in the judgment of SWIFT, J.

Montgomery, K.C., and *J. H. Bowman* for the applicant.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *W. Bowstead* for the Minister of Health.

Scholefield, K.C., and *W. E. P. Done* for South Shields Corporation.

SWIFT, J.—This is the first case which has been heard by the court under the provisions of s. 11 of the Housing Act of 1930, and, therefore, I think that it is not inexpedient that I should consider the scope of the Act and the right of appeal of which Mr. Bowman seeks to avail himself in this court.

The Act is one of a series of Acts which have from time to time been passed for the purpose of enabling local authorities to regulate the occupation, and, indeed, the existence of dwelling-houses in their districts. There have been Acts of Parliament which have provided for dealing with particular insanitary houses, there have been Acts of Parliament which have provided for schemes for demolition and re-building and the securing of open spaces where dwelling-houses have hitherto been, and this Act of 1930 is the last one of that series. It gives to local authorities very much greater power than the local authorities have, in my opinion, ever had before. It enables them, under proper limitations and observing proper precautions, to compel the owners of dwelling-houses to pull them down and not to erect any other building upon the site save under the supervision, and subject to the conditions, of the local authority, and this is to be done entirely at the expense of the owner of the property and without any compensation being given to him for the loss of that which is certainly of pecuniary benefit to him at the present time.

When an owner of property comes into this court and complains that there has A been some irregularity in the proceedings and that he is not liable to have his property taken away, it is right, I think, that his application should be entertained sympathetically, and that a statute depriving an individual of his rights to property should be construed strictly against the local authority and favourably towards the interest of the applicant. For he, for the benefit of the community, is undoubtedly suffering a substantial loss, and that loss must not be inflicted upon him, in my B view, unless it is quite clear that Parliament has intended that it shall be.

Section 1 (1) of the Act of 1930 provides that the local authority may declare an unhealthy area in its district to be a clearance area. It provides:

> "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(i) that the dwelling-houses in that area are by reason of disrepair or C sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets, dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in D the area, the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health, and shall pass a resolution declaring the area so defined to be a clearance area—that is to say, an area to be cleared of all buildings in accordance with the provisions hereinafter contained—provided that, before passing any such resolution, the authority shall E satisfy themselves, (a) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and (b) that the resources of the authority F are sufficient for the purpose of carrying the resolution into effect."

Section 1 (2) provides:

> "A local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area." G

By sub-s. (3):

> "So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the H other of them—that is to say, (i) by ordering the demolition of the buildings in the area; or (ii) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon."

Then s. 2 (1) provides:

> "Where as respects any area declared by them to be a clearance area a local authority determine to order any buildings in the area to be demolished, they I shall make and submit to the Minister, for confirmation by him, an order (in this Act referred to as a 'clearance order') ordering the demolition of each of those buildings."

Subsection (2) says:

> "The provisions of the First Schedule to this Act shall have effect with respect to the making submission, and confirmation of clearance orders."

In the First Schedule I need read only the first paragraph as to clearance orders and the proviso to the fourth:

> "A clearance order shall be in the prescribed form and shall describe by reference to a map the area to which it applies, and shall fix by reference to the date on which it becomes operative the period, not being less than twenty-eight days from that date, within which the authority require the buildings in the area to be vacated for the purposes of demolition, and for that purpose may fix different periods as respects different buildings."

Paragraph 2 relates to the publication of the clearance order and the service of notices upon the owners and the lessees and the occupiers of the premises, and para. 3 provides that after the required notice has been given the local authority shall submit the order to the Minister for confirmation, and para. 4 provides that, if there is no objection, he may, if he thinks fit, confirm the order with or without modification, and if there is any objection, that he shall have an inquiry held and a report made to him, and after the report shall, if he thinks proper, confirm the order with or without modification. The proviso to para. 4 is:

> "Provided that the order as confirmed by the Minister shall not apply to any building to which the order would not have applied if it had been confirmed without modification."

I do not think that there is any other section of the Act to which I need allude except s. 62 (1), which is the interpretation section and in the light of which s. 1 is to be read, which defines sanitary defects by saying:

> "The expression 'sanitary defects' includes lack of air space or of ventilation, darkness, dampness, absence of adequate and readily accessible water supply or sanitary accommodation or of other conveniences and inadequate paving or drainage of courts, yards or passages."

So far as I know, the local authority in declaring the Thames Street area to be a clearance area within the meaning of s. 1 of the Housing Act, 1930, proceeded with perfect propriety and every step taken was in perfect order with two exceptions. With reference to those two exceptionable matters Mr. Bowman appeals to this court, and he appeals by virtue of the provisions of s. 11 of the Act of 1930. An appeal is the creature of statute. Apart from statute there is no right in this country to appeal from one court to another, and if a person desires to go from one tribunal, be it a judicial tribunal in the ordinary sense of the term or a tribunal such as the Minister of Health and his department for purposes such as I am considering in this case, he can appeal only if a statute has given him the right and only within the limits which the statute giving the right lays down. Section 11 of the Act of 1930 makes provision as to the validity and date of operation of clearance orders, and provides:

> "(1) The provisions of this section shall have effect with respect to the validity of clearance orders and compulsory purchase orders made under this Act, and the date on which such an order is to come into operation. (2) So soon as may be after an order has been confirmed by the Minister, the local authority shall publish in a newspaper circulating in their district a notice in the prescribed form stating that the order has been confirmed, and naming a place where a copy of the order as confirmed and of the map referred to therein may be seen at all reasonable hours, and shall serve a like notice on every person who, having given notice to the Minister of his objection to the order, appeared at the public local inquiry in support of his objection. (3) If any person aggrieved by an order desires to question its validity on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with, he may, within six weeks after the publication of the notice of confirmation, make an application for the purpose to the High Court, and where any such application is duly made the court"

may take certain steps which are prescribed in the section.

If, therefore, the order having been confirmed by the Minister of Health, any person feels himself to be aggrieved by it, he may apply to this court on one of two grounds or on both of those two grounds, but on those grounds alone. The grounds on which he may appeal are that the order, as it has been confirmed, is not within the powers of the Act, or that any requirement of the Act has not been complied with. He is not, in my view, entitled to come here and complain that the local authority has made a mistake in fact in making the order. He is not entitled, in my view, to say that his house is not insanitary or unfit for human habitation, and that, therefore, the order should not have been made. Those matters seem to me to be matters which are left by the legislature entirely to the local authority subject to the confirmation of the Minister of Health.

Section 1 (1) provides:

> "Where a local authority upon consideration of an official representation or other information in their possession, are satisfied . . ."

and once the local authority says that they are satisfied, it does not seem to me that there is any power in any tribunal at all, unless it be the Minister of Health, to interfere. It may well be that there is a case, which is certainly not this case, in which it can be said that there was no material, there was no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made. When such a case arises it will be dealt with, but where, as in this case, there was obviously ample material before the local authority justifying them in making the clearance order if they thought fit to do so, it does not seem to me that this court has any right to interfere. I do not think that this court is authorised to re-try or re-hear the case, or re-consider the matter which the local authority have been entrusted with, and I do not think that this court has any right to interfere in the decision at which they have arrived. In those circumstances I declined to accede to the request of counsel for the applicant that I should hear evidence whether or no with regard to particular houses the order ought to have been made. Counsel stated to me that he could not say there was not evidence upon which the local authority might have come to the conclusion that they did. He could not say it was a case in which there was no evidence, and in those circumstances I held that it was a matter for the local authority, and not for a court of appeal sitting over them, to determine what the real facts were, and it being admitted that there was some evidence upon which they might act, I declined to interfere in the matter so far as that part of the case is concerned.

The matter, therefore, comes before me merely to determine on the material which is before me whether Mr. Bowman, who alleges, and I have no doubt rightly alleges, that he is aggrieved by the order, has satisfied me that the order is invalid on the ground that it is not within the powers of this Act or that any requirement of this Act has not been complied with. There are two points made with regard to this matter. As the order was originally drafted and as it was originally exposed to the view of those to whom notice had been given, there was inserted in the column which relates to the period from the date when the order becomes operative, within which the building is to be vacated, the words "seven days" against a great many of the houses which were named in that schedule. In truth there was no power on the part of the council to order vacation of the premises within seven days. The schedule which I have read provides that there shall be not less than twenty-eight days for the premises to be vacated after the order becomes operative. Mr. Bowman, through his counsel, contends that the order was, therefore, bad. When the matter came before the Minister of Health that error was corrected; the seven days was altered into twenty-eight days before the matter went further. In that the Minister obviously modified the order. If the order demands that the thing shall be done within seven days and the period is afterwards extended to twenty-eight days, giving the owner twenty-one days longer to do the act which he is required to do, that is a modification of the order which was originally made, and the Minister of Health modified the order and made it comply with the statute.

Is the order, nevertheless, bad? Counsel for the applicant contends that it is because, he says, as the order was originally drafted, it prescribed a period of seven days in respect of a number of houses, that was an error, and so none of those houses was within the order and the order was not effective as regards them and did not apply to them. By the proviso to para. 4 of Sched. I, which I have read, it is provided that no modification of a clearance order by the Minister of Health shall have the effect of bringing into the order a house which would not otherwise be there. Counsel says that these houses, because of the stipulation of seven days, were not in the order at all, and by altering the seven days to twenty-eight the Minister of Health has brought into the order, contrary to the proviso, houses which would otherwise not have been there. I cannot assent to that very seductive argument. I think that, although the order improperly and inaccurately named the time in which the houses were to be vacated, it, nevertheless, was an order applying to the houses. It may well be that it did not comply with the requirements of the Act of Parliament and that the local authority might have found it impossible to enforce the order, but those houses were in the order and the Minister was quite right in altering the period to twenty-eight days. That he had power to do this I am convinced, and if any authority were needed for the proposition I think it is found to be amply covered by the speech of LORD DUNEDIN in the passage which has been read to me in *Minister of Health* v. *R.*, *Ex parte Yaffé* (1), where he says ([1931] A.C. at p. 504):

> "The last words of limitation seem to me to show that otherwise the Minister is unfettered in the conditions which he may impose, or modifications he may make. I do not, of course, suggest that if there was something sent up which was really not a scheme at all, the Minister could confirm it. He is not the author of the scheme; he is the critic and the finisher of it. In particular he may, I think, remove any blot which he finds in it as presented, and in the word 'blot' I include any provision which, if left untouched, would not be in conformity with the Act."

I can find no language more appropriate to describe the position where the clerk, who was filling in this form, so blotted his copy that he made a twenty-eight into a seven, and I think the Minister of Health was not only within his rights, but was right as a matter of business administration in the affairs of the country in putting the twenty-eight back again where the seven had been inadvertently placed by the clerk.

The second point where it is said that the order does not come within the powers of the Act and was a non-compliance with its requirements is this. There is prescribed by the Minister of Health a form to be used for the making of the order, and on that form there are notes of instruction to the person who has to fill in the order. They are at the foot of the order and they are headed "Directions for filling up this form." In the body of the form there are a number of figures inserted, 1, 2, and 3, calling attention to the notes, and in the schedule to the form there is a star calling attention to a note which is starred in the directions for filling up the form. It is said that those notes or directions for filling up are part of the form, and because they are not in the form as it was deposited in the office of the council, Mr. Bowman is entitled to have the order quashed. As to whether or no that starred note forms part of the form, my attention was called to *Rayner* v. *Stepney Corpn.* (2). That was a case in which NEVILLE, J., held that a section of an Act of Parliament or sections of an Act of Parliament which had been set out at the foot of a form of notice to close a dwelling-house ought to have been set out on the form so that the owner of the dwelling-house might observe the rights which the law gave to him as to appeal, and so forth. I do not think that that case is really applicable to the one I am now considering. In that case the notice giving the right of appeal, the document upon which the learned judge held that the right of appeal should be specified, was a document which had to be served upon the owner of the house. In this case it is not so. The order has not got to be served upon the owner, but a notice of the order has to be served, and if it is any part of the scheme of the legislature that the owner of the house shall have notice given to him by the local authority what his rights of appeal are, he most certainly got it in this case, because both in the notice that the clearance order had been made and in the notice that the Minister had confirmed the clearance order, the owner of the house was informed as to what his rights of appeal were. It is said by counsel for the applicant: "But they did not specify the section." It is true that they did not specify the section, but they directed his attention to the Housing Act, 1930, and they told him in express terms that Parliament had given him a right to appeal upon certain grounds and put him, at any rate, upon his guard and inquiry about it. I myself do not think that *Rayner's Case* (2) is binding upon me in this matter, and I should be inclined to hold that the note was not part of the order and the mere fact that the note was not upon the order did not vitiate the order. But Mr. Solicitor-General, with great propriety, has said: "I am not going to argue that point in this case: it is immaterial for the decision of this case. Some day when it becomes necessary to decide it I will argue it, but I am not going to occupy the time of this court with things which I venture to think are irrelevant, and I will admit, for the purposes of this case, that the note ought to have been on the face of the order." But that does not get rid of the matter. The fact of the note not having been put on the face of the order, clearly does not entitle anybody to question its validity on the ground that it is not within the powers of the Act; all that can be said is that the requirement of the Act, namely, to put that note on the face of the order has not been complied with. The Solicitor-General says: "Admitting, if you like, that we have not complied with the requirement of the Act, what then is the position?" In order to ascertain what the position then is, one has to look at s. 11 (3) from the point at which I broke off when I was reading it a little earlier:

> "And where any such application is duly made the court (i) may by interim order suspend the operation of the order . . . until the final determination of the proceedings; and (ii) if satisfied upon the hearing of the application that the order is not within the powers of this Act or that the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with, may quash the order either generally or in so far as it affects any property of the applicant."

I am quite satisfied here that this order was entirely within the powers of the Act. There is no ground for supposing that the local authority has in making this order in any way transgressed or trespassed outside the four corners of the Act, and I find as a fact, if it be a question of fact, that what they have done was within their powers, and I hold as a matter of law, if it be a matter of law, that what they have done was within the powers of the Act. But it is admitted that in regard to the omission of the starred note from the order, that that is a requirement of the Act which has not been complied with, and then the question arises: Have the interests of the applicant been substantially prejudiced by that non-compliance with the Act? I have listened, and I have listened in vain, for any suggestion that he has in any form or shape been prejudiced by that note not having been put on the order. He knew when the order was published that he had a right of appeal; he was told that in the notice. Knowing of his right of appeal he carried on his objections. Consequent upon his objections (and no doubt those of other people, but consequent upon his) the Minister held an inquiry. He attended at that inquiry, and he pointed out at that inquiry that the seven days was not complying with the requirements of the statute, and I am not sure whether he pointed out the absence of the note or not; I rather think not. But while not pointing out the absence of the note, I am told that his representative cited to the gentleman who was holding the inquiry *Rayner* v. *Stepney Corpn.* (2). Following upon the inquiry he got a notice informing him again of his right of appeal and that the order had been confirmed, and finally two days before the time expired in which he could appeal, having known all along that his right of appeal existed—I am not quite certain as to the time but very near the time when the confirmation would become operative and so his right of appeal would vanish—he gave notice of his appeal. I cannot imagine and I cannot conceive, nor has it been suggested to me, any way in which it can be said that this gentleman's rights or interests have been substantially prejudiced, or indeed have been in the slightest degree prejudiced, by the omission of that starred note from the form of the order. I cannot conceive it and I find as a fact that he has not been in the least degree prejudiced.

In those circumstances, in my view, this application fails, and this motion should be dismissed.

Solicitors: *Haslam & Sanders*, for *Bowman & Brown*, South Shields; *Solicitor to the Ministry of Health*; *Speechly, Mumford, & Craig*, for *J. Moore Hayton*, Town Clerk, South Shields.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

HOLDER AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), March 7, 8, 10, 11, April 15, 1932]

[Reported [1932] A.C. 624; 101 L.J.K.B. 306; 48 T.L.R. 365, 76 Sol. Jo. 307; 147 L.T. 68; 16 Tax Cas. 540]

Income Tax—Relief—Repayment—Interest paid to bank—Interest owed by customer paid to bank by guarantor—Right of guarantor to repayment of tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 36 (1).

A guarantor of a bank account who under his guarantee pays the bank a sum to discharge a liability of the person guaranteed which includes interest on that person's overdraft is not a person who pays interest to the bank within the meaning of s. 36 (1) of the Income Tax Act, 1918, and so is not entitled thereunder to repayment of tax on interest.

Notes. The tax Acts referred to in this report have been replaced by the Income Tax Act, 1952, s. 200 (1) of which replaced s. 36 (1) of the Act of 1918.

Followed: *Fenton's Trustee* v. *I.R. Comrs.*, [1936] 1 All E.R. 116. Considered: *I.R. Comrs.* v. *Lawrence Graham & Co.*, [1937] 2 All E.R. 1; *Paton* v. *I.R. Comrs.*, [1938] A.C. 341. Referred to: *Marland* v. *I.R. Comrs.* (1934), 19 Tax Cas. 467; *Earl of Carnarvon* v. *I.R. Comrs.* (1935), 19 Tax Cas. 455; *Dame Webb* v. *I.R. Comrs.* (1943), 169 L.T. 360; *I.R. Comrs.* v. *Oswald*, [1945] 1 All E.R. 641.

As to repayment of tax on interest paid by a guarantor, see 20 HALSBURY'S LAWS (3rd Edn.) 474, para. 900; and as to the extent of a guarantor's liability for interest, see 18 ibid. 446–447, para. 820, text and notes (m)–(r). For the Income Tax Act, 1952, s. 200 (1), see 31 HALSBURY'S STATUTES (2nd Edn.) 191.

Cases referred to:

(1) *Devaynes* v. *Noble, Clayton's Case* (1816), 1 Mer. 572; 35 E.R. 781; 3 Digest 179, *334*.

(2) *Re Morris, Mayhew* v. *Halton*, [1921] 1 Ch. 172; 90 L.J.Ch. 53; 124 L.T. 329; 37 T.L.R. 46; 65 Sol. Jo. 95; affirmed, [1922] 1 Ch. 126; 91 L.J.Ch. 188; 126 L.T. 281; 38 T.L.R. 27; 66 Sol. Jo. (W.R.) 18, C.A.; 28 Digest 72, *378*.

(3) *Re Jauncey, Bird* v. *Arnold*, [1926] Ch. 471; 95 L.J.Ch. 377; 134 L.T. 728; 70 Sol. Jo. 527; 32 Digest 317, *35*.

(4) *Bradford Old Bank* v. *Sutcliffe*, [1918] 2 K.B. 833; 88 L.J.K.B. 85; 119 L.T. 727; 34 T.L.R. 619; 62 Sol. Jo. 753; 24 Com. Cas. 27, C.A.; 32 Digest 333, *182*.

(5) *Eaton* v. *Bell* (1821), 5 B. & Ald. 34; 106 E.R. 1106; 3 Digest 245, *706*.

(6) *Crosskill* v. *Bower, Bower* v. *Turner* (1863), 32 Beav. 86; 1 New Rep. 379; 32 L.J.Ch. 540; 8 L.T. 135; 9 Jur.N.S. 267; 11 W.R. 411; 55 E.R. 34, L.C.; 3 Digest 265, *816*.

(7) *Parr's Banking Co., Ltd.* v. *Yates*, [1898] 2 Q.B. 460; 67 L.J.Q.B. 851; 79 L.T. 321; 47 W.R. 42, C.A.; 3 Digest 267, *828*.

(8) *Provincial Bank of Ireland* v. *O'Reilly* (1890), 26 L.R.Ir. 313; 3 Digest 266, *822 ii*.

(9) *Reddie* v. *Williamson*, 1863 1 Macph. (Ct. of Sess.) 228; 7 Digest 194, *n*.

(10) *Deeley* v. *Lloyds Bank, Ltd.*, [1912] A.C. 756; 81 L.J.Ch. 697; 107 L.T. 465; 29 T.L.R. 1; 56 Sol. Jo. 734, H.L.; 12 Digest (Repl.) 552, *4191*.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.) upon a Case Stated under the Finance Act, 1925, s. 19 (3), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the court.

The Case Stated was as follows:

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 24, 1929, and an adjourned meeting held on July 9, 1929, the claim was heard of Sir Henry C. Holder and Mr. J. A. Holder, hereinafter called the taxpayers, who were aggrieved by the decision of the Commissioners of Inland Revenue (hereinafter called the revenue) in respect of a claim made by the taxpayers for repayment of income tax under s. 36 of the Income Tax Act, 1918 (which provides for the repayment in certain cases of income tax in respect of interest paid to banks without deduction of tax out of taxed profits).

The taxpayers were interested in a company called Blumfield, Ltd., hereinafter referred to as "the company." The company had been indebted for many years to its bankers, the London City and Midland Bank, Ltd., which changed its name to the Midland Bank, Ltd., and is hereinafter referred to as "the bank." To secure the company's indebtedness to the bank, guarantees were given from time to time by the taxpayers to the bank. In some cases the guarantees were given by the taxpayers individually, and in the other cases by the taxpayers jointly and severally.

Under these guarantees, all of which were in similar form, the guarantor (or guarantors) undertook, in consideration of the bank allowing the company (therein called "the principal") to keep an account with the bank or otherwise granting the company banking facilities or accommodation,

> "to pay and satisfy to the bank all and every the sum or sums of money which shall at any time be owing to the bank anywhere on any account . . . for notes or bills discounted or paid or for other loans, credits or advances made to or for the accommodation or at the request of the principal . . . or for any moneys for which the principal may be liable as surety or in any other way whatsoever, together with in all the cases aforesaid all interest, discount and other bankers' charges including legal charges occasioned by or incident to this or any other security held by or offered to the bank for the same indebtedness or by or to the enforcement of any such security."

The total liability ultimately enforceable against the guarantor (or guarantors) under each guarantee was limited to a definite sum.

A From the year 1920 onwards, the company was indebted to the bank continuously in large amounts. The interest on the amounts owing from time to time to the bank was debited half-yearly in the company's account with the bank. Payments into the account were made by the company from time to time, but the amount due to the bank with the exception of the half-year to Dec. 31, 1924, increased each half-year.

B The bank pressed the taxpayers from time to time for payment, and the whole indebtedness of the company to the bank was finally satisfied by the taxpayers on Nov. 17, 1926, by means of a loan made by the bank to the taxpayers personally.

The company was completely insolvent, and there is no chance of the taxpayers obtaining any reimbursement from the company of the amount paid by them to the bank under the guarantees.

C The taxpayers in terms of s. 19 of the Finance Act, 1925, claimed repayment of income tax under s. 36 of the Income Tax Act, 1918, on the interest amounting to £17,861 16s. 5d. debited half-yearly to the company's account with the bank from Jan. 1, 1920, to Nov. 17, 1926, which the taxpayers contended was paid by them on Nov. 17, 1926, when the company's indebtedness to the bank was satisfied by them as aforesaid. The revenue refused the claim in toto and also contended at D the hearing of the appeal that as regards the interest debited for the first three of the half-years this had been satisfied under the rule in *Clayton's Case* (1) by the subsequent payments by the company into their account with the bank.

It was contended on behalf of the taxpayers:

(i) That the payment made by the taxpayers to the bank on Nov. 17, 1926, was a payment of principal and interest due to the bank, and included a payment of E interest as such.

(ii) That the debiting of the interest in the account did not amount to payment of the interest: *Re Morris, Mayhew* v. *Halton* (2); *Re Jauncey, Bird* v. *Arnold* (3).

(iii) That the rule in *Clayton's Case* (1) did not apply, and (iv) that repayment of income tax should be made for the year 1926–27 in respect of the whole of the interest amounting to £17,861 16s. 5d.

F It was contended on behalf of the revenue (inter alia):

(i) That the whole of the payment made by the taxpayers to the bank was in satisfaction of the debt due under the guarantee, and that no part of the payment was interest as such: *Bradford Old Bank* v. *Sutcliffe* (4).

(ii) That in view of the bank's practice of adding the interest each half-year to the amount advanced the interest was in effect paid each half-year, and that for G this reason also no part of the payment made by the taxpayers (except the amount of interest charged from July 1, 1926, to Nov. 17, 1926) was interest. The following cases were referred to in support: *Bradford Old Bank* v. *Sutcliffe* (4); *Eaton* v. *Bell* (5); *Crosskill* v. *Bower* (6); *Parr's Banking Co.* v. *Yates* (7); *Provincial Bank of Ireland* v. *O'Reilly* (8); *Reddie* v. *Williamson* (9).

(iii) That alternatively the interest for the first three of the half-years had, under H the rule in *Clayton's Case* (1), been satisfied by the subsequent payments by the company into the account: *Deeley* v. *Lloyds Bank* (10).

(iv) That the taxpayers were not entitled to the relief claimed.

The Commissioners held, following previous decisions of the Special Commissioners on this point, that having regard to the decision in *Parr's Banking Co.* v. *Yates* (7) the payment made by the taxpayers on Nov. 17, 1926, included interest I paid as interest.

The Commissioners further held that the interest was not in effect paid each half-year by being added to the amount of the advance.

The Commissioners accordingly admitted the claim for repayment for the year 1926–27 under s. 36 of the Income Tax Act, 1918, but they decided that under the rule in *Clayton's Case* (1) the interest debited in the account for the first three half-years to June 30, 1921, must be regarded as having been paid by the company, and that accordingly the taxpayers' claim must be restricted to the interest charged from July 1, 1921.

The revenue immediately after the determination of the appeal declared their dissatisfaction therewith as being erroneous in point of law and in due course required the Commissioners to state a Case for the opinion of the High Court pursuant to the Finance Act, 1925, s. 19 (3) and the Income Tax Act, 1918, s. 149.

The question of law for the opinion of the court was whether any, and if so what, portion of the payment made by the taxpayers to the bank under their guarantees was interest, so as to entitle them to repayment of income tax thereon under s. 36 of the Income Tax Act, 1918.

The Court of Appeal held, reversing the decision of ROWLATT, J., that as the principal debtor had acquiesced in the system of bankers of turning interest into capital a transposition was effected of the interest due and unpaid into capital, therefore the taxpayers had not brought themselves within s. 36 (1) and had no claim to repayment of the income tax not deducted and, further, the taxpayers in fact did not pay interest to the bank even in respect of the £1,341 18s. 1d., as what they paid to the banks was the debt due from them under the guarantees, and s. 36 (1) did not apply to a guarantor's liability.

The taxpayers appealed.

Spens, K.C., and *Cyril King* for the taxpayers.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *The Solicitor-General* (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the revenue.

The House took time for consideration.

April 15. The following opinions were read.

LORD DUNEDIN.—The taxpayers were interested in a company called Blumfield, Ltd. (hereinafter referred to as "the company"), which had for many years been indebted to its bankers.

The taxpayers, in some cases individually and in others jointly and severally, gave guarantees to the bank to secure the company's indebtedness.

The taxpayers undertook thereby

> "to pay and satisfy to the bank all and every the sum or sums of money which shall at any time be owing to the bank . . . on any account . . . together with . . . all interest, discount and other bankers' charges."

The total liability ultimately enforceable against the guarantor or guarantors under each guarantee was limited to a definite sum.

From 1920 onwards, the company was continuously indebted to the bank and, in accordance with the usual custom of bankers, the interest on the amounts owing to the bank from time to time was debited half-yearly to the company's capital account with the bank. Though from time to time payments were made by the company into the account, the amount due to the bank increased each half-year save that ending Dec. 31, 1924.

After being pressed by the bank to discharge the company's indebtedness, the taxpayers on Nov. 17, 1926, paid to the bank the sum due on the company's account, this sum being covered by the guarantees that had been given by the taxpayers. The sum paid by the taxpayers was £64,482 16s. 8d.

By examination of the bank accounts the taxpayers contend that it can be shown that, of this sum, £16,519 18s. 4d. represents interest added as aforesaid to the half-yearly rests and £1,341 18s. 1d. represents the interest due on the current half-year in which the whole sum was paid. They accordingly made a claim against the Inland Revenue Commissioners for that sum. The whole claim was founded on sub-s. (1) of s. 36 of the Income Tax Act, 1918, which is as follows:

> "Where interest payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of the interest."

A Their claim was disallowed but, on appeal to the Special Commissioners they allowed it. A stated Case was asked for and, upon the stated Case, ROWLATT, J., affirmed the judgment of the Special Commissioners. Appeal being taken to the Court of Appeal, they reversed the judgment of ROWLATT, J., and of the Special Commissioners.

The Court of Appeal approached the Case first of all from the point of view of B whether the great bulk of the sums paid was really interest at all, or whether the half-yearly interests, as they became due and were, according to the practice of the bank, added to the capital so that interest might run on the whole sum, did not lose their quality of interest by having become capital.

There is no question that in *Reddie* v. *Williamson* (9), in Scotland, it was so laid down by the Lord Justice-Clerk, as he then was, better known to English lawyers C as LORD PRESIDENT INGLIS; but it was argued by counsel for the taxpayers that that was not the law in England. The Court of Appeal held that it was consonant to English law. This view, although it determined the case as to the greater part of the sum paid, did not determine the question of the £1,341 odd, the current interest for the last half-year. This point also the Court of Appeal decided against the taxpayers on the ground that s. 36 did not apply to the Case in point of a D guarantor paying money under his guarantee. The Court of Appeal did not accentuate the fact that, if their view on this point was right, it disposed of the whole Case without the question of the first point at all.

I am of opinion that on this point, first really for consideration although taken second by the Court of Appeal, their judgment is right. I agree with the view of the Master of the Rolls. I think that interest payable on an advance from a bank E means interest on an advance made to the person paying. The guarantor does not pay on an advance made to him but pays under his guarantee. It is true that he pays a sum which pays all interest due by the person to whom the advance is made, but his debt is his debt under the guarantee, not a debt in respect of the advance made to him. That disposes of the whole case, and I think it was therefore unnecessary to decide the other and wider question, and I say so because I think it F would be very advisable, if that question is to be determined, that the bank in question should be a party to the suit. That is my only reason for thinking it better not to decide the question. It must not be inferred at all from this view that I express any doubts as to the soundness of the judgment of the Court of Appeal on this point.

I move that the appeal be dismissed with costs.

G

LORD WARRINGTON.—I have had the advantage of reading the opinion expressed by my noble and learned friend on the Woolsack and the other opinions about to be expressed and I concur therein.

LORD ATKIN.—There are two questions of importance in this case. The first is whether, when a person has had an overdraft with his bank for a number of H years kept in the ordinary way by which interest at the end of each half-year is added to the total sum then due, and interest charged on that total sum, the person who pays the accumulated overdraft at the end of three or four years has paid interest on the overdraft for those years. The second is whether if he has, a guarantor of the advance with interest who pays the total sum due can be said to be "the person by whom the interest is paid" within the meaning of s. 36 (1) of I the Income Tax Act, 1918. I understand that the majority of your Lordships are of opinion that the guarantor in such a case cannot be said to have paid the interest within the meaning of the section. I confess to feeling doubts on this point, for there can be no doubt, I think, that, as the result of the sum of money paid by the guarantor, the interest due from the principal debtor was in fact paid, and that if the principal debtor were sued he could support a plea of payment. Similarly, it might, I think, be said that if a guarantor of rent pays under the guarantee he pays the rent, not, it is true, his rent, but the rent of the tenant. No one would, I think, doubt that payment by a guarantor made within the stipulated time would defeat a forfeiture for non-payment of rent. But one has to construe the words used in a particular case, and if your Lordships have come to the conclusion that the words of the section do not give the guarantor the relief that is given to the principal debtor, I do not dissent.

The result is that it becomes unnecessary to consider the first point. The question there raised involving consideration of the statement that by adding interest to the advance at the end of each half-yearly "rest" the interest is in fact paid is one of great mercantile importance, and one which I venture to think it would, unless necessary, be undesirable to decide in a case where your Lordships could not have the advantage of hearing the views of any bank. I concur with the motion proposed.

LORD THANKERTON.—The taxpayers, who were interested in a company called Blumfield, Ltd., from time to time gave guarantees to the Midland Bank, Ltd., to secure the indebtedness of the company to the bank, inter alia, on the company's current account with the bank, the total liability under each guarantee being limited to a definite sum.

From the year 1920 onwards the company was continuously indebted to the bank in large amounts. In accordance with the ordinary custom of banks, the interest accruing on the overdraft amounts was added to the amount overdrawn by half-yearly rests, interest being thereafter charged on the amount so added. Payments into the accounts were made by the company from time to time, but, with the exception of the half-year to Dec. 31, 1924, the amounts paid in were insufficient to meet the borrowings each half-year, and the indebtedness steadily increased. As at June 30, 1920, the balance due to the bank was £28,894 15s. 11d., and on Nov. 17, 1926, when the account was closed, the total amount due to the bank was £64,482 16s. 8d.

The bank pressed the taxpayers for payment under their guarantees from time to time, and eventually the company's whole indebtedness of £64,482 16s. 8d. was satisfied by the taxpayers on Nov. 17, 1926, by means of a loan made by the bank to the taxpayers personally. The company is completely insolvent, and there is no chance of the taxpayers obtaining any reimbursement from the company.

The taxpayers, in terms of s. 19 of the Finance Act, 1926, claimed repayment of income tax under s. 36 of the Income Tax Act, 1918, on the interest amounting to £17,861 16s. 5d. debited half-yearly to the company's account with the bank from Jan. 1, 1920, to Nov. 17, 1926, when the account was closed.

The provisions of s. 36 of the Act of 1918, so far as relevant, are as follows:

> "36.—(1) Where interest payable in the United Kingdom on an advance from a bank carrying on a bona fide banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the satisfaction of the Special Commissioners, to repayment of tax on the amount of the interest. Provided that no repayment shall be made unless the Inland Revenue Commissioners are satisfied that the interest has been or will be brought into account in the statement delivered or to be delivered for the purposes of income tax by the person making the advance."

It is not disputed that the sum in question was paid by the taxpayers out of profits or gains brought into charge or that the proviso to the section has been satisfied. Further, it is not now disputed by the taxpayers that, under the rule in *Claytons' Case* (1), the appropriation of the amounts paid in by the company during the currency of the account to satisfaction of the debits in their chronological order includes the discharge by the company of the interest for the first three half-years, which amounts to £3,675 15s. 6d., and that their claim falls to be reduced by that amount.

Two questions were in issue in this appeal, namely, (a) whether the claim came within s. 36, and (b), if so, whether the claim, so far as it related to the amounts of interest entered as a debit at each of the half-yearly rests up to and including the rest at June 30, 1926, constituted interest within the meaning of the section.

The revenue maintained that the taxpayers' claim did not fall within the section on two alternative grounds, namely, first, in respect that the taxpayers, as guarantors to the bank, did not pay interest on advances by the bank, but a sum due under the guarantee, the quality of the payment being determined by the guarantee and not by the quality of the obligations of the principal debtor, although the latter were invoked for the purpose of ascertaining the amount of the guarantors' liability; and, secondly, that the section only related to payment of interest by the person to whom the advances were made. The taxpayers disputed both these contentions on general grounds, and also on the terms of the particular guarantees granted by them.

I am of opinion that both contentions of the revenue are right, and that on a ground that is really common to both. Interest is the return given for the use of the advances, and is due by the person who obtains the advances; the liability of the guarantor is direct to the creditor, and is an undertaking to indemnify him against loss. The creditor computes his loss by the amount of the failure of the principal debtor to pay him principal and interest. In paying the amount of the indemnity, whether limited or otherwise, I am of opinion that the guarantor cannot be said to be paying interest to the creditor, though he is making good the loss of interest. The terms of the specimen guarantee included in the stated Case is a guarantee for "all and every the sum or sums of money which shall at any time be owing to the bank" with a long list of how the debt may arise, including unpaid interest as a possible source of the indebtedness, and is in conformity with the view above expressed. I am therefore of opinion that s. 36 (1) only relates to the person who has obtained the advances, and that a guarantor does not pay interest to the bank within the meaning of the section.

In that view, it becomes unnecessary to consider question (b), which raises a question of importance as to what is the effect of the practice of adding the amount of interest accrued at half-yearly or yearly rests as a debit item in the account, and whether such debit item retains the quality of interest. On that question I desire to reserve my opinion. I am therefore of opinion that the appeal should be dismissed.

LORD MACMILLAN.—The taxpayers assisted the finances of a company known as Blumfield, Ltd., by granting their personal guarantees to secure the company's indebtedness to the Midland Bank. The guarantees were all in similar terms, and the specimen exhibited shows that the taxpayers undertook to pay to the bank all sums which should at any time be owing by the company to the bank, together with all interest, discount and other banker's charges, the liability under each guarantee being limited to a definite sum. Having been called upon by the bank under these guarantees to discharge the company's indebtedness, the taxpayers, on Nov. 17, 1926, paid to the bank a sum of £64,482 16s. 8d., being the sum then due by the company to the bank. It appears from a summarised statement of the company's account with the bank from Dec. 31, 1919, to Nov. 17, 1926, that during this period the bank calculated the interest on the company's indebtedness at half-yearly intervals, and at the end of each half-year accumulated the interest with the principal. Of the total sum of £64,482 16s. 8d. paid by the taxpayers to the bank the sum of £17,861 16s. 5d. consisted of these half-yearly interest debits, together with the interest accrued for the broken period from June 30 to Nov. 17, 1926.

The taxpayers contended that in paying to the bank the sum of £64,482 16s. 8d. they paid £46,621 0s. 3d. as principal and £17,861 16s. 5d. as interest. They so contended in order to secure the benefit of s. 36 (1) of the Income Tax Act, 1918, which provides that where interest payable on an advance from a bank is paid to the bank, without deduction of tax, or gains brought into charge to tax, the person by whom the interest is paid shall be entitled to repayment of tax on the amount of the interest so paid. This provision was first introduced into the income tax system by s. 22 of the Finance Act, 1915. In the ordinary case a borrower from a bank who is not carrying on a trade or business is not entitled in computing his income for tax purposes to deduct the interest paid by him to the bank nor is he entitled in paying the interest to the bank to deduct the tax thereon, for such interest is not treated as annual or yearly interest. A person engaged in trade or business, on the other hand, who has obtained an advance from the bank for the purposes of his trade or business, is permitted in computing the balance of his profits or gains to deduct the interest which he has to pay to the bank. The effect of s. 36 (1) of the Income Tax Act is to give everyone, whether engaged in trade or business or not, who pays interest on an advance obtained from the bank, the right to repayment of tax on the amount of such interest if he has paid it without deduction of tax and out of profits or gains brought into charge. Persons engaged in trade or business, however, will not ordinarily benefit by this provision for as they deduct such interest in making the return of their profits they do not pay it out of profits or gains brought into charge. On the other hand, borrowers from a bank who are not engaged in trade or business, or who have obtained an advance for purposes not connected with their trade or business, obtain by virtue of the section the benefit of recoupment of tax on the interest paid by them to the bank. The rights of the revenue are safeguarded by the proviso to the section under which no repayment is to be made unless the Inland Revenue Commissioners are satisfied that the interest has been, or will be, brought into account in the return made by the bank for income tax purposes.

The taxpayers claim that they are entitled to this benefit in respect of the sum of £17,861 16s. 5d., forming part of the total sum of £64,482 16s. 8d. paid by them to the bank under their guarantees on the ground that they paid this sum of £17,861 16s. 5d. as "interest payable on an advance from a bank." The short answer, in my opinion, is that the taxpayers received no advance from the bank and owed no interest to the bank. Their relationship to the bank was not that of borrower and lender, and their liability to the bank was solely that of guarantors of a third-party's indebtedness to the bank. When they paid the sum of £64,482 16s. 8d. to the bank they did so in discharge of their liability to pay whatever sum, whether of principal or interest, the company owed to the bank. It cannot, therefore, with legal accuracy be said that the taxpayers made payment to the bank of interest on an advance from the bank within the meaning of the section. The benefit of the section, in my opinion, is confined to persons who pay interest to a bank on advances which they themselves have received from the bank.

As this ground of judgment is sufficient for the disposal of the appeal I do not find it necessary to express any opinion as to the question decided adversely to the taxpayers in the Court of Appeal and on which a very full argument was developed at your Lordships' Bar, namely, whether the sums of interest accumulated half-yearly in the account between the bank and the company still retained, on Nov. 17, 1926, their original character as interest or had become capitalised by being merged with the principal.

I agree with your Lordships that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Peacock & Goddard*, for *Shakespeare & Vernon*, Birmingham; *Solicitor of Inland Revenue.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DONOVAN *v.* UNION CARTAGE CO., LTD.

[KING'S BENCH DIVISION (Acton and Talbot, JJ.), December 9, 1932]

[Reported [1933] 2 K.B. 71; 102 L.J.K.B. 270; 148 L.T. 333;
49 T.L.R. 125; 77 Sol. Jo. 30]

Child—Negligence—Allurement—Unhorsed van on highway—No inherent danger in van.

The plaintiff, an infant, sustained injuries through climbing on to and falling from an unhorsed stationary van which had been left unattended by the defendants' servants on the public highway outside their premises.

Held: the cases in which it was laid down that a high degree of care was imposed to safeguard children from danger had the common feature that the object left unattended and accessible to children and likely to be an allurement to them possessed some attribute which rendered it dangerous in itself, and it was in consequence of its possession of this attribute that the accident happened and the injury ensued; it might be that the object was dangerous through being actually in motion or liable to be easily set in motion, or was poisonous or deleterious to eat or handle, or so defective in some way as to be inherently dangerous; but there was no such element of inherent danger in a sound, stationary, and immobile vehicle such as the van in the present case, and to extend the principle of *Lynch* v. *Nurdin* (1) (1841), 1 Q.B. 29, to things in no way dangerous in themselves which were left unattended in a street or other public place would be to impose burdens of responsibility so far-reaching and incalculable as to be unreasonable and intolerable; and, therefore, the plaintiff was not entitled to succeed.

Notes. Considered: *Liddle* v. *North Riding of Yorkshire County Council*, [1934] All E.R. Rep. 222. Referred to: *Culkin* v. *McFie & Sons, Ltd.*, [1939] 3 All E.R. 613.

As to the degree of care necessary in relation to acts by children, see 23 HALSBURY'S LAWS (2nd Edn.) 584–586, and for cases see 36 DIGEST (Repl.) 114 et seq.

Cases referred to:

(1) *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; Arn. & H. 158; 4 Per. & Dav. 672; 10 L.J.Q.B. 73; 5 J.P. 319; 5 Jur. 797; 113 E.R. 1041; 36 Digest (Repl.) 33, *150*.

(2) *Cooke* v. *Midland Great Western Rail. Co. of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(3) *Latham* v. *R. Johnson & Nephew, Ltd.*, [1913] 1 K.B. 398; 82 L.J.K.B. 258; 108 L.T. 4; 77 J.P. 137; 29 T.L.R. 124; 57 Sol. Jo. 127, C.A.; 36 Digest (Repl.) 49, *262*.

(4) *R. Addie & Sons (Collieries), Ltd.* v. *Dumbreck*, [1929] A.C. 358; 98 L.J.P.C. 119; 140 L.T. 650; 45 T.L.R. 267; 34 Com. Cas. 214, H.L.; 36 Digest (Repl.) 120, *604*.

(5) *Duff* v. *National Telephone Co., Ltd.* (1889), 16 R. (Ct. of Sess.) 675; 26 Sc.L.R. 512; 36 Digest (Repl.) 117, **854*.

(6) *M'Gregor* v. *Ross and Marshall* (1883), 10 R. (Ct. of Sess.) 725; 20 Sc.L.R. 462; 36 Digest (Repl.) 124, **918*.

(7) *Findlay* v. *Angus* (1887), 14 R. 312.

(8) *Harrold* v. *Watney*, [1898] 2 Q.B. 320; 67 L.J.Q.B. 771; 78 L.T. 788; 46 W.R. 642; 14 T.L.R. 486; 42 Sol. Jo. 609, C.A.; 36 Digest (Repl.) 115, *577*.

(9) *Wilkins* v. *Day* (1883), 12 Q.B.D. 110; 49 L.T. 399; 48 J.P. 6; 32 W.R. 123, D.C.; 36 Digest (Repl.) 209, *1105*.

Appeal from Bow County Court.

The plaintiff, suing by his father as next friend, claimed damages for personal injuries sustained by him through, as he alleged, the negligence of the defendants' servants. The facts found by the learned county court judge were that an unhorsed van belonging to the defendants was left unattended on the public highway outside their premises in Bow Common Lane, London. The plaintiff while playing in the street with other boys on Aug. 6, 1931, climbed on to the van and fell from it, sustaining the injuries complained of. It was contended for the plaintiff that the defendants were under a duty towards him not to leave an object which was likely to be dangerous to children, in a place where they might be able to reach it, without protection or control. The learned county court judge dismissed the action, and the plaintiff appealed.

Weitzman for the plaintiff.
Granville Sharp for the defendants.

Cur. adv. vult.

Dec. 9. **ACTON, J.,** read the following judgment of the court.—This is one of the cases in which it is contended that liability arises from the established duty in relation to children to take care not to leave that which may be dangerous to them, if meddled with, in any place where they may be able to reach it, without interference, protection, or control, and it is probable that they may be allured or attracted to it through the propensities common to children. It is said, accordingly, that to leave a vehicle such as a stationary van, even with no horse attached to it and in an immobile condition, in a public street in which young children are known to be in the habit of playing, and at a time when they are likely to be doing so, is a breach of this duty, and that, if a child in such circumstances climbs on to such a vehicle and falls from it and is thereby injured, liability in damages is incurred by the person who so leaves it.

The contention is that the present case is within the principle of *Lynch* v. *Nurdin* (1) and other similar cases. That principle is explained by LORD ATKINSON in *Cooke* v. *Midland Great Western Rail. Co. of Ireland* (2) in the following words ([1909] A.C. at p. 237):

> "The authorities from *Lynch* v. *Nurdin* (1) downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred."

There is, however, a distinction between these cases and the present case which, in our opinion, is a valid distinction, and, as indicated by LORD ATKINSON, it is supported by authority. The cases in which it has been held that liability arises appear to have one common feature, namely, that the object left unattended and accessible to children and likely to be an allurement to them possessed some attribute which rendered it dangerous in itself, and it was in consequence of its possession of this attribute that the accident happened and the injury ensued. It may be that the object is dangerous, through being actually in motion, or liable to be easily set in motion, or poisonous or deleterious to eat or handle, or explosive, or so defective in some way as to be inherently dangerous. The cases cited to us are illustrations of this principle.

There is, in our judgment, no such element of inherent danger in a sound, stationary, and immobile vehicle such as the van in the present case. To extend the principle of *Lynch* v. *Nurdin* (1) to things in no way dangerous in themselves left unattended in a street (or in other places open to the public, such as parks, pleasure grounds, or open spaces) would be to impose burdens of responsibility so far-reaching and incalculable as to be unreasonable and intolerable. It cannot be said that, even if such things are likely to attract children, there is in them anything in the nature of a trap or a concealed peril. The distinction here drawn is best illustrated by the decision in *Latham* v. *R. Johnson & Nephew, Ltd.* (3). In that case HAMILTON, L.J., said ([1913] 1 K.B. at p. 415):

> "Two other terms must be alluded to—a 'trap' and 'attraction' or 'allurement.' A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise, of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant, there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. 'Allurements,' too, is a vague word. It may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a frequented place of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object. Finally, what objects which attract infants to their hurt are traps even to them? Not all objects with which children hurt themselves simpliciter. A child can get into mischief and hurt itself with anything if it is young enough. In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal. No strict answer has been, or perhaps ever will be, given to the question, but I am convinced that a heap of paving stones in broad daylight in a private close cannot so combine the properties of temptation and retribution as to be properly called a trap."

Then again HAMILTON, L.J., says ([1913] 1 K.B. at p. 419):

> "One asks what kind of chattel it is in respect of which its owner owes a duty of care towards strangers, equally whether it is in a public place or on his own premises, and equally whether the strangers are invited or are only licensed. There is only one answer: the chattel must be something highly dangerous in itself, inherently or from the state in which its owner suffers it to be. Danger is relative. What property must the chattel possess to make the consideration of its attractiveness to children relevant? It must be something which, from its nature or state, will draw children to it and induce them heedlessly to put it into operation. Hence, in my opinion, in any view of it, the decision in *Cooke's Case* (2) is a decision on traps for children. Each of the four opinions says so. I refer to p. 236 [of [1909] A.C.]: 'But it does not seem unreasonable to hold,' &c.; p. 240:
>
> > 'These latter [the defendants] owed to the child a duty not to permit the machine to be in the movable and dangerous, because movable, condition in which they permitted it in fact to be';

> p. 241: 'The turntable . . . was a dangerous thing for young children to play with'; and p. 242: 'A machine dangerous unless protected.' The argument that the question for the jury, as stated by LORD MACNAGHTEN on p. 234, gives the decision a wider scope is fallacious. It ignores the fact that LORD MACNAGHTEN is speaking of 'the' turntable in question and of that machine as 'attractive to children and dangerous as a plaything,' an observation which he directs to the consequences which ought to be foreseen by a reasonable man as resulting from his own acts or omission, if the acts of other persons intervene, and with which he concludes his speech. The question was vital because Cooke had been put on the turntable by other boys, who then revolved it, he being purely passive, and the remoteness of his consequent injury had been relied on. Indeed, it is one which generally arises in children's cases and is characteristic of them."

It may be worth notice that LORD SUMNER'S judgment in *Latham* v. *R. Johnson & Nephew, Ltd.* (3) is approved and adopted in the House of Lords in *Addie & Sons* (*Collieries*), *Ltd.* v. *Dumbreck* (4) ([1929] A.C. at pp. 367, 370). There is also a Scottish case which, though not binding on English courts, deals expressly with the distinction now under consideration. This is the case of *Duff* v. *National Telephone Co., Ltd.* (5), the headnote of which reads:

> "A two-wheeled barrow, which on account of its size could not be received into its owner's workshop, was left by his servants in an adjoining lane, and secured to the wall by a chain. Some children who were playing in the lane mounted the barrow, and were swinging on it when they slid to the back of it, and brought it suddenly down on the head of a child aged three years, who died shortly after in consequence of the injuries he then sustained. In an action of damages by the father—held, that as a two-wheeled barrow was not a dangerous article no blame was to be attached to the owner for leaving it chained in the lane, and that no relevant averment of fault had been made by the pursuer to entitle him to an issue."

And in that case LORD SHAND said:

> "It was remarked in the course of the discussion that if the relevancy of this action was sustained it would be impossible to say where responsibility in such matters would end, and I agree with that observation. What is usually averred in cases of this kind is that an article dangerous in itself has been left unguarded in an exposed position. What the word 'dangerous' may mean in such cases cannot perhaps definitely be determined, but in the cases to which we were referred the meaning sufficiently appears. In *M'Gregor* v. *Ross and Marshall* (6), what were left exposed were machines which were dangerous if set in motion, and the setting of them in motion was a simple matter. In *Findlay* v. *Angus* (7), the article was a heavy shutter which if let alone was harmless, but was so placed that with a very slight movement it would come down. No doubt if a horse were left unattended in a public street, most serious consequences might follow, but I cannot adopt the view that an ordinary hurley is in any sense a dangerous article, nor do I think that in leaving it where they did the defenders rendered themselves liable to an action of damages on the ground of fault."

In the present case it was strenuously argued, in order to distinguish it from *Latham* v. *R. Johnson & Nephew, Ltd.* (3), that the van in the condition in which it was left was an obstruction of the highway and therefore a nuisance and that for that reason the defendants are liable. The answer to this is that even on the assumption that the van was a nuisance (which on the evidence at the trial is not clear) the accident did not happen because the van was an obstruction to the highway but because the child trespassed upon the van: see *Lynch* v. *Nurdin* (1). The child's user of the highway was not in any way obstructed or interfered with or rendered perilous by the van being on the highway. If an adult climbs on a stationary vehicle left on the highway to see a cricket match or a horse-race and falls off and injures himself, it is not relevant for him to complain that the van was an obstruction to the highway and a nuisance. That gives him no right to get upon it, and in relation to this particular point there seems to be no valid distinction between an adult and a child. On the other hand, *Lynch* v. *Nurdin* (1) is an authority that in an action by a child the fact that he was unlawfully on a vehicle in a public highway is no defence for the persons who left it there if the vehicle was in itself both attractive to children and dangerous: see also per Rigby, L.J., in *Harrold* v. *Watney* (8) ([1898] 2 Q.B. at p. 324).

In *Wilkins* v. *Day* (9), which was cited for the plaintiffs, it was the lawful user of the highway by a person driving a carriage along it that was rendered dangerous by the existence of an obstruction upon it, and it is on this that the decision in that case rests. In the present case there is no relation of cause and effect between an obstruction to the user of the highway and the occurrence of the accident.

For these reasons, in our judgment, this appeal should be dismissed, with costs.

Solicitors: *Silkin & Silkin*; *Cole & Matthews.*

[*Reported by* V. R. Aronson, Esq., *Barrister-at-Law.*]

Re WELLS. SWINBURNE-HANHAM *v.* HOWARD

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ), May 26, 27, 30, July 18, 1932]

[Reported [1933] Ch. 29; 101 L.J.Ch. 346; 148 L.T. 5; 48 T.L.R. 617]

Crown—Bona vacantia—Equity of redemption of leasehold property—Right of Crown to personal property of corporation at time of dissolution—Chattels held by trustee on trusts which have failed.

The Crown is entitled to all personal property as being bona vacantia. The term bona vacantia includes an equity of redemption of leasehold property. It is not a condition precedent to the success of a claim by the Crown to such an equity as being bona vacantia that it must be vested in some person or legal entity who or which has ceased to exist.

Observation of Wright, J., in *Re Higginson and Dean, Ex parte A.-G.* (1), [1899] 1 Q.B. 325, not approved.

The right of the Crown to succeed to the personal estate, including chattels real, vested in a company at the time of its dissolution does not differ in substance from the right of the Crown to succeed to the personal estate of a person dying intestate without next-of-kin.

Chattels, real and personal, vested in a person as trustee on private trusts which have failed are, as a general rule, held by him as trustee for the Crown as bona vacantia.

Notes. Applied: *Re Strathblaine Estates, Ltd.*, [1948] 1 All E.R. 162. Considered: *Re Azoff-Don Commercial Bank*, [1954] 1 All E.R. 947.

As to the right of the Crown to bona vacantia, see, in general, 7 Halsbury's Laws (3rd Edn.) 536; on dissolution of a company, ibid., vol. 6, 730 et seq.; on dissolution of a corporation, ibid., vol. 9, 100; and as to equity of redemption, see 23 Halsbury's Laws (2nd Edn.) 300 et seq. For cases see 18 Digest 32 et seq., 10 Digest (Repl.) 1103, 1104, 13 Digest 436, 437, and 35 Digest 343 et seq.

Cases referred to:

(1) *Re Higginson and Dean, Ex parte A.-G.*, [1899] 1 Q.B. 325; 68 L.J.Q.B. 198; 79 L.T. 673; 47 W.R. 285; 15 T.L.R. 135; 43 Sol. Jo. 153; 5 Mans. 289, D.C.; 4 Digest 340, *3200*.

(2) *Middleton* v. *Spicer* (1783), 1 Bro.C.C. 201; 28 E.R. 1083, L.C.; 24 Digest (Repl.) 954, *9647*.

(3) *Dyke* v. *Walford* (1848), 5 Moo.P.C. 434; 6 State Tr. N.S. 699; 6 Notes of Cases 309; 12 Jur. 839; 13 E.R. 557, P.C.; 18 Digest 32, *319*.

(4) *Megit* v. *Johnson* (1780), 2 Doug.K.B. 542; 99 E.R. 344; 18 Digest 34, *331*.

(5) *Taylor* v. *Haygarth* (1844), 14 Sim. 8; 2 L.T.O.S. 437; 8 Jur. 135; 60 E.R. 259; 18 Digest 31, *312*.

(6) *Pawlett* v. *A.-G.* (1667) Hard. 465; 145 E.R. 551; 35 Digest 343, *854*.

(7) *Casborne* v. *Scarfe* (1737), West temp. Hard. 221; 1 Atk. 603, L.C.; 35 Digest 343, *853*.

(8) *Burgess* v. *Wheate, A.-G.* v. *Wheate* (1759), 1 Eden 177; 1 Wm. Bl. 123; 28 E.R. 652; 35 Digest 344, *864*.

(9) *Marquis of Cholmondeley* v. *Lord Clinton* (1820), 2 Jac. & W. 1; 37 E.R. 527; on appeal (1821), 4 Bli. 1, H.L.; 35 Digest 904, *348*.

(10) *A.-G.* v. *Crofts and others* (1708), 4 Bro. Parl. Cas. 136; 2 E.R. 91, H.L.; 16 Digest 234, *293*.

(11) *Bartlett* v. *Rees* (1871), L.R. 12 Eq. 395; 40 L.J.Ch. 599; 25 L.T. 373; 19 W.R. 1046; 35 Digest 578, *3122*.

(12) *Beale* v. *Symonds* (1853), 16 Beav. 406; 22 L.J.Ch. 708; 22 L.T.O.S. 61; 1 W.R. 137; 51 E.R. 835; 23 Digest (Repl.) 348, *4160*.

(13) *Powell* v. *Merret* (1853), 1 Sm. & G. 381; 22 L.J.Ch. 408; 21 L.T.O.S. 98; 17 Jur. 449; 1 W.R. 243; 65 E.R. 167; 24 Digest (Repl.) 955, *9652*.

(14) *Cradock* v. *Owen* (1854), 2 Sm. & G. 241; 2 Eq. Rep. 381; 23 L.T.O.S. 19; 2 W.R. 319; 65 E.R. 382; 24 Digest (Repl.) 908, *9109*.

(15) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, *344*.

(16) *Hastings Corpn.* v. *Letton*, [1908] 1 K.B. 378; 77 L.J.K.B. 149; 97 L.T. 582; 23 T.L.R. 456; 15 Mans. 58; 10 Digest (Repl.) 1104, *7627*.

(17) *The Prior of Spalding's Case*, 7 Edw. 4.

(18) *Armory* v. *Delamirie* (1722), 1 Stra. 504; 93 E.R. 664; 3 Digest 64, *75*.

(19) *Henchman* v. *A.-G.* (1834), 3 My. & K. 485; 40 E.R. 185, L.C.; 20 Digest 381, *1180*.

Appeal from an order of FARWELL, J.

Sir Thomas Spencer Wells, by his will dated Nov. 19, 1896, after making various bequests, devised and bequeathed the residue of his real and personal estate to his trustees upon trust to invest certain shares thereof upon the securities therein mentioned, including freehold, copyhold, leasehold, and chattel real securities in Great Britain, but not in Ireland, and to hold such securities upon the trusts therein declared, which were still subsisting.

The testator died on Jan. 31, 1897. By a mortgage dated Oct. 31, 1899, the Tufnell and Caledonian Parks Syndicate (hereinafter called the company) assigned to the trustees three leasehold properties, known as 3, 4, and 5, St. John's Park Mansions, Pemberton Gardens, London, for the residue of the respective terms of ninety-nine years from June 24, 1868, for which the same were held by the company, by underleases, to secure the sum of £4,325, money subject to the trusts of the will, with interest at the rate of £4 per cent. per annum, subject to the usual proviso for redemption.

On March 23, 1910, the company passed an extraordinary resolution that it should be reconstructed by a sale and transfer of its property to a new company, and that the company should be wound-up voluntarily and that Llewellyn Howard Williams should be appointed liquidator. In July, 1913, the trustees gave notice to the liquidator to pay off the mortgage, but default was made in payment. In December, 1913, the trustees appointed a receiver of the income of the mortgaged property, and he entered into possession of the rent and profits. From the accounts rendered by the receiver it appeared that, after payment of the ground rent and other outgoings, a very small balance remained, which was not sufficient to satisfy the interest on the mortgage debt.

The company was never reconstructed, nor was any sale or transfer made to a new company, and on May 24, 1916, the company was dissolved. At the time of the dissolution the liquidator was of opinion that the equity of redemption of the mortgaged premises was of no value, and he took no steps to surrender the equity of redemption to the mortgagees, or to dispose of it to any other person. At the time of the dissolution a substantial sum was due to the mortgagees in respect of unsatisfied interest. Since the dissolution of the company the rents of the mortgaged premises had largely increased so that the rents received had been sufficient to pay the current interest and all arrears of interest and to leave a balance in the hands of the receiver. The equity of redemption in the mortgaged premises had, therefore, become of value.

The Crown claimed to be entitled to the equity of redemption as bona vacantia, and the surviving trustee claimed that, in the circumstances, no one was entitled to redeem the property, and that he, as the surviving mortgagee, was entitled to the property, free from any equity of redemption. The trustee, therefore, issued a summons, to which one of the beneficiaries and the Attorney-General, representing the Crown, were defendants.

Farwell, J., held, (i) that the Crown could only claim as bona vacantia property in the hands of another person if that person held the property upon a trust for a legal entity which had failed; and (ii) that a mortgagee was not a trustee of the equity of redemption for a mortgagor, and, therefore, the property was vested in the mortgagees for the remainder of the term, free from the right of any person to redeem.

The Crown appealed.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Stafford Crossman* for the Crown.

F. D. Morton, K.C., and *R. H. Hodge* for the beneficiaries under the will.

Nicholson Combe for the plaintiff.

Cur. adv. vult.

July 18. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal by His Majesty's Attorney-General from an order made by Farwell, J., on Jan. 21, 1932, whereby he declared that certain leases are now vested in the plaintiff as the sole surviving trustee of the will of Sir Thomas Spencer Wells, deceased, free from any right of redemption under the mortgage. The Attorney-General claims that the equity of redemption of these leases passed to the Crown in the circumstances hereinafter stated as bona vacantia belonging to His Majesty by virtue of his Royal Prerogative and in right of his Crown.

Sir Thomas Spencer Wells by his will, dated Nov. 19, 1896, appointed three persons as his executors and trustees, of whom the plaintiff alone survives. The testator died on Jan. 31, 1897, and probate of his will was granted on March 30 of that year. By the terms of the will, the residue of his estate after payment of his debts and certain legacies was to be invested and held on the trusts therein declared. The investments authorised included leaseholds in Great Britain.

In 1899 certain leasehold premises known as Nos. 3, 4, and 5, St. John's Park Mansions, Pemberton Gardens, were vested in the Tufnell and Caledonian Parks Syndicate, Ltd., under leases granted to the company in April and July, 1899, respectively, for the term of ninety-nine years, less the last three days thereof, from June 24, 1868; and by an indenture of mortgage dated Oct. 31, 1899, between the company and the then trustees of the will of Sir Thomas Spencer Wells, these leasehold properties were mortgaged to the trustees by assignment of the unexpired residue of the said three several terms to secure the sum of £4,325 at 4 per cent.

On March 23, 1910, a special resolution of the company was passed that the company should be wound-up voluntarily and for the appointment of a liquidator, and this resolution was confirmed by a resolution of the company on April 7 following.

Notice requiring repayment of the mortgage money was given to the liquidator on July 29, 1913, and upon default being made, the trustees as mortgagees, on Dec. 10, 1913, appointed a receiver—Claude Lound—of the income of the premises comprised in the mortgage of 1899. At that time the balance of the rents received quarterly, after deducting the outgoings, were insufficient to discharge the interest falling due and were carried over to the next account without reducing the sum total of the interest accrued due, or that accruing due.

On Feb. 23, 1916, the company held its final meeting, when the accounts of the liquidator were laid before the shareholders. The return was registered on Feb. 24, 1916, by the registrar, and the dissolution of the company became effective on May 24, 1916. The receiver, Lound, was, in 1920, replaced by one Percy Lawrence, who died in 1928, and from that date an agent was appointed by the surviving trustee to manage and collect the rents of the premises.

Before the dissolution of the company took effect no effort was made to deal with the equity of redemption in the leaseholds referred to; but since that time the rents received from the mortgaged premises have increased, with the result that since the date of the appointment of the receiver down to the present time, the total income therefrom, after allowing for the necessary and proper outgoings, is sufficient to discharge the amount of the mortgage interest for the whole period and to leave a balance over. The equity of redemption has thus become of value.

The Crown claims to be entitled to it as bona vacantia; while the surviving trustee claims that in the circumstances no one was entitled to redeem the property, and that he, as survivor of the mortgagees to whom the property had been assigned, was entitled to it free from any equity of redemption. The trustee, therefore, issued a summons to which one of the beneficiaries and the Attorney-General were parties. On the hearing before Farwell, J., he decided that after the dissolution of the company, the mortgagees had an estate which was freed from any right in anyone to redeem, and that the moneys in their hands representing the surplus rents are their property and that the Crown has no claim to them. From that decision the Crown appeals.

If the question were one to which s. 71 of the Companies Act, 1928, applied, a short answer could be found to it in that section, which is now replaced by s. 296 of the Companies Act, 1929. That s. 71 first introduced the words in the brackets

> "(including leasehold property but not including property held by the company on trust for any other person)";

and where a new provision is made by a statute, the ordinary rule applies that its effect is prospective, unless there is some clear indication that it is intended to have a retrospective effect. This rule is clearly stated and the authorities supporting it given in Maxwell on Statutes, 7th Edn., p. 186. There is no such indication to be found in the Act, and the question cannot, therefore, be decided by this short cut.

It is necessary to consider whether the right of the Crown to bona vacantia can be applied to an equity of redemption of leaseholds which is not vested in any specified person. I emphasise this because the learned judge based his judgment upon the view which he considered that Wright, J., had taken in *Re Higginson and Dean* (1), namely,

> "that the only cases where the Crown can maintain an action to recover as bona vacantia property or money in the hands of another person is where the Crown can show that the property or money is held upon a trust which has failed."

Farwell, J. ([1932] 1 Ch. at p. 391), adopts that principle as governing and deciding the claim of the Crown in the present case.

The nature of the doctrine as to bona vacantia is stated in a passage from Blackstone's Commentaries. In the 8th Edn., vol. 1, p. 298, there is this statement:

A "Besides the particular reasons before given why the King should have the several revenues of royal fish, shipwrecks, treasure trove, waifs and estrays, there is also one general reason which holds for them all; and that is because they are bona vacantia, or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder, and so continued under the imperial law."

B Two questions arise for consideration upon the present facts, namely, (i) Does the legal phrase bona vacantia include an equity of redemption of leasehold property? (ii) Is it true that such an equity must be vested in some person as a trustee for some other person or legal entity which has ceased to exist, as a condition precedent to the success of the claim of the Crown? It is not easy to discover the logical reason on which this latter condition as to a trust is founded, and it must be discussed later on. C

The principle under which the Crown takes bona vacantia is baldly stated in the argument of the Attorney-General, SIR WILLIAM WEDDERBURN, in *Middleton* v. *Spicer* (2): "The King is the owner of everything which has no other owner." That view was accepted by LORD THURLOW in his judgment in that case, in which he was dealing with leaseholds held by an executor upon a trust which had failed, D for he says (1 Bro.C.C. at p. 204): "The Crown would have had a right had there been no executor.'"

So also in *Dyke* v. *Walford* (3) (5 Moo.P.C. at p. 496), the Privy Council accepted this view as authoritative. The question that arose in that case was whether the right to goods belonging to persons dying intestate, without leaving husband or widow and without any next-of-kin, passed to the Crown as bona vacantia, and, if E so, whether the King had granted the right to them to the Duchy of Lancaster. The origin and history of bona vacantia was considered and dealt with in the judgment delivered by the judge, who was afterwards LORD KINGSDOWN (5 Moo.P.C. at p. 495):

> "The origin of this right shows that, if it existed at all, it must have existed from the foundation of the monarchy; it is the right of the Crown to bona F vacantia; to property which has no other owner. This is the ground upon which it is plainly respected by Lynwood, in the reign of Henry VI, and by LORD THURLOW, in his decision in *Middleton* v. *Spicer* (2) in the reign of George III. We consider it, therefore, to be perfectly clear that, at the date of the charters (granted by Edward III, 1377) on which the Duchy claim is founded, the right in question was vested in the Crown, as one of its jura G regalia, and the question is, whether, under the terms of these charters, it passed to the Duchy."

LORD MANSFIELD in *Megit* v. *Johnson* (4) states that upon the intestacy of a bastard or of a legitimate person without next-of-kin, the King takes as ultimus hæres, but subject to the debts of the intestate, and in that case the right of the Crown upon the death of a man felo de se, was accepted. In *Taylor* v. *Haygarth* H (5), to which I refer below, the Crown was held entitled to the personalty of an illegitimate who died intestate.

Acting upon this principle, there does not appear to be any difficulty in holding that bona vacantia extends to an equity of redemption of leaseholds, for it is not to be considered as a mere equity. In *Pawlett* v. *Attorney-General* (6) there was a bill to redeem a mortgage as against the Crown, then in possession of the land I mortgaged upon the failure of the mortgagor to pay and the attainder of the heir of the mortgagee. HALE, C.B., (Hard. at p. 469) held

> "that a power of redemption is an equitable right inherent in the land, and binds all persons . . . because it is an ancient right, which the party is entitled to in equity."

The court were divided on the question whether that right could be enforced against the Crown, but it is unnecessary to refer to that part of the judgment.

LORD HARDWICKE in *Casborne* v. *Scarfe* (7) (1 Atk. at p. 604) definitely held that

> "an equity of redemption has always been considered an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgagee in fee is considered as personal assets."

LORD HALE'S words cited above were quoted with approval by the Master of the Rolls, SIR THOMAS CLARKE, in *Burgess* v. *Wheate* (8) (1 Eden. at p. 206), and he adds the words of LORD NOTTINGHAM'S: "An equity of redemption charges the land, not a trust": see also *Cholmondeley* v. *Clinton* (9) (2 Jac. & W. at pp. 184, 185). In fact in some cases of outlawry and felony it has been held that the Crown by legal right takes an equity of redemption. Thus, in *Attorney-General* v. *Crofts and others* (10) a mortgagor was outlawed for high treason, and it was held in the House of Lords that the Attorney-General was to be admitted to redeem the premises, paying what was due for the principal and interest upon the mortgage debt. In *Bartlett* v. *Rees* (11) the interest of the mortgagor—a convicted felon—was then (1871) held to be forfeited to the Crown by reason of his conviction.

Beale v. *Symonds* (12) points in a different direction, but I cannot think that LORD ROMILLY'S decision prevails against those above quoted, more especially as the Attorney-General was not before the court, and the Crown was not represented. The decision was based upon that of *Burgess* v. *Wheate* (8) which has been treated as the authority for the proposition that the Crown had no title to equitable estates in freeholds.

As pointed out in SIR G. S. ROBERTSON'S CIVIL PROCEEDINGS BY OR AGAINST THE CROWN (1908 Edn.), *Burgess* v. *Wheate* (8) only decided that the Crown had no title by escheat, and the question whether it might not have a title to such estates as being bona vacantia was overlooked. This oversight is adverted to in the argument of counsel for the Crown in *Taylor* v. *Haygarth* (5) (14 Sim. at pp. 10, 15 and 16). The Crown was there held entitled to the personalty of the deceased, who died intestate, but was held not to be entitled to an act of a court of equity to give foundation to its rights, by means of the doctrine of conversion, for the purpose of converting the freehold estate in fee into personalty. The general principle

> "that by the law of the land the Crown is entitled to the undisposed of personal estate of any person who happens to die without next-of-kin"

was adopted and enforced. The Crown's right to an equity of redemption as an estate or interest in the land was not in question.

It is argued, however, that the right of the Crown is not as stated above to take property which has no other owner; but that in the case of a right of property which is incorporeal, that right will not survive unless it is vested in a trustee and so kept alive; in other words that such a right only survives where there is a trust that fails. The question, therefore, must be asked and answered—what is the reason for this curious condition or qualification of the broad rule above stated? On what foundation does it rest?

The equity of redemption is a right of property which can be disposed of by the mortgagor. The mortgagee is not in a general sense a trustee for the mortgagor. Their respective interests are antagonistic, though in a limited sense the mortgagee is a trustee for the mortgagor—e.g., in respect of the surplus of the purchase money after his own claims have been satisfied and there is no other mortgage. That leaves the problem unsolved. Why should the mortgagee upon a failure of the trust for any person entitled to the equity of redemption become entitled to a larger interest in the mortgaged property than his right as a mortgagee gives him?

But if the mortgagee were to be treated as a trustee, can that give him a right to the equity? It is clear from a number of cases that the trustee of personalty cannot take for himself.

A
> "When the trust fails, if there are no next-of-kin, the executor must hold it as trustee for the Crown":

see per SIR JOHN STUART, V.-C., in *Powell* v. *Merret* (13); see also *Cradock* v. *Owen* (14), *Cunnack* v. *Edwards* (15), and, indeed, the cases from *Middleton* v. *Spicer* (2) onwards.

B In *Attorney-General* v. *Crofts* (10) the question was whether an absolute assignment was in truth and in fact a mortgage, and it was found so to be, and thereupon the Attorney-General was admitted to redeem the premises in question as upon an equity of redemption which had passed to the Crown. There was not in that case any trustee who had kept alive the right of redemption which, ex facie, appeared to have been erased and non-existent.

C The examination of the cases as above leaves the foundation of the argument that the right of the Crown survives only where there is a trustee resting upon the decision in *Re Higginson and Dean* (1) alone.

The decision in *Hastings Corpn.* v. *Letton* (16) does not assist—indeed, is not relevant. The point that was there decided was that a lease to a corporation was to be treated as conditional, for the life of the corporation, and ceased upon its dissolution. D The decision itself is not easily understood, for a good deal of the reasoning in the judgment appears to turn upon what metaphor was most closely appropriate to the facts under consideration. In any case it is not an authority which conflicts with *Re Higginson and Dean* (1), and the decision turned upon the facts as found by the court.

The very learned judgment of WRIGHT, J., in *Re Higginson and Dean* (1) may E be accepted as determining that, upon the dissolution of the bank in the case before him, the right of property or interest which had belonged to it was not annihilated, but continued to be existing personal property. So in the present case, following that authority—for it does not appear to be necessary to go over the same ground again upon which I should respectfully reach the same conclusion—upon the dissolution of the Tufnell and Caledonian Parks Syndicate, Ltd., the equity of redemption F was not annihilated or merged or lost, but continued to be an existing right or interest in the mortgaged premises. WRIGHT, J.'s judgment expressly leaves open the question now before us. His words are ([1899] 1 Q.B. at p. 332):

> "It would however, I think, in the present state of the authorities, be judicial legislation to declare the Crown entitled to maintain actions in such cases, except where it can allege a trust."

G But the words are confessedly obiter. His attention was not directed mainly to the point upon which he offers the benefit of his opinion. We have had the advantage of a further examination and review of the authorities, and I have failed to find any authority which directly supports the observation of the learned judge. We have failed to find any sufficient reason upon which it can be based. So-called judicial legislation may fall to be a duty of the court in such circumstances. If H there be no statute or authority or reason which binds us to accept WRIGHT, J.'s dictum, it is our duty to give expression to the opinion which we have formed and perhaps also not to be unmindful of the maxim *Cessante ratione legis cessat et ipsa lex.*

For these reasons, in my judgment, the appeal must be allowed, and a declaration made that the Crown is entitled to claim the equity of redemption as bona vacantia.

I

LAWRENCE, L.J.—I agree with FARWELL, J., that s. 296 of the Companies Act, 1929, is not retrospective, and, consequently, does not apply to the present case, which falls to be determined apart from the recent statutory provisions affecting the destination of the property and rights of dissolved companies.

In these circumstances the question (upon which there is no direct authority) is whether the equity of redemption in leasehold property mortgaged by assignment by a limited company which was dissolved in 1916 devolved on the Crown as bona vacantia, or whether, as the learned judge has held, it became extinguished.

Bona vacantia (the Crown's right to which is not in dispute) are defined in Blackstone's Commentaries, 21st Edn., vol. 1, p. 298, as "goods in which no one else can claim a property." The expression "goods" in this definition has admittedly a larger signification than goods properly so called and has long since been construed and accepted by the courts as extending to personal property of every kind, both corporeal and incorporeal (including equitable interests in personalty). In *Dyke* v. *Walford* (3) the right of the Crown to succeed to the whole of the personal estate of a person dying intestate without next-of-kin as bona vacantia was traced back to very early times and was upheld as against the Ordinary. In the judgment delivered in that case there is the following passage dealing with the Crown's right to succession to the personal estate of such an intestate (5 Moo.P.C. at p. 495):

> "The origin of this right shows that, if it existed at all, it must have existed from the foundation of the monarchy. It is the right of the Crown to bona vacantia; to property which has no other owner. This is the ground upon which it is plainly rested by Lyndwood in the reign of Henry VI and by Lord Thurlow in his decision of *Middleton* v. *Spicer* (2) in the reign of George III. In this case no doubt was ever suggested as to the right of the Crown in case of intestacy."

Counsel for the beneficiaries and the trustee under the will have admitted that if the equity of redemption in the present case had been vested in a person dying intestate without next-of-kin, or even if it had been vested in a trustee for the dissolved company, it would have devolved on the Crown as bona vacantia, but contended that, as it was vested in the company itself at the time of its dissolution without the interposition of a trustee, it became extinguished.

In my judgment, this contention is not well founded. The right of the Crown to succeed to the personal estate vested in a company at the time of its dissolution does not, in my opinion, differ in substance from the right of the Crown to succeed to the personal estate of a person dying intestate without next-of-kin. In both cases the title of the Crown arises because the property has no other owners; such property must not, of course, be confused with property the owner of which is unknown. The old textbook writers on the law of corporations such as Kyd (1794), vol. 2, p. 516, and Grant (1850), p. 304, expressed the opinion that the Crown is entitled to the personal estate of a dissolved corporation, and, so far as I know, the correctness of that opinion has never been doubted.

The only difference between the case of an intestate and of a dissolved company is purely one of form. In the case of an intestate, his personal estate immediately on his death formerly vested in the Ordinary, and now vests in the probate judge pending the grant of letters of administration. As the right of administration follows the right of property, letters of administration in the case of an intestate dying without next-of-kin are granted to the nominee of the Crown, but subject to the usual condition of paying the administration expenses and debts of the intestate. In the case of a dissolved company the personal estate passes directly to the Crown, and there is no necessity to provide for the payment of any administration expenses or debts as the legislature has provided that these must be discharged before the company is dissolved.

Wright, J., in *Re Higginson and Dean* (1) held that the fact that the personal estate of a dissolved company was vested in a trustee, and was, therefore, not without a legal owner, did not defeat the Crown's title to it as bona vacantia. The ground of this decision was that from the time of Lord Thurlow's decision in *Middleton* v. *Spicer* (2) it has been an accepted proposition of law that chattels real and personal vested in a person as a trustee on private trusts which have failed are, as a general rule, held by him as trustee for the Crown as bona vacantia. The principle upon which this proposition is founded is that a trustee cannot conscientiously set up a claim to the beneficial title to the trust property as against the

A Crown any more than he could have set up a claim to such title as against his cestuis que trust had the trusts not failed.

The contention that, because the Crown's title to a share in a trust fund belonging to a dissolved company as bona vacantia has been upheld notwithstanding that the trust fund was legally vested in a trustee, therefore, unless the equity of redemption in question in the present case was vested in a trustee for the company, B the Crown cannot claim it as bona vacantia, seems to me wholly illogical; yet this is what the contention of the respondents on this appeal really amounted to.

This contention was founded upon that part of the judgment of WRIGHT, J., in *Re Higginson and Dean* (1) which dealt with the position of a debt due to a dissolved company, and suggested a doubt whether the Crown could sue for the recovery of such a debt unless it could allege a trust. In my judgment this doubt C is not justified. Long before choses in action became transferable at common law they were regarded in equity as assignable and could be dealt with inter vivos, and on the death of the owner devolved upon his legal personal representative as part of his personal estate. The statement in BLACKSTONE'S COMMENTARIES (vol. 1, p. 484), that the debts of a corporation either to or from it are totally extinguished by its dissolution, and similar statements made by KYD and GRANT, must either D be read as having reference merely to the rights and liabilities of the individual corporators or else are obsolete. Moreover, I find it difficult to reconcile the doubt expressed by the learned judge with his decision that the Crown had the right to recover its distributive share of the assets of the bankrupt's estate from the trustee. There is no difference in principle between a right to enforce payment of a share in a trust fund in the hands of a trustee and the right to enforce payment of a debt— E both are choses in action and are personal property which admittedly would pass to the Crown as bona vacantia in the case of persons dying intestate without next-of-kin. But it is not necessary to dwell on this subject, as the present case is not concerned with a debt. The actual decision in *Re Higginson and Dean* (1) was that the right to participate in the assets of the bankrupt in respect of the debt due to the dissolved company ([1899] 1 Q.B. at p. 333)

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> "existed as an equitable interest or chattel at the time of the dissolution, and upon the dissolution of the bank that chattel or interest was not annihilated, but continued to be existing personal property, which devolved upon the Crown as bona vacantia as completely as any other equitable interest."

With that decision I entirely agree, and, in my opinion, it covers in principle the G case of an equity of redemption in leasehold property.

The position of a mortgagee of land, whether freehold or leasehold, is well established. In equity the right of the mortgagee is limited to the money secured, and he holds the land only as security for his money; therefore, although he has the legal estate in the land, yet in equity he has a mere charge for the amount due to him. In equity the mortgagor is regarded as the owner of the mortgaged land H subject only to the mortgagee's charge, and the mortgagor's equity of redemption is treated as an equitable estate in the land of the same nature as other equitable estates. Moreover, no agreement between the parties that the mortgage should not be redeemable has any effect in equity, and any attempt to fetter the equity of redemption with any other condition than the payment of the money secured is null and void.

I It follows from this relationship between mortgagor and mortgagee that it would be just as unconscionable for a mortgagee to set up a claim to hold the land comprised in his mortgage free from the equity of redemption as it would be for a trustee to set up a claim to retain the trust property in his hands for his own use. Consequently, the reasoning which has induced the court to hold that a trustee cannot on failure of the trusts set up his legal title so as to defeat the Crown's claim to bona vacantia applies with equal force to a mortgagee of leaseholds where the mortgagee, being an individual, has died intestate without next-of-kin, or, being a company, has been dissolved; in neither case will the mortgagee be permitted to set up his legal estate in the term so as to defeat the Crown's equity of redemption any more than he would have been permitted to set up that title to defeat the mortgagor's equity of redemption had the mortgagor still been in existence. It cannot make any difference whether the equity of redemption is or is not vested in a trustee for the company. The existence or non-existence of a bare trustee of an equitable estate cannot have any real bearing on the question whether on the dissolution of the company that equitable estate would be extinguished or would devolve upon the Crown as bona vacantia. If there were such a trustee, he (having no legal estate) would be looked upon by a court of equity as a mere cipher; the court would treat the company as the owner of the equitable estate and disregard the trustee.

There only remains the contention that chattels real belonging to a dissolved corporation stand on a different footing from the other personal property belonging to such a corporation and do not devolve upon the Crown as bona vacantia. This contention is based on the decision of the Divisional Court in *Hastings Corpn.* v. *Letton* (16). In that case the plaintiff had granted a lease of certain business premises in Hastings to a limited company which was subsequently dissolved, but which before its dissolution had assigned the lease to another limited company. The assignee company was subsequently also dissolved, and the Divisional Court held that thereupon the lease did not vest in the Crown as bona vacantia, but that the reversion was accelerated and that the premises reverted to the lessors. This decision was based on the statement in Blackstone's Commentaries (21st Edn., vol. 1, p. 483), that to every grant to a corporation the law annexes a condition that if the corporation be dissolved the grantor shall have the lands again, because the cause of the grant faileth. This statement was in turn based on the statement of Lord Coke (Co. Litt. 13b) that on the dissolution of a corporation lands belonging to it revert to the donor. This statement of the law has been criticised and adversely commented upon by (inter alios) Gray in his work on Perpetuities (ss. 44 to 51a) and Sweet in a note to Challis's Real Property (3rd Edn., app. VI, p. 467); both of these learned authors have for reasons which they have set out at length come to the conclusion that Lord Coke's statement is erroneous. The main reasons given by Sweet for arriving at this conclusion are that the dictum of Choke, J., in the *Prior of Spalding's Case* (17) (7 Edw. at pp. 10 to 12), upon which Lord Coke mainly founded his statement, was an obiter dictum, as in the case before the court the question was as to the nature of frankalmoigne tenure in which the donor and the lord must be the same person; that the other authorities cited by Lord Coke were really adverse to his statement, as they showed that on a dissolution of a corporation lands held by it belong to the lord not by reverter but by escheat; that if Lord Coke's statement were accurate it would be difficult to see how a corporation could aliene its land free from the grantor's right of reverter; and that Preston's attempt to get out of this difficulty by speaking of corporations as having a fee simple for the purpose of alienation, but only a determinable fee for the purpose of enjoyment (1 Prest. Abrd. 272), was not satisfactory, because if that explanation were correct, a condition against alienation might be annexed to a grant to a trading company at the present day. Finally, Sweet says (Challis's Real Property, 3rd Edn., app. VI at p. 468):

> "On the whole, therefore, it may be said with some confidence that the statements of Lord Coke and Mr. Preston are contrary both to principle and authority and that the decision in *Hastings Corpn.* v. *Letton* (16) is erroneous."

I agree with this conclusion, and with the reasons upon which it is based; it is unnecessary, therefore, to consider whether even if Lord Coke's statement of the law were correct the Divisional Court in *Hastings Corpn.* v. *Letton* (16) was right in applying the doctrine of reverter to a lease for a term of years, a question which is open to serious doubt (see Gray on Perpetuities, p. 51) and could not be decided in the present case in the absence of the head lessor.

In any event, however, the decision in *Hastings Corpn.* v. *Letton* (16) is no authority for the general proposition that the rule that the personal estate of a dissolved company devolves on the Crown as bona vacantia does not apply to chattels real. The decision was based entirely on the alleged doctrine of reverter, and has no application to such chattels real as equitable interests in leaseholds, although if the decision, contrary to my opinion, was right, it would afford some support to a claim by the head lessor in the present case that the sub-lease had come to an end on the dissolution of the company, a question which cannot be decided in the present proceedings as the head lessor is not before the court.

In the result, however, for the reasons stated, I am of opinion that on the assumption that the sub-lease is still subsisting the equity of redemption in question was not extinguished on the dissolution of the mortgagor company but passed to the Crown as bona vacantia, and that this appeal ought to be allowed.

ROMER, L.J.—In my opinion, it is established law that the Crown is entitled to all personal property that has no other owner. The property to which this law is most commonly applied is that of an intestate dying without leaving a widow or next-of-kin. It was property of this kind that was the subject-matter of the action of *Dyke* v. *Walford* (3). In delivering the judgment of the Privy Council in that case, a judgment that affirmed the right of the Crown to the personal estate of a bastard, who had died intestate, Mr. Pemberton Leigh (as he then was) said this (5 Moo.P.C. at p. 495):

> "The origin of this right shows that if it existed at all, it must have existed from the foundation of the monarchy; it is the right of the Crown to bona vacantia, to property which has no other owner. This is the ground upon which it is plainly rested by Lyndwood in the reign of Henry VI, and by Lord Thurlow in his decision in *Middleton* v. *Spicer* (2) in the reign of George III."

The Privy Council in fact accepted the argument put forward by Mr. Parker in that case (5 Moo.P.C. at p. 471) that the rule at common law is that property must belong to somebody, and where there is no other owner, not where the owner is unknown, that is the distinction, it is the property of the Crown. The distinction referred to by Mr. Parker is, of course, that on which such cases as *Armory* v. *Delamirie* (18) are based. But this right of the Crown to property that has no other owner has been frequently stated by writers of great authority. In Coke's Institutes, 2nd part, at p. 167, it is said:

> "The cause whereof originally wreck was given to the Crown stood upon two maxims of the common law: First, that the property of all goods whatsoever must be in some person; secondly, that such goods as no subject can claim any property in do belong to the King by his prerogative, as treasure trove, strays, wreck of the sea and others."

In Comyn's Digest, Prerogative D (49), the same rule is stated thus: "The King, by his prerogative, is entitled to all goods which have no owner." 1 Blackstone's Commentaries, p. 299, contains a statement to the same effect, citing a passage from 1 Bracton, Ch. 12, s. 10; so does Brook's Abridgement, title, Prerogative le Roy, 12.

The extension of the doctrine to equitable interests was not, however, accomplished without some difficulty. Where there was an owner at law, such as a trustee, the common law doctrine would be inapplicable. The property was not without any other owner. The doctrine could, therefore, only be applied by analogy. But a formidable obstacle in the way of doing this was thought to have been occasioned by *Burgess* v. *Wheate* (8). In that case it had been held by Lord Northington and Sir Thomas Clarke, Lord Mansfield dissenting, that the equitable estate in lands which were vested at law in a trustee was not liable to escheat on the death of the cestui que trust without heirs, that is to say that, there being no escheat at law, there should be none in equity. That case was followed in *Beale* v. *Symonds* (12), where Lord Romilly held that on the death intestate and without heirs of a mortgagor of lands, the legal estate in which was vested in the mortgagee in fee simple, the equity of redemption did not escheat to the Crown. Lord Romilly stated that the principle was that neither the Crown nor the lord could seize where there was a legal tenant in possession. In *Middleton* v. *Spicer* (2) a testator had by his will directed certain leaseholds to be sold, and bequeathed the proceeds of sale to his executors upon trusts that failed to take effect. The testator having died without leaving any next-of-kin, an attempt was made by the executors to defeat the claim of the Crown to the money. It was, however, argued by the Attorney-General that the case was governed by the general principle that the King is owner of everything which has no other owner, and though Lord Thurlow was at first inclined to think that, inasmuch as the will had vested the legal property in the executors, the case was indistinguishable in principle from *Burgess* v. *Wheate* (8), he ultimately decided in favour of the Crown. To the report of the case in the fourth edition, Mr. Eden added a note, of which the material portion is as follows:

> "The determination of the present case does not in any degree affect the principles upon which Lord Northington and Sir Thomas Clarke founded their decision. It relates to a different subject-matter, and rests on principles entirely different. The question in the present case was one of vacant possession, and, therefore, a question of prerogative. In *Burgess* v. *Wheate* (8) it was a question of tenure, the claim of the Crown having been admitted on all sides to be 'seigniorial and not prerogatival.' "

Both in *Burgess* v. *Wheate* (8) and in *Beale* v. *Symonds* (12) the claim of the Crown was based on the ground of escheat, and not on the ground that the equitable interest in the freeholds devolved on the Crown as bona vacantia. Mr. Butler, in his notes on Coke upon Littleton, p. 191a (17th Edn.), says this:

> "While the relation between the lord and the tenant was great, the separation of the beneficial interest from the legal tenure was a serious mischief. As the relation is now exceedingly small, it is, in this respect, scarcely felt. In the case of *Burgess* v. *Wheate* (8) Lord Mansfield endeavoured to establish the right of the Crown to the benefit of a trust, which failed for want of an heir, by attempting to fix on trusts, the feudal incidental of an escheat. In the discussion of the question the analogy appeared unnatural, and the case was decided against the Crown. A better ground in favour of the claim of the Crown might, perhaps, have been found by resorting to its acknowledged prerogative, of being entitled to the bona vacantia, or every species of property of which no owner is discoverable."

On the other hand, Lord Brougham in *Henchman* v. *Attorney-General* (19) (3 My. & K. at p. 492) said that the Crown may take personalty as bona vacantia, but real estate it can never take unless by escheat. In these circumstances the question whether an equitable interest in real estate used to devolve on the Crown as being bona vacantia cannot be regarded as being clear. But the Crown's right to the equitable interests in personal estate of which interests there is no other owner does not, in my judgment, admit of doubt. This was established by the decision in *Middleton* v. *Spicer* (2). In such cases, however, the equitable interest vests in the Crown not because the legal interest is vested in trustees, but in spite of that fact. The right of the Crown to take as bona vacantia all legal interests in personal property of which there is no other owner had been established centuries before that case. It was suggested in argument in the present case that an equity of redemption stands on a different footing from other equitable interests in relation to the doctrine of bona vacantia. It was said that the mortgagee would be prejudiced if the equity of redemption became vested in the Crown. The Statute of Limitations, for instance, would not run in the mortgagee's favour. But a similar argument might be advanced by a debtor to the estate of an intestate that has devolved upon the Crown, and yet it can hardly be suggested that the debt in question is to be excluded from the assets. I can see no valid reason for drawing any distinction between an equity of redemption and any other personal property in relation to the right of the Crown to bona vacantia. No difficulty was felt in the old days as to the right of the Crown to succeed to and enforce an equity of redemption in a term of years vested in a man convicted of high treason: see *Attorney-General* v. *Crofts* (10).

If the Crown be entitled, as in my opinion it is, to the whole personal estate of an intestate dying without widow or next-of-kin, why should there be any doubt as to the right of the Crown to the personal estate of a corporation that has ceased to exist? The right of the Crown to bona vacantia depends upon the fact that there is no other owner of the property claimed, and cannot depend upon the particular reasons for the existence of that fact. I know of no authority for drawing any distinction between the case of such a corporation and the case of a man dying intestate and without kin except the decision of the Divisional Court in *Re Higginson and Dean* (1). In that case the Crown was held entitled to money held in trust for a corporation that had been dissolved on the ground, oddly enough, that it was so held, and not that it belonged to the Crown as bona vacantia in spite of its being so held. WRIGHT, J., indeed, in giving judgment, said that he thought that it would be judicial legislation to declare the Crown entitled to the rights of a dissolved corporation except when it can allege a trust. He said that in the case before him it was not necessary to decide the question. His statement to which I have referred was, therefore, merely obiter. But it has never yet been dissented from or questioned, and FARWELL, J., not unnaturally felt bound to follow it in the present case. In my judgment, however, the distinction drawn by WRIGHT, J., between personal property held in trust for a corporation and personal property held by a corporation without the intervention of a trustee is unsound, and cannot be supported. The learned judge indeed seems to refer to *Middleton* v. *Spicer* (2) and some of the numerous cases that followed it as though the rule as to bona vacantia only applied to equitable interests in personal estate. He said that the principle underlying those cases was that the court will not allow a person who has obtained title or possession as a mere trustee of chattels to set up unconscientiously any beneficial title by occupancy, possession or otherwise. So it was. But the principle was applied for the purpose of extending the common law doctrine as to bona vacantia to equitable interests and to prevent the trustee relying upon his legal estate to defeat the claim of the Crown. In the present case the interest claimed by the Crown is an equity of redemption in property sub-leased to the corporation and assigned by them to the plaintiffs by way of mortgage to secure moneys that are still owing. On the dissolution of the corporation that equity of redemption passed, in my opinion, to the Crown as bona vacantia, assuming that the term granted by the sub-lease in question did not come to an end on the dissolution of the corporation. If it did, then obviously there was no interest in the demised property that could pass on the dissolution to the Crown or anyone else.

In order to determine this question it would be necessary to consider whether the decision in *Hastings Corpn.* v. *Letton* (16) can be supported. According to the headnote to the case it decided that a lease to a corporation for a term of years determines if the corporation is dissolved without having assigned the lease. In point of fact, however, the lease in that case, though originally granted to a corporation that was dissolved on Jan. 23, 1906, had in the year 1904 been assigned to another corporation that suffered the same fate on Aug. 9, 1906. According to the decision of the Divisional Court the lease survived the first dissolution, but succumbed to the second. The decision was not received by the legal profession with universal approval and the reasons given for it are not very satisfactory. PHILLIMORE, J., seems to have given as one ground for his decision that there could not be a lease without a leaseholder. This, no doubt, is true. But it does not seem an adequate reason for deciding that the Crown did not on the dissolution of the second corporation become the leaseholder. He then observed that if the lease was still in existence there ought never to have been a dissolution of that corporation, because a company must strip itself or be stripped of all its property and obligations three months before it ceased to exist. Darling, J., had also suggested much the same thing when he said ([1908] 1 K.B. at p. 384):

> "The dissolution of a company is regulated by s. 142 and s. 143 of the Companies Act, 1862, by which it is provided that before a company is dissolved it shall have nothing; it must first be divested of everything, and is not permitted to dissolve until it is divested of everything."

It is not easy to appreciate the relevancy of these observations unless it was intended to suggest that the dissolution of the company while the lease was still undisposed of was by itself a reason for regarding the lease as having ceased to exist. But the dissolution of a corporation does not exterminate every asset that the liquidator may have failed to get in or realise. Should he by some oversight have failed to dispose of the office table it is obvious that the office table still exists. And what is true of the office table must, as it seems to me, be true of the office lease. The considerations that I have mentioned, however, were only minor ones. The chief ground of the decision was a statement made by Blackstone in his Commentaries that the law doth annex a condition to every grant to a corporation that if the corporation be dissolved the grantor shall have the lands again because the cause of the grant faileth. The grant is, indeed, only during the life of the corporation which may endure for ever; but when that life is determined by the dissolution of the body politic the grantor takes it back by reversion, as in the case of every other grant for life. The statement so made by Blackstone received the approval of both Darling, J., and Phillimore, J. The former said it was still good law. The latter said that whether land be granted to a corporation in fee or for a term of years the law so stated by Blackstone applies; the property is given on the implied condition that it is to be held during the life of the corporation. If this be so, it would have been a good reason for holding that the lease in question in that case came to an end on the dissolution of the lessee corporation. How and why it survived that dissolution and only came to an end on the dissolution of the assignees is more than I can understand. In the case of a grant of the fee to a trading corporation the inconvenience of the doctrine stated by Blackstone has been felt for a long time. If, for instance, a conveyance of land be made to a company formed for the purpose of developing and turning it to account, the fact, if fact it be, that on the dissolution of the company, which would probably take place as soon as the land had all been disposed of to purchasers, the land would revert to the grantors would seriously prejudice the sale of the land to the best advantage. It was, therefore, suggested by Mr. Preston for the purpose of getting over this difficulty that a corporation has a fee simple for the purpose of alienation, but only a determinable fee for the purpose of enjoyment. Assuming that such an estate be capable of existing at law, it would be an interesting problem to discover what would happen in the event of the grantee corporation alienating the fee to another corporation. Equally interesting problems arise if the doctrine as modified by Preston were applied to terms of years. If the lessee corporation assigns the lease to another corporation which is dissolved, does the assignment operate as an underlease that determines on the dissolution, or is it an assignment of the whole term, the assignor having, according to the doctrine, the whole term for the purpose of alienation? And what happens on the dissolution? Does the land revert to the original lessor or to the lessee corporation?

But in truth the whole doctrine is suspect. To begin with, a fee simple limited to continue during the existence of a corporation, even though limited only for the purpose of enjoyment, is a determinable fee, and serious doubts have been raised whether such a fee could be created since the statute Quia Emptores. Professor Gray thought it could not. Mr. Challis took the opposite view. Mr. Charles Sweet, however, in a note to his third edition of Challis, said he thought the weight of authority and argument was in favour of Professor Gray. In the next place, Mr. Charles Sweet in his notes to Challis contained in Appendix VI gives reasons for saying "with some confidence" that the alleged doctrine, with or with-

A out PRESTON'S modification, is contrary both to principle and authority, and that the decision in *Hastings Corpn.* v. *Letton* (16) is erroneous. And here I must leave it. For the court in the present case is in this difficulty. All the parties before it are united in asserting that the underlease is still in existence. The head lessor, or rather those claiming through him, who would be interested in asserting that either the lease has already determined, or would, ipso facto, do so if the B Crown redeemed the plaintiffs' mortgage, are not before the court. In the circumstances, therefore, all that the court can now do, as it seems to me, is to discharge the order of FARWELL, J., and declare in effect that the equity of redemption in the leaseholds in question, assuming the underlease still to be in existence, is vested in the Crown as bona vacantia. The exact form of declaration to be made can be discussed in a moment. I only wish to add that I agree with the Master of the C Rolls for the reasons given by him that s. 296 of the Companies Act, 1929, is not retrospective.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *Herbert Smith & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

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LYMBURN AND ANOTHER *v.* MAYLAND AND OTHERS

[PRIVY COUNCIL (Lord Dunedin, Lord Blanesburgh, Lord Atkin, Lord Russell and Sir George Lowndes), December 15, 17, 18, 1931, February 4, 1932]

[Reported [1932] A.C. 318; 101 L.J.P.C. 89; 146 L.T. 458;
F 48 T.L.R. 231; [1932] 1 W.W.R. 578; [1932] 2 D.L.R. 6]

Canada—Alberta—Powers of provincial legislature—Prevention of fraud on sale of securities—Dominion companies affected—British North America Act, 1867 (30 *&* 31 *Vict., c.* 3), *s.* 92.

By s. 9 of the Security Frauds Prevention Act, 1930, of Alberta, Canada, the object of which was to prevent fraud in connection with the sale of securities, G the Attorney-General of the province or his authorised representative might "examine any person [or] company . . . to ascertain whether any fraudulent act, or any offence against this Act . . . has been, is being, or is about to be committed." The Act also provided that persons registered as brokers and salesmen under the Act must enter into a personal bond and might be required to enter into a surety bond each in the sum of $500 conditioned for payment if H the registered person, among other events, was (in the former bond) "charged with" and (in the latter bond) "convicted of" a criminal offence or found to have committed an offence against the Act.

Held: (i) the last-mentioned provisions indirectly imposed an additional punishment for a criminal offence, but neither they nor the Act as a whole encroached on the sole right of the Dominion to legislate in respect of the I criminal law; (ii) the provisions of the Act did not destroy the status of Dominion companies which were subject to competent laws of the province relating to the business of all persons who traded in securities; but (iii) those provisions fell within the scope of legislation dealing with property and civil rights within s. 92 of the British North America Act, 1867; and, therefore, (iv) the Act was not ultra vires the provincial legislature.

Notes. Referred to: *R.* v. *Arrow Transit Lines*, [1953] O.W.N. 861; *Saumer* v. *City of Quebec*, [1953] 2 S.C.R. 299; *A.-G. for Ontario* v. *Winner*, [1954] 3 All E.R. 177.

As to the legislative powers of the Dominion Parliament, and those of the provincial parliaments, of Canada, see 5 HALSBURY'S LAWS (3rd Edn.) 494 et seq., and for cases see 8 DIGEST (Repl.) 708 et seq. For British North America Act, 1867, see 6 HALSBURY'S STATUTES (2nd Edn.) 303.

Cases referred to:

(1) *A.-G. for Manitoba* v. *A.-G. for Canada*, [1929] A.C. 260; 98 L.J.P.C. 65; 140 L.T. 386; 45 T.L.R. 146, P.C.; 8 Digest (Repl.) 709, *150*.

(2) *John Deere Plow Co., Ltd.* v. *Wharton and Duck*, [1915] A.C. 330; 84 L.J.P.C. 64; 112 L.T. 183; 31 T.L.R. 35, P.C.; 8 Digest (Repl.) 709, *149*.

(3) *Great West Saddlery Co.* v. *R.*, [1921] 2 A.C. 91; 90 L.J.P.C. 102; 125 L.T. 136; 37 T.L.R. 436, P.C.; 8 Digest (Repl.) 730, *254*.

Appeal from an order of the Appellate Division of the Supreme Court of Alberta declaring that s. 9 of the (Alberta, Canada) Security Frauds Prevention Act, 1930, had no application to companies incorporated under legislation of the Dominion of Canada.

The appeal arose out of an action commenced on March 10, 1931, in which the respondents sought a declaration of their rights and an injunction restraining the appellants from proceeding with certain investigations under the Act and from examining into the affairs of the respondent, Mercury Oils, Ltd. The Act was designed for the prevention of fraud in connection with the sale of securities. It required all brokers including officials of partnerships and companies to be registered and registration was made subject to the approval of the Attorney-General. By s. 9:

> "The Attorney-General, or any person or persons to whom as his representative or representatives he may in writing delegate such authority, may examine any person, company . . . at any time in order to ascertain whether any fraudulent act, or any offence against this Act . . . has been, is being, or is about to be, committed."

The Appellate Division held that s. 9 was not applicable to Dominion companies because it was ultra vires in relation to such companies. The first appellant was the Attorney-General for Alberta. The Attorney-General for Canada, who intervened, supported the respondents, who contended that the Act was ultra vires of the provincial legislature.

W. N. Tilley, K.C. (of the Ontario Bar), *Aimé Geoffrion, K.C.* (of the Quebec Bar), and *Maurice Alexander* for the appellants.

D. N. Pritt, K.C., and *S. J. Helman, K.C.* (of the Alberta Bar) for the respondents.

F. P. Varcoe, K.C. (of the Ontario Bar) for the Attorney-General for Canada, intervener.

Frank Gahan for the Attorney-General of Ontario, intervener.

Feb. 4. **LORD ATKIN.**—This is an appeal from the Supreme Court of Alberta in proceedings taken by the plaintiffs to challenge powers sought to be exercised by the Attorney-General of Alberta under the provisions of the Security Frauds Prevention Act, 1930 (Alberta), Statutes of Alberta, 20 Geo. 5, c. 8. Under the terms of s. 9 of that Act the Attorney-General or any delegate appointed by him has power to examine any person or company at any time in order to ascertain whether any fraudulent act as defined by the statute or any offence against the Act or the regulations has been, is being, or is about to be, committed. The Attorney-General, Mr. Lymburn, had appointed the defendant, Mr. Frawley, to hold the examination in question, and Mr. Frawley had summoned the plaintiff, Mr. Mayland, to attend him for examination on an inquiry, among other things, into items appearing in the balance sheet of the other plaintiff, Mercury Oils, Ltd., as at Dec. 31, 1930. Mr. Frawley also gave notice that he intended to inquire into a transaction between Solloway Mills & Co., Ltd., and the plaintiff Mayland respecting the exchange of certain shares, and the assumption by Mayland of an underwriting agreement entered into between Solloway Mills & Co., Ltd., and Mill City Petroleums, Ltd. All the companies mentioned are incorporated under the provisions of the Dominion Companies Act.

The plaintiffs, by their statement of claim, claimed a declaration that the statute, or alternatively, s. 9, was ultra vires the province, and an injunction restraining the Attorney-General and Mr. Frawley from proceeding with the examination. They gave notice of motion for an interim injunction which came before IVES, J., and with the consent of the defendants was referred by him to the Appellate Division of the Supreme Court. On April 23, 1931, the Appellate Division made an order declaring that s. 9 of the Act had no application to the plaintiff or the three companies mentioned above and that the defendants had no authority to proceed with the examinations and investigations referred to in the statement of claim. The reasons for the judgment were delivered by HARVEY, C.J., concurred in by WALSH and CLARKE, JJ. The learned Chief Justice reviewed the statute as a whole, but founded his decision on the ground that the provincial legislature could not delegate to the Attorney-General power to obtain information unlimited in extent inasmuch as that legislature itself was restricted in its power to obtain from a Dominion company unlimited information, apparently because such a requirement would clash with the Dominion legislation as to companies. It was, therefore, held that s. 9 was not applicable to Dominion companies; not as would appear as a matter of construction, but because it was ultra vires in relation to such companies, though it would severably be valid as to other companies. Before the board the attack was made on a broader ground—that the whole Act was invalid so far as it related to Dominion companies because it destroyed their status by making it impossible for them to issue their share capital. In this respect it was said the case was covered by the decision of this board in *A.-G. for Manitoba* v. *A.-G. for Canada* (1). It was further contended that, apart altogether from Dominion companies, the Act was invalid because under the colour of dealing with the prevention of fraud in share transactions it was assuming to legislate as to criminal law, a class of subject reserved to the Dominion. Apart from invalidity it was further said that, if the terms of the Act were examined, the three Dominion companies in question as well as the plaintiff Mayland did not carry on any business as brokers in shares, and it was only to transactions by brokers that the provisions of s. 9 applied. Their Lordships cannot accept any of these contentions.

When the framework of the Act is examined it will be found that after an elaborate definition clause it is divided into five parts. The material definitions are those of broker, which includes every person, other than a "salesman" as defined, who is engaged in the business of "trading" in securities, and "trading" includes the solicitation or obtaining a subscription to any security. "Salesman" includes every person employed by a company to trade in securities. Part I is entitled "Registration of Brokers and Salesmen," and provides in substance that no person may trade in securities unless he is registered as a broker or salesman. The prohibition is confined to "persons" which by the definition clause does not include corporations. A corporation may, however, be registered, in which event its officials do not need separate registration. Registration is made subject to the approval of the Attorney-General, who may direct that registration be refused for any reason which he may deem sufficient. Registered persons must enter into a personal bond and may be required to enter into a surety bond each in the sum of $500 conditioned for payment if the registered person, among other events, is (in the former bond) "charged with," (in the latter bond) "convicted of" a criminal offence or found to have committed an offence against the Act or the regulations made thereunder. It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise intra vires, the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

There is no reason to doubt that the main object sought to be secured in this part of the Act is to secure that persons who carry on the business of dealing in securities shall be honest and of good repute, and in this way to protect the public from being defrauded. Incidentally, the net has been drawn so wide as to cover the issue of shares by a public company, with the result that a company cannot issue its shares to the public unless for that purpose it employs a registered broker or salesman, or unless the company itself is registered. It is said that these provisions so far as they affect Dominion companies are ultra vires according to the principles adopted by this board in *John Deere Plow Co., Ltd.* v. *Wharton and Duck* (2); *Great West Saddlery Co.* v. *R.* (3); and *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1). In those cases there was a general prohibition to companies either to trade at all or to issue their capital unless the company was registered. The legislation was held ultra vires because the legislative powers of the province are restricted so that "the status and powers of a Dominion company as such cannot be destroyed": *John Deere Plow Co. Case* (2); and legislation will be invalid if a Dominion company is "sterilised in all its functions and activities" or "its status and essential capacities are impaired in a substantial degree": *Great West Saddlery Co. Case* (3). It appears to their Lordships impossible to bring this legislation within such a principle. A Dominion company constituted with powers to carry on a particular business is subject to the competent legislation of the province as to that business and may find its special activities completely paralysed, as by legislation against drink traffic or by the laws as to holding land. If it is formed to trade in securities, there appears no reason why it should not be subject to the competent laws of the province as to the business of all persons who trade in securities. As to the issue of capital there is no complete prohibition as in the *Manitoba Case* (1) in 1929, and no reason to suppose that any honest company would have any difficulty in finding registered persons in the province through whom it could lawfully issue its capital. There is no material upon which their Lordships could find that the functions and activities of a company were sterilised or its status and essential capacities impaired in a substantial degree.

Their Lordships have discussed this part of the Act because the attack on it by the respondents was mainly directed to it partly because it was said that the pith and substance of the Act was contained in it and that by sterilising Dominion companies it was inseverably invalid; and partly because it was said that, even if severable so far as registration of Dominion companies was concerned, inasmuch as inquiry could be made under Part II as to an offence against the Act, an inquiry under Part II might be directed to an alleged offence invalidly created, and, therefore, the inquiry provisions of Part II themselves were invalid. This brings their Lordships to the consideration of Part II, and it will be found that once the main attack on registration has failed there is little to be said against this part of the Act.

Section 9, under which the examination in dispute in these proceedings was ordered, empowers the Attorney-General or any delegate appointed by him to examine any person or company in order to ascertain whether any fraudulent act or any offence against the Act or regulations has been, is being, or is about to be, committed. The definition of fraudulent act appears to be very wide, in some cases having no relation to securities or dealing in securities; and it is possible that if the question becomes relevant a limited construction would be put upon the very general terms used. But this has no bearing upon the question of validity. The examination is not confined to questions of registration, nor are the persons or companies to be examined limited to persons or companies who themselves trade in securities. It seems obvious that the object of the section would be defeated unless the powers of examination extended to persons who might have relevant knowledge, including companies and the officials of companies whose securities might be or be about to be the subject of dealings with the public. The provisions of this part of the Act may appear to be far reaching; but if they fall, as their

A Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights, the legislature of the province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public. There appears to be no reason for excluding Dominion companies from the inquiries of the Attorney-General under this section, and no inconsistency between this legislation and the powers of inquiry under the B Dominion Companies Act made on application of members of a company and for a limited purpose, namely, the investigation of the affairs of the company. Their Lordships are unable to agree with the view which was adopted by the Appellate Division that in respect of the subject-matter under discussion the legislature of the province has only a limited right to require information.

Part III of the Act provides for the appointment of auditors to audit the accounts C of brokers and to advise the executive committees of stock exchanges in the province. There appears to be no ground for disputing the validity of these provisions.

Part IV by s. 14 contains a provision making it an offence for a broker in certain transactions for customers to place beyond his control securities he may be carrying for customers, and ss. 15 and 16 provide for the necessary records of such transD actions. The penal provisions of s. 14 have been subsequently incorporated into the Criminal Code of the Dominion by 20 & 21 Geo. 5, c. 11 (Canada), s. 5, which now presumably occupies the field so far as the criminal law is concerned. The substantive provisions of the section avoiding the impugned transaction at the option of the customer and the provisions of the other sections of this part cannot be attacked. Part V has general provisions which need not be noticed except as E to the argument of the respondents founded on the words of s. 20, which provide inter alia that any person who does any fraudulent act not punishable under the provisions of the criminal code of Canada shall be liable to fine and imprisonment. It is said that this encroaches on the exclusive legislative power of the Dominion as to criminal law. Having regard to the wide definition of fraudulent act above referred to, it may well be that this argument is well founded. But so far as the F section is invalid it appears to be clearly severable. In any case it appears to their Lordships, after reviewing the whole Act, that there is no ground for holding that the Act is a colourable attempt to encroach upon the exclusive legislative power of the Dominion as to criminal law. They have already given their reasons for holding that the Act cannot be considered invalid as destroying the status of Dominion companies. The provisions, therefore, of Part II of the Act appear to G be competent provincial enactments dealing with property and civil rights and have to be obeyed by persons subject to them.

In the result, the order of the Appellate Division must be set aside and the motion must be dismissed. The respondents must pay the costs here and below. In the court below the appellants agreed that if the court decided in favour of the plaintiffs the motion should be treated as the hearing of the action and that final H judgment should be given accordingly. There appears to be no such agreement by the respondents in the event that has happened. Presumably they will so agree, but in the meantime their Lordships can only say that the judgment for the plaintiffs should be set aside with the consequences already stated, and the action continue in the Supreme Court, and they will humbly advise His Majesty accordingly.

Appeal allowed.

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Solicitors: *Blake & Redden*; *Lawrence Jones & Co.*; *Charles Russell & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

Re AIDALL, LTD.

[Chancery Division (Maugham, J.), April 26, 27, 1932]

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 15, 1932]

[Reported [1933] Ch. 323; 102 L.J.Ch. 150; 148 L.T. 233;
18 Tax Cas. 617; [1933] B. & C.R. 56, Ch.D. & C.A.]

Company—Winding-up—Contributory—Order to pay money to company—Holder of fully paid-up shares—Receipt of surplus assets—Debts of company not provided for—Companies (Consolidation) Act, 1908 (8 *Edw*. 7, *c*. 69), *s*. 165.

In the Companies Acts the term "contributory" is used with different meanings. In ss. 123–128 of the Companies (Consolidation) Act, 1908 (now ss. 212–217 of the Companies Act, 1948), "contributory" is used in the strict sense of holder of partly paid shares, but in the subsequent sections, including ss. 164 and 165 (ss. 258 and 259 of the Act of 1948), the word includes the holder of fully paid-up shares. Therefore, an order may be made under s. 165 (s. 259 of 1948) on the holder of fully paid-up shares directing him to repay money to the company where he has received surplus assets and the liquidator has not provided for all the debts of the company.

Notes. The Companies (Consolidation) Act, 1908, was repealed by the Companies Act, 1948, the relevant sections of the later Act to those of the Act of 1908 being set out in the headnote.

As to contributories, see 6 Halsbury's Laws (3rd Edn.) 630 et seq., and for cases see 10 Digest (Repl.) 953 et seq. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Case referred to:

(1) *Re Marlborough Club Co.* (1868), L.R. 5 Eq. 365; 37 L.J.Ch. 296; 18 L.T. 46; 16 W.R. 668; 10 Digest (Repl.) 954, *6564*.

Appeal from an order of Maugham, J.

An application by summons dated March 18, 1931, and intituled: "In the Matter of Aidall, Ltd., and In the Matter of the Companies (Consolidation) Act, 1908," was made by the Attorney-General, three persons being named as respondents—John Ernest Baldwin, the liquidator of the company; and Arthur George Whiteman and Arthur Percy Whiteman, described as the administrators of the estate of Alice Maud Whiteman, and, in that capacity, contributories of the company. The Attorney-General sought an order:

> "That the respondents, Arthur George Whiteman and Arthur Percy Whiteman, may be ordered to refund to the company or to the respondent liquidator a sum of £568 19s. 6d., together with a sum equal to the costs of the applicants of this application, out of the sum of £9,070 5s. paid to them out of the assets of the company by the respondent liquidator, and that the sum of £568 19s. 6d., being the amount of supertax which has been assessed upon the company under s. 21 of the Finance Act, 1922 (as amended), and the applicants' costs of this application may be paid out of the moneys so recovered."

The Attorney-General contended that the court had jurisdiction to make the order under s. 165 of the Companies (Consolidation) Act, 1908. The respondents disputed both the jurisdiction of the court and the propriety, if there were a jurisdiction, of making the order or any part of the order asked for.

Stamp for the Attorney-General.
S. R. Benson for the respondents.

MAUGHAM, J., [after stating the facts continued:] The liquidator, Mr. Baldwin, was appointed for the purpose of winding-up the company by a special

A resolution confirmed on April 4, 1929. In the course of his duties he found that Alice Maud Whiteman, who held 994 ordinary shares of the company, died on Sept. 26, 1926, and that her shareholding had been entered in the register of members as being held by her executors, without naming them. Prior to the winding-up he had been the secretary to the company, and he says in his affidavit:

> B "As Arthur George Whiteman, one of the administrators of the said Alice Maud Whiteman, claimed that the whole of the capital of the said company was his on the ground that it had been provided by him, and that the said Alice Maud Whiteman was merely his nominee, he claimed the right to receive the assets of the business as they came in, and, accordingly, as those assets were realised they were paid into the business account of the said Arthur C George Whiteman."

What that precisely means I do not know, but I do not accept the view that Arthur George Whiteman was entitled, because he said that Alice Maud Whiteman was his nominee, to have payment of the sums that were realised by the liquidator during the winding-up of the company, except in respect of his position as administrator for the said Alice Maud Whiteman, and when the affidavit of Mr. Baldwin D goes on to assert that at the date of his appointment Arthur George Whiteman had in his way received the total net sum of £8,950 1s. 1d. out of collections of assets belonging to the company I think that I must necessarily form the opinion that those sums were received with a liability to repay them, since they obviously were not distributed as dividend, and could only be handed over to any shareholder, or the administrator of any shareholder, in the winding-up of the company or, it E may be as the result of some scheme of arrangement, as a return of capital. What the liquidator did, apparently, was to make a book-keeping cross entry debiting Arthur George Whiteman with the amount that he had received, namely £8,950, and accounting for that money by making another book-keeping entry of £9,185, representing a return, and now come these words: ". . . . to the contributories of the balance in the hands of the liquidator at the rate of 7s. 6d. in the pound." He F produces his account and summary of his receipts and payments as liquidator, and he says that he has not any longer, in his capacity as liquidator, any moneys of the company. The file in the winding-up is before me, and there I find a certificate by Mr. Baldwin in the usual form by which he certifies that a return of surplus assets was declared payable to contributories on Nov. 30, 1929, at the rate of £9 2s. 6d. per share, and that the contributories whose names were set forth below were G entitled to the amounts set opposite their respective names, and had been paid such amounts, except in the cases specified as unclaimed. That exception does not apply here. The certificate is dated May 14, 1930, and the list, or schedule, of the persons described as contributories has at the head of it: "Arthur George Whiteman in respect of 994 shares," and the amount paid to him is stated to be £9,070 5s., and under his name are added the words: "for executors of the late H A. M. Whiteman." Then there is Violet Alice Whiteman who, in respect of five shares, gets £45, and Florence Elizabeth Van Hawkin who, in respect of one share, gets £9 2s. 6d. That makes the total amount of surplus assets distributed by the liquidator in the voluntary winding-up.

The Inland Revenue are claiming that Arthur George Whiteman, to whom this money was paid, is liable to refund to the liquidator a sum of £568 19s. 6d. by I reason of the steps taken by the Special Commissioners of Income Tax under s. 21 of the Finance Act, 1922, as amended by the Finance Act, 1927. I will not stay to read those somewhat complicated sections, but I think that I may summarise the matter as follows. The Special Commissioners have a power under s. 21 (1) of the Finance Act, 1922, where it appears to them that a company to which the section applies has not, within a reasonable period, distributed to its members in such manner as to render the amount distributed liable to be included in the statements of the members for the purpose of supertax, a reasonable amount of its income for the year, by notice in writing to the company to direct that, for the purposes of the assessment to supertax, the income of the company shall, for the year in question, be deemed to be the income of the members. That step was taken by notice dated Aug. 26, 1929. They have power under the section, as amended, to apportion the actual income of the company in accordance with the respective interests of the members, and that they did by a document of Aug. 26, 1929, apportioning to Mr. A. G. Whiteman the sum of £2,069 10s. 3d. They have power under the section to assess upon the members, in the name of the company, the supertax so chargeable under the steps which they have taken, and they can do it, notwithstanding the liquidation of the company, by the provisions of the section as amended. That they did, by a notice dated Aug. 30, 1929, by which they directed, for the purposes of assessment to supertax, that the income of Aidall, Ltd., in liquidation, should, for the year ending March 31, 1928, be deemed to be the income of the members, and that the amount thereof should be chargeable among the members. That was served upon Mr. J. E. Baldwin, the liquidator of Aidall, Ltd., and it was accompanied by the usual statement saying that if the company was aggrieved it might appeal.

Notice of appeal was given on behalf of the company or the liquidator. The grounds of the direction and apportionment were stated in a notice of Oct. 5, 1929, and the clerk to the Special Commissioners asked whether, in view of that explanation, the company desired to proceed with the appeal. The solicitors for the company, or the liquidator, replied on Oct. 8, 1929, that, in the circumstances, they did not feel justified in advising their clients to proceed with the appeal, and the appeal was, accordingly, not proceeded with. The next step which was taken was a notice of assessment under the Income Tax Acts by the Special Commissioners dated Oct. 18, 1929. The notice of assessment was an assessment of the supertax at £568 19s. 6d. in respect of an amount of £2,069, and it was addressed and sent to Arthur G. Whiteman, in the name of Aidall, Ltd., in liquidation. The notice, which was under s. 21, added, as it was bound to add, these words:

> "You are requested to inform the commissioners if you elect to pay this tax. If you do not, within twenty-eight days of the date hereof, elect to pay the tax a notice of charge will be served on the company, and the tax will thereupon become payable by the company."

There was a notice as to the period for appealing against the assessment. That followed strictly the terms of s. 21 (3) of the Finance Act, 1922, which stated that the notice of charge to supertax under the section should, in the first instance, be served on the member of the company on whom the tax was assessed, and if that member did not, within twenty-eight days from the date of the notice, elect to pay the tax, a notice of charge should be served on the company, and the tax should thereupon become payable by the company. Mr. Whiteman, as he was perfectly entitled to do, did not elect to pay the tax, and the final step was taken under date Dec. 5, 1929, by a notice of assessment under the Income Tax Acts by the Special Commissioners in this form: After stating that the Commissioners had made an assessment on Arthur G. Whiteman to supertax for the year in question in the amount of £568 19s. 6d., it proceeded to say:

> "As Arthur G. Whiteman, Esq., has not within the time limited by [s. 21 (3)] elected to pay the tax, such tax is payable by the company. If you intend to appeal against the assessment you must give notice in writing, and state the grounds of your appeal within twenty-one days from the date hereof."

That was sent to Aidall, Ltd., in liquidation. On Oct. 19, 1929, prior to that document, Mr. Whiteman had returned the notice of assessment, and said that he entirely repudiated the same. On Jan. 23, 1930, the Special Commissioners gave notice to Mr. Baldwin that unless the supertax outstanding, namely, £568 19s. 6d., was remitted to the Inland Revenue authorities within fourteen days, they would refer the matter to the Solicitor of Inland Revenue with a view to the institution of legal proceedings for the recovery of the arrears. On Jan. 25 the liquidator replied, and informed the clerk to the Special Commissioners that he repudiated everything stated in the letter. When asked for grounds he was, apparently, unable to give any.

As the result of those notices, founded, as they were, on a direction of the Special Commissioners which I have no power to vary or to consider, the company, in my opinion, became liable to pay a sum of £568 19s. 6d. to the Inland Revenue officials, and became so liable on Dec. 5, 1929. The liquidator, for reasons which I do not understand, had paid no attention to the demands or the steps which were being taken by the Special Commissioners, and, although the liquidator had, of course, received notice of this proceeding, he, nevertheless, purported to make a book entry under which Mr. Arthur George Whiteman was credited with the amount which I have mentioned in my statement of the acts of the liquidator. No payment has been made by either the respondent Baldwin or any other person, in respect of the tax, and the total amount is still due and owing by the company. In those circumstances, in my opinion, the liquidator, having thought fit to distribute the assets of the company without providing for the payment of a claim which he knew was pending against the company, and which, in fact, accrued due as a debt on Dec. 5, 1929, is, I think, personally liable to pay the sum to the applicants here. I understand, however, that the prospects of recovering the sum from him are small, and the Inland Revenue officials have thought fit to take another step—to apply under s. 165 of the Companies (Consolidation) Act, 1908, to recover from Mr. A. G. Whiteman the sum in question forming a small part of the total which he has received in the winding-up which, for my purpose, I must take to be the sum of £9,070 5s. Whether that sum was paid over to him in cash, or whether it was partly arrived at by releasing him, in effect, from the liability that he had to pay sums to the assets of the company is wholly immaterial.

I come now to consider the section under which the application is made. I think that ss. 164 and 165 of the Act of 1908 are closely connected, and I shall, therefore, read both of them. Section 164 is as follows:

> "The court may, at any time after making a winding-up order, require any contributory for the time being settled on the list of contributories, and any trustees, receiver, banker, agent, or officer of the company to pay, deliver, convey, surrender, or transfer forthwith, or within such time as the court directs, to the liquidator any money, property, or books and papers in his hands to which the company is primâ facie entitled."

Section 165 provides:

> "(1) The court may, at any time after making a winding-up order, make an order on any contributory for the time being settled on the list of contributories, to pay, in manner directed by the order, any money due from him, or from the estate of the person whom he represents, to the company, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act."

Subsection (2) of that section provides:

> "The court, in making such an order, may . . . in the case of a limited company, make to any director or manager whose liability is unlimited, or to his estate, the like allowance"

—that is, an allowance by way of set-off of any money due from him, or the estate which he represents, from the company.

The first question to be determined, in my opinion, is whether the jurisdiction of the court summarily to direct Mr. A. G. Whiteman, or any other person, to pay any money due from him, or from the estate of the person whom he represents, to the company is one which is applicable, notwithstanding the fact that Mr. A. G. Whiteman is the holder as a representative of fully paid-up shares. It is alleged on behalf of the present respondents that a contributory in this section means somebody who is liable to contribute to the assets of the company in respect of his shares; in other words, that it is limited to the definition as found in s. 124 of the Act of 1908, which provides that the term "contributory" means

> "every person liable to contribute to the assets of a company in the event of its being wound-up, and, in all proceedings for determining and in all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory."

It is unfortunate that in this Act, and in the Acts which it supersedes, the term "contributory" is used in a large number of places, not as limited to holders of partly paid shares, but as including holders of fully paid shares in the company. In the series of sections 123 to 128, which are headed with the word "contributories," I am of opinion that the word "contributories" is used in the narrow sense, namely, the holders of partly paid shares, but when we pass from that series of sections to the later series, for instance, those headed "Winding-up by Court" [Companies Act, 1948, ss. 218–277], those headed "Liquidators" [ss. 237–251 of 1948], those headed "Committees of Inspection" [ss. 252–255 of 1948], and, finally, those headed "Ordinary powers of court" [ss. 256–274 of 1908] in which ss. 164 and 165 of the Act of 1908 [ss. 258 and 259 of 1948] are to be found, it is clear that the word "contributories" is really used as synonymous with the word "members." In s. 137 of the Act of 1908, which deals with the parties who may apply to the court for winding-up a company, it is obvious that a contributory includes a holder of fully paid-up shares. In s. 138 the word "contributory" again must be used in the same wide sense. In s. 144, which deals with the power of the court to stay the winding-up, it is again obvious that "contributory" includes the holder of fully paid-up shares. In s. 145, the well-known section which provides that the court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or the contributories as proved to it by any sufficient evidence, it is plain that "contributories" has the wider meaning. The same is true as regards s. 147 (6); it is true as regards the meetings of contributories mentioned in s. 152; it is true as regards the payments referred to in s. 154; it is true as regards s. 157, which includes a reference to adjusting the rights of the contributories amongst themselves. Again in s. 158 the directions that may be given by contributories at general meeting must include directions given by fully paid-up shareholders; the same is true as regards sub-s. (2) of that section. Section 160 refers to a committee of inspection consisting of creditors and contributories of the company, and "contributories" there cannot be limited to people who are the holders of partly paid shares. Among the sections headed "Ordinary Powers of the Court," there are again a number of sections in which the word "contributories" must be used in the wider sense; for instance, in ss. 166, 167, 168, 170, and in 173; and I might add that one may go on through other sections of the Act which are expressed in the same way, e.g., ss. 191, 193, 197, 219, 220, which are all sections which use the word "contributory" as synonymous with the word "member." When I turn to ss. 164 and 165 I have to observe that I am dealing with a jurisdiction which the court may exercise as against persons described as contributories "for the time being settled on the list of contributories."

In my opinion, apart from any authority binding upon me, the proper course there is to hold that "contributory" is not limited to the narrower meaning of persons who owe money to the company in respect of their shares, but that, unless such a shareholder is for the time being settled on the list of contributories, the court has no jurisdiction under these sections. It may also be correct to hold that the court will refuse to exercise its jurisdiction of putting somebody who is not on the list of contributories upon the list merely for the purpose of obtaining jurisdiction under either of the two sections. It is evident that there is a considerable distinction between the case of members of a company who have fully paid-up shares and who have no prospect of obtaining anything in the division of the surplus assets of the company and the case of holders of fully paid-up shares who are entitled to a return in the winding-up after all the liabilities of the company have been disposed of. It may be that the list of contributories which is being referred to in s. 164 and s. 165 is a list of the persons who either owe money to the company in respect of their shares, or who are entitled, on a distribution, to a share in the

A surplus (as mentioned in s. 170 of the Act), but the jurisdiction is only conferred against persons of whatever class they are who are "settled on the list of contributories."

In the present case I have not had produced to me a document which appears to be the original list of contributories as made out by the liquidator, but I have the fact that upon the file he has certified a return of surplus assets to the three con-
B tributories who alone were entitled to share in the distribution of the surplus assets of the company, and Arthur George Whiteman, who was practically the sole shareholder in the company, with the exception of only six shares, is the first person on that list. I do not think that it is necessary for me to speculate whether the liquidator ever made out a separate document which he headed: "List of contributories," and in which he inserted the names of the three persons entitled to
C share in the surplus assets. I think that I am bound to hold that, at the date when he declared that the surplus assets were payable to three ascertained contributories, according to a particular list, he made a sufficient list of contributories for the purpose of the distribution, and that that list included the name of Arthur George Whiteman as being a person fairly to be described as a contributory for the time being settled on the list of contributories within the meaning of s. 165 of the
D Act of 1908.

A number of cases have been cited to me for the purpose of showing that that is not the correct view. The only one which I think is at all relevant is *Re Marlborough Club Co.* (1). If I thought that that case was applicable I should certainly follow it, because it has been cited in the textbooks for very many years, and it never appears to have been doubted. In my opinion, however, it does not deal
E with the precise point with which I have to deal here. The headnote in 5 Eq. Cas. is:

> "A holder of fully paid-up shares in a company, although indebted to the company, cannot be put on the list of contributories."

It was a case of a company called the Marlborough Club, Ltd., incorporated under
F the Companies Act, 1862, for the purpose of carrying on a clubhouse in the county of Middlesex under certain rules. In November, 1866, the company was ordered to be wound-up. The official liquidator proposed to settle a supplementary list of contributories containing the names of holders of fully paid-up shares who were indebted to the company for arrears of their annual subscriptions, and a small sum in respect of refreshments furnished by the club, and an application was made to
G the court for the purpose. LORD ROMILLY refused to allow the application. He said (5 Eq. at p. 267):

> "The persons sought to be put on the list are holders of fully paid-up shares, and are only sought to be made contributories for the purpose of giving the court jurisdiction over them as debtors to the company. Now, the court is not in the habit of settling a supplemental list, and I find nothing in the Act
> H which enables a supplemental list to be made. On the contrary, s. 101 shows that persons on whom orders are made under it must be already settled on the list."

Section 101 of the Companies Act, 1862, is the same, in substance, as the section with which I am now dealing, s. 165, and it contains the words:

> I "The court may make an order on any contributory for the time being settled on the list of contributories."

Those are the words that LORD ROMILLY is referring to. He goes on to say:

> "Unquestionably these gentlemen could not be settled on the list in the first instance, and I cannot put them on solely to give the court jurisdiction to enforce payment of the debts due from them. The liquidator must recover these debts in the county court in those cases where the sums are small, and where they are large he must bring actions in the usual way."

That, I think, clearly is a case where the company was insolvent, and there was nothing distributable to the members of the company, and it was a case where the members of the company who were, of course, ordinary club members, objected to being put on the list because they had paid for their shares in full, and they thought that they would prefer actions to be brought against them by the liquidator in the county court, or otherwise, rather than be put on the list and be subjected to the summary jurisdiction of the court. LORD ROMILLY said that they were right. Here, however, I have a case where a member of the company, as I read the facts in evidence before me, has been put upon the list of contributories in order that he might, in that capacity, receive a sum of no less than £9,070 5s., a sum which he has received either in cash or by means of a settlement of other liabilities due from him to the company. I come to the conclusion, therefore, that Mr. A. G. Whiteman is a person for the time being settled on the list of contributories, and that he is, accordingly, subject to the jurisdiction of the court under s. 165. I should add that there is a strong reason for not limiting the jurisdiction of the court with regard to the contributories settled on the list for the time being; for it would be unfortunate in the case of a fully paid-up shareholder who has large claims in the surplus assets of the company, but who happens to owe money to or has property in his hands to which the company is primâ facie entitled, to have to hold that the court has no jurisdiction in a summary manner to settle all questions as between him and the company. I accept the decision of LORD ROMILLY as showing that the jurisdiction rests upon the fact that a man has been, for the time being, settled on the list, but I do not accept it as showing that Mr. A. G. Whiteman could not properly have been settled on the list. I am of opinion that where it is possible that surplus assets will be divisible in the winding-up of the company to the shareholders, fully paid-up shareholders ought to be on a list of contributories, and I think that the fact is shown not only by the sections of the Act to which I have referred, but also, perhaps even more distinctly, by the Companies (Winding-up) Rules, 1909, including, in particular, r. 151.

That applies to Mr. A. G. Whiteman, but as regards the other respondents, Mr. Arthur Percy Whiteman, I am unable to say that I have, according to the view that I have formed of the section, any jurisdiction against him at all. I have got no evidence to show that he has been settled for the time being on the list of contributories, and therefore, as against him, I think that no order can be made. The question remains whether Arthur George Whiteman, who, as I have held, is within the jurisdiction, ought to be ordered to repay this sum of £568 19s. 6d. to the respondent liquidator. To my mind, the facts are reasonably clear. He received the sum knowing perfectly well that the sum was a debt which ought to have been provided for by the liquidator. It was a sum assessed under s. 21 upon him in the name of the company. He elected not to pay the tax in question, knowing that as a result the tax would thereupon become payable by the company, and with that knowledge I do not think that there can be any doubt but that, having received a much larger sum as a dividend in the winding-up, he is liable to repay the sum of £568 19s. 6d. to the liquidator for the purpose of the liquidator discharging the debt of the company to the Inland Revenue officials; and I so hold. Accordingly, I think that the proper order will be that the respondent, Arthur George Whiteman, is liable to refund the sum of £568 19s. 6d. out of the assets of the company received by him, and that he be ordered to pay such sum to the credit of the liquidator's account at the Bank of England. Section 167 of the Companies (Consolidation) Act, 1908, authorises payment in some other way than to the respondent, Baldwin. That section says:

> "The court may order any contributory purchaser, or other person from whom money is due to the company, to pay the same into the Bank of England or any branch thereof to the account of the liquidator instead of to the liquidator."

If counsel for the summons asks for an order under that to pay the sum into the Bank of England to the account of the liquidator I see no objection. What he is going to do after that is not my concern.

Stamp.—If your Lordship will make an order for payment to the company's liquidation account at the Board of Trade, the Board of Trade can deal with it afterwards.

MAUGHAM, J.—Very well.

The respondent, A. G. Whiteman, appealed.

Granville Sharp for the appellant.
J. H. Stamp for the respondent.

LORD HANWORTH, M.R.—Counsel has said all there is to be said in favour of this appeal, and he has candidly said he has a difficult case. I agree with him. It is impossible to add usefully to what has been said by MAUGHAM, J. The truth of the matter is that the money was first of all paid to Mr. George Whiteman because he stood, and was returned on the list of contributories, as the owner of 994 shares. It was in that capacity that he had paid over to him a sum of money by way of distribution of the assets. It now appears that the sum which was paid over to him was too large, and that provision had not been made for a debt due from the company to the Inland Revenue. The money is now asked for by way of return from the person who has been overpaid. He has received too much from the company, and he must repay some portion of that money, which never ought to have been handed over to him and which is needed for the purpose of repaying the debts of the company. The sections which have to be dealt with are intricate, and I should not add anything to what MAUGHAM, J., has said. The appeal is to be dismissed with costs.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Edwin E. Clark & Son*; *Solicitor of Inland Revenue.*

[*Reported by* A. W. CHASTER, ESQ., *and* G. P. LANGWORTHY, ESQ., *Barristers-at-Law.*]

A.-G. *v.* SMETHWICK CORPORATION

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), February 3, 4, 1932]

[Reported [1932] 1 Ch. 562; 101 L.J.Ch. 137; 146 L.T. 480; 96 J.P. 105; 48 T.L.R. 227; 30 L.G.R. 117]

Local Government—Corporation—Powers—Corporation of borough incorporated by charter—Powers limited by general statute.

The powers of a corporation are limited by the terms of the statute which prescribes those powers, and this is so even though the corporation has been incorporated by charter. The powers of a borough corporation incorporated by charter **held** to be limited by the provisions of the Municipal Corporations Act, 1882.

Notes. Paragraph 12 of Sched. V to the Municipal Corporations Act, 1882, was repealed by s. 307 and Sched. 11 of the Local Government Act, 1933. For the present provisions regarding the rate fund of a borough, see ss. 185–187 of the Act of 1933.

Considered: *Grainger* v. *Liverpool Corpn.*, [1954] 1 All E.R. 333.

As to the limitation of the powers of a corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 62 et seq., and as to the general rate fund of a borough, see 21 HALSBURY'S LAWS (2nd Edn.) 145, 146. For cases see 13 DIGEST 354 et seq. and 33 DIGEST 80 et seq. For Municipal Corporations Act, 1882, see 14 HALSBURY'S STATUTES (2nd Edn.) 114, and for Local Government Act, 1933, see ibid., p. 353.

Cases referred to:

(1) *A.-G.* v. *Great Eastern Rail. Co.* (1879), 11 Ch.D. 449; 48 L.J.Ch. 428; 40 L.T. 265; 27 W.R. 759, C.A.; on appeal (1880), 5 App. Cas. 473; 49 L.J.Ch. 545; 42 L.T. 810; 44 J.P. 648; 28 W.R. 769, H.L.; 13 Digest 356, *932*.

(2) *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; 44 L.J.Ex. 185; 33 L.T. 450; 24 W.R. 794, H.L.; 13 Digest 354, *922*.

(3) *Deuchar* v. *Gas Light and Coke Co.*, [1925] A.C. 691; 94 L.J.Ch. 382; 133 L.T. 565; 89 J.P. 177; 41 T.L.R. 563; 23 L.G.R. 525, H.L.; 25 Digest 471, *10*.

(4) *Baroness Wenlock* v. *River Dee Co.* (1885), 10 App. Cas. 354, H.L.; 53 L.T. 62; 13 Digest 367, *1002*.

(5) *Roberts* v. *Hopwood*, [1925] A.C. 578; 94 L.J.K.B. 542; 133 L.T. 289; 89 J.P. 105; 41 T.L.R. 436; 69 Sol. Jo. 475; 23 L.G.R. 337, H.L.; 33 Digest 20, *83*.

Appeal from an order of EVE, J.

The Attorney-General, on the relation of one Benjamin Thomas Hill, who was engaged in the printing industry at Smethwick, claimed against Smethwick Corporation a declaration that it was unlawful for the corporation to expend any part of the general rate fund for the purpose of establishing or carrying on a printing, bookbinding or stationery works, and an injunction to restrain the defendants from so doing.

EVE, J., refused the declaration and dismissed the action, and the plaintiff appealed.

R. M. Montgomery, K.C., and *Astell Burt* for the plaintiff.

Gavin Simonds, K.C., and *Andrewes Uthwatt* for the corporation.

The arguments appear in the judgment of the Master of the Rolls.

LORD HANWORTH, M.R.—This action was brought by His Majesty's Attorney-General, as the guardian of public rights, on the relation of Benjamin Thomas Hill against the mayor, aldermen, and burgesses of the county borough of Smethwick. The defendants are a corporation who rule over, I think, a population of some 90,000 persons, and it is said in the statement of claim, that:

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> "The defendants have passed a resolution providing for the establishment of a printing, bookbinding, and stationery works for the purpose of executing all printing, bookbinding, and stationery work required by them,"

and that they intend to expend moneys from the general rate fund in and about the purchasing of a plant for that purpose. It is claimed by the plaintiffs that such expenditure is contrary to the provisions of s. 140 of the Municipal Corpora- B tions Act, 1882. The defendants, on the other hand, say that certain duties fall upon them; they have to incur certain expenses and make certain payments in the exercise of their powers, and those expenses fall upon them and are to be made out of the general rate fund; as a necessary incident to the due performance of their powers they require a certain amount of printing, bookbinding, and stationery work to be done; and it is found after consideration that it will be to the advantage of C the economical and satisfactory carrying out of their duties that they should establish a plant for printing purposes costing round about £1,000. It is to be observed that the claim of the plaintiff is that the defendants have passed a resolution providing for the establishment of printing, bookbinding, and stationery works. It would seem from the evidence given that those words ought to be confined within certain limits, because, taken simpliciter, they would appear to indicate to an D ordinary mind something in the nature of a printing establishment started for the purpose of profit.

I turn, therefore, to the actual documents which are before the court, and which show what the intention of the defendants is. It appears that as long ago as May, 1928, there was a report of a sub-committee who had been appointed to investigate the question of establishing a printing department, and it was resolved:

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> "That having considered such report, this sub-committee have come to the conclusion that such a department is desirable and would, in their opinion, be profitable and conducive to better service to the corporation."

For that purpose it was decided that the officers of the corporation should be asked to provide information as to the requirements of their departments. We are told F that there are no less than thirteen departments. They have, as the catalogue of them shows, necessarily to issue a number, I was going to say a terrible number, of notices, documents, and the like. There is the engineer's department, the treasurer, the public health, public accounts, gas undertaking, education, public library, weights and measures, local taxation, licences, fire brigade, and so on, and so on. All of these require books and they require books of account which G must be bound books. They require books for the purpose of entry, rate books, demand books, valuation lists, and so on, and there are a number of records which have to be kept and cannot be maintained by merely loose sheets. That is some indication of the nature of the work which falls to be carried out by the defendants. Hitherto the expenditure by them on the printing, and, as I gather, the books as well, is something like £5,000 to £6,000. To that must be added another £1,000 H for binding books of account including library books, making a total of something like £6,000 or £7,000 per annum.

This committee went into the matter and did get information from the departments and ultimately they made a report which we find under the date July 18, 1930. They came to the conclusion that the establishment of a printing and stationery department was desirable, and, if developed along reasonable lines, I would be likely to prove an economical proposition. Then they say:

> "It would be more advisable to provide the nucleus of a plant and to engage as manager of the department a man possessed of experience in the purchase of stationery, the control of a printing office, and the organisation of supplies. Your sub-committee find that there is in the several departments of the council duplicating equipment which, in their opinion, should be transferred to the new printing department, where the necessary duplicating could be more advantageously carried out, and, if necessary, supplemented as the need arises. They are of opinion that when the suggested printing apparatus is installed it

> will be necessary for a properly qualified compositor to be appointed to work under the direction of the manager.''

So the works could be enlarged or developed accordingly as the needs of the corporation grew. For the purpose they suggested the purchase of a certain amount of machinery, one machine being capable of printing full-size posters. That recommendation came up on report, and ultimately the particulars of the estimated annual cost was a sum of about £1,000. That includes the remuneration of manager, compositor, machine man, girl "feeder," three gammeter operators, and so on, and added to that there would have to be the initial outlay on the machines. Finally the council approved this report, accounts and proceedings and recommended that the proposals should be carried into effect.

The result is that one has evidence that the corporation, proceeding on their normal course, have come to the conclusion that as an economical proposition it would be wise to provide by means of this printing and stationery department the means of issuing the documents which have to be multiplied. It is not as if a single document was produced; they have to produce them in large quantities. The word "duplicated" is sometimes used, that is wholly insufficient, they have to be multiplied. It is admitted that the corporation must engage in the issue of a large amount of documents, and those documents must be copied and reproduced. It is not denied that if they had a number of machines for the purpose of multiplying the documents they produce that would be quite in order. It is not denied that they might purchase and use a number of typewriters which can produce a number of copies at the same time, and the like. What is said is that this is really an incursion into what is called municipal trading and is not really carrying out the Act of 1882. Eve, J., had the matter before him, and, as he tabulates the arguments which are urged on behalf of the plaintiffs, they are these—(i) that the payment that is proposed to be made for the purpose of this outlay on machines and the consequent annual outlay on the men and women is not authorised under s. 140 of the Municipal Corporations Act, 1882, and (ii), even if some part of the expenditure could be brought within the Act, the rest cannot because it is a capital outlay and what ought to be provided and paid for out of the borough rate fund is something which is periodic and relates to the rates which are raised half-yearly.

I turn, therefore, to consider whether or not the corporation in their discretion are entitled to engage in this—I will call it an "enterprise." It seems quite clear from the facts I have recounted that the corporation have exercised their discretion, and, so far as I can see, they have taken into account the question whether or not this is a useful and economical departure. Tempora mutantur, and, as time goes on, it is possible every body of this nature will adopt something different—what are called modern methods—in dealing with the mass of material that has to be issued by them in the form of documents and notices.

The powers of this corporation, although it is incorporated by charter, are prescribed by the terms of the Act of 1882, and we find that s. 140 provides:

> "The borough fund shall be applicable to and charged with the several payments specified in the fifth schedule."

In the fifth schedule to the Act we find a number of payments, some of which may be made without special order and some of which may not be made without an order. They cover a large field of the duties and activities with which the corporation is charged. It is said that this enterprise, as I have called it, to give it, perhaps, the worst name that would be attached to it, is one which is not within the schedule. It is, as I say, admitted that there must be a great deal of reproducing of documents by the corporation, and we have the words in the schedule:

> "All other expenses, not by this Act otherwise provided for, necessarily incurred in carrying this Act into effect."

There are powers for bringing up an improper payment or an order for payment of money in order that it may be considered by the court if the corporation goes outside the powers which are conferred by the statute.

The question of what interpretation ought to be given to words of this nature is not in doubt. It has often been considered whether or not a corporation tied by the terms of an Act of Parliament was going outside these powers and engaging in what may be a collateral form of activity or business not originally contemplated when the terms of its statute were passed by Parliament. I need go no further back than to look at *A.-G.* v. *Great Eastern Rail. Co.* (1), and the well-known judgment of James, L.J., in that case. He deals with the question of a railway company going outside, and, perhaps for its own purposes, taking part in a business of a colliery and the like in order to secure commodities which they might require for the purposes of their line. He says (11 Ch.D. at p. 484):

> "So far as [a corporation] has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other."

There is a judgment also of Bramwell, L.J., dealing very carefully with the duties of a corporation and the limits within which they may exercise discretion. When that case went to the House of Lords Lord Selborne said (5 App. Cas. at p. 478):

> "It appears to me to be important that the doctrine of ultra vires as it was explained in that case [*Ashbury Railway Carriage and Iron Co.* v. *Riche* (2)] should be maintained. But I agree with James, L.J., that this doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

Lord Blackburn also says (5 App. Cas. at p. 481):

> "I quite agree with what James, L.J., has said on this first point as to prohibition, that those things which are incident to and may reasonably and properly be done under the main purposes, though they may not be literally within it, would not be prohibited."

The same question as to what were the powers of a corporation whose duty it was to carry out an Act of Parliament and whose powers were limited by the Act, came before the House of Lords in *Deuchar* v. *Gas Light and Coke Co.* (3), where Lord Cave, L.C., said ([1925] A.C. at p. 695): "There is no dispute as to the legal propositions which are to be applied in this case." He refers to Lord Watson's speech in *Baroness Wenlock* v. *River Dee Co.* (4) (10 App. Cas. at p. 362), namely:

> "Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of opinion, not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions."

He quotes again the passage which Lord Selborne and Lord Blackburn had quoted from James, L.J., in *A.-G.* v. *Great Eastern Rail. Co.* (1). Those words give a guide, because, although the actual facts in the *Gas Light and Coke Co. Case* (3) were different, although the facts in the *Great Eastern Rail. Co. Case* (1) were different, in both of them the courts were considering what were the limitations imposed upon a corporation or a statutory company by the terms of the Act of Parliament. In the present case there is no question that this borough council has got to perform the duties with which it is charged under this Act, and is limited in its powers by this Act, not less because it is a corporation by charter. So we have the direction of the House of Lords that if this undertaking is incidental to or consequential upon those things which the legislature has authorised they ought not to be held by judicial construction to be ultra vires.

In the present case, going by steps, it is a question of degree—what is wise, what is prudent. I quite agree that the corporation could not start a printing business in the sense in which these terms would generally be understood. It cannot cater for the public or endeavour to trade and make a profit, but is it to be said on the other hand, step by step leading on from the duplicating machine and the typewriting machine, that it must not have any printing done on its own premises? But, if that can be done and save the ratepayers money, is not that wise? It is quite a different case from the one to which our attention was called of *Roberts* v. *Hopwood* (5). That is beside the point. It would appear from the facts that the corporation have exercised their discretion within the area which is entrusted to them, and in those circumstances it seems impossible to hold that they are not authorised to take further steps which prudence dictates and which modern mechanism offers to them.

Then it is said on the second point: That may be so, but still they are not justified in making this capital outlay out of the borough rate fund. It must always be a difficult question to decide what is attributable to capital and what ought to be put down to revenue. There is in this case no determination by an auditor that the expense incurred or to be incurred is wrong; he has not disallowed it, and, indeed, at the present moment it has not actually been incurred. But it is said that, if you will look at the section and the schedule, you will find that the borough rate is, broadly speaking, to be devoted to current expenses and periodic expenses and not to something which falls to be paid out of capital. That, broadly speaking, may be true, but as ROMER, L.J., pointed out, there are certain items in the fifth schedule which it is difficult to attribute to revenue only, such as:

> "No. 3: The expenses of providing, furnishing, maintaining, or improving the corporate buildings, including the justices' room (if any) and the necessary expenses of that room. (8) The expenses of and incidental to the division of a borough into wards or the alteration of wards. (10) [repealed by Local Government Act, 1933] The expenses of and relating to a charter of incorporation for a borough, and of and relating to all elections, acts, and proceedings under the charter."

Those items, or clearly as to some part of them, indicate a capital expenditure. I do not think, therefore, it can be said that the schedule contemplates only matters which are attributable to revenue.

With regard to the suggestion that what is attributable to capital and what is attributable to revenue purposes can be tested by saying that in the case of capital there is a power to borrow in respect of it, as in the case of sanitary works. Our attention was called to s. 120, where there is a power to borrow for municipal buildings, and so on. But I do not think that test is accurate, or, indeed, applicable. You may be able to find there is a power to borrow for a great number of matters that are capital outlay, but, having regard to the terms of the fifth schedule, when you are getting down to small matters, you come back to the question of fact and the question of degree, finding that some capital outlay is not excluded from the fifth schedule. It seems, therefore, that this second point that the money cannot be provided out of the borough rate fund because it is in the nature of capital expenditure fails.

For these reasons it appears to us that the learned judge came to a right conclusion and this appeal must be dismissed with costs.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree. I only desire to add this. For the purposes of ascertaining whether any particular matter falls within the category No. 12 second part of Sched. V to the Municipal Corporations Act, 1882, it is necessary to determine two distinct things. The first thing that it is necessary to determine is whether the power being exercised in connection with which expenses have been or are about to be incurred is within the power of the corporation, or whether the exercise

A of such a power is ultra vires the corporation. For the purposes of determining that question one must apply the principles enunciated by JAMES, L.J., and LORD SELBORNE in *A.-G.* v. *Great Eastern Rail. Co.* (1). If that question be determined in favour of the corporation and the exercise of the particular power be found to be ultra vires the corporation, then the second question which I conceive to be the dependent question arises whether the expenses incurred are unnecessarily large—
B in other words, the word "necessarily" in that para. 12 of Sched. V does not apply to the exercise of the power itself, but to the expenditure incurred in connection with the exercise of that power.

Appeal dismissed.

Solicitors: *Scatliffs*; *Sharpe, Pritchard & Co.*, for *Frank Chapman*, Town Clerk, Smethwick.

C

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

D

TOOGOOD & SONS, LTD. *v.* GREEN (SOUTHAMPTON REVENUE OFFICER)

E

[HOUSE OF LORDS (Lord Dunedin, Lord Warringon, Lord Atkin, Lord Thankerton and Lord Macmillan), February 19, 22, 23, March 10, May 13, 1932]

[Reported [1932] A.C. 663; 101 L.J.K.B. 453; 147 L.T. 201; 96 J.P. 249; 48 T.L.R. 463; 76 Sol. Jo. 458; 30 L.G.R. 301]

F *Rating—De-rating—Industrial hereditament—"Retail shop"—Sale of goods retail —Tests of "shop" to be applied—Rating and Valuation (Apportionment) Act*, 1928 (18 *&* 19 *Geo.* 5, *c.* 44), *s.* 3 (1) (*a*).

In determining whether a hereditament is an "industrial hereditament" within s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928, or is excluded from that category as being occupied and used for the purposes of a
G retail shop within proviso (b) to the subsection the test to be applied is not whether the hereditament is mainly occupied and used for the purposes of retail business, but whether it is mainly occupied and used for the purposes of a retail shop. To determine whether it is a "shop" the test is whether or not there is provided in the premises accommodation for the public who may resort thereto to have their wants supplied. The relevant matter is what is
H done in the hereditament, not what is done outside it, as, for instance, the retail sale of goods adapted for sale in the hereditament.

The occupiers of a hereditament which was registered as a factory and workshop under the Factory and Workshop Acts, 1901 to 1920, were seedsmen who cleaned, tested, and sorted seeds therein, so adapting them for sale. There was no warehousing of the seeds as an end in itself. Of the product of
I the hereditament a small quantity was sent to a retail shop occupied by the same persons in a neighbouring town; for the remainder orders were received by the occupiers at the offices, and the seeds were despatched from the hereditament direct to their customers in fulfilment of these orders.

Held: applying the above tests, the hereditament was not occupied and used to any material extent for the purpose of a retail shop, and, therefore, it was an "industrial hereditament" within s. 3 (1) of the Act of 1928, and so entitled to the relief from rates prescribed by s. 68 (1) (a) of the Local Government Act, 1929.

Case Stated—Quarter sessions—Case Stated under Baines's Act—Amendment of Case—Consent of parties.

Parties who consent to a Special Case being stated under s. 11 of the Quarter Sessions Act, 1849 (Baines's Act), can also consent to an amendment or an alteration of the Case, subject to the approval of the court.

Notes. Considered: *McGowan* v. *Osgoldcross Assessment Committee, West Riding of Yorkshire*, [1936] 2 All E.R. 170; *Ritz Cleaners, Ltd.* v. *West Middlesex Assessment Committee*, [1937] 2 All E.R. 368. Referred to: *James A. Jobling & Co.* v. *Sunderland County Borough Assessment Committee*, [1944] 1 All E.R. 500; *Simmonds Aerocessaries (Western), Ltd.* v. *Pontypridd Area Assessment Committee*, [1944] 1 All E.R. 264; *Dolton Bournes and Dolton, Ltd.* v. *Osmond*, [1955] 2 All E.R. 258.

As to de-rating of industrial hereditaments, see 27 HALSBURY'S LAWS (2nd Edn.) 435 et seq., and for cases see DIGEST Supps., tit. Rates, case No. *226a* et seq. As to a Special Case stated under Baines's Act, see 21 HALSBURY'S LAWS (2nd Edn.) 739, 740, and for cases see 33 DIGEST 448.

Cases referred to:

(1) *Finn (Wimbledon Revenue Officer)* v. *Kerslake*, [1931] A.C. 457, 485; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926–31] 2 B.R.A. 886, H.L.; Digest Supp.

(2) *Turpin* v. *Middlesbrough Assessment Committee and Bailey*, [1931] A.C. 451, 470; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926–31] 2 B.R.A. 886, H.L.; Digest Supp.

(3) *Kaye (Barnsley Revenue Officer)* v. *Eyre Bros., Ltd.*, [1931] A.C. 451; 100 L.J.K.B. 1; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926–31] 2 B.R.A. 886, H.L.; Digest Supp.

(4) *Pritchard (Cardiff Revenue Officer)* v. *William Lewis & Sons*, [1931] 1 K.B. 386; 100 L.J.K.B. 1; 143 L.T. 650; 94 J.P. 177; 46 T.L.R. 601; 74 Sol. Jo. 661; 28 L.G.R. 550; [1926–31] 2 B.R.A. 742, C.A.; Digest Supp.

(5) *Consett Industrial and Provident Society, Ltd.* v. *Consett Iron Co.*, [1922] 2 Ch. 135; 91 L.J.Ch. 630; 127 L.T. 383; 38 T.L.R. 584; 66 Sol. Jo. 452, C.A.; 11 Digest (Repl.) 65, *907*.

(6) *Hines (Ipswich Revenue Officer)* v. *Eastern Counties Farmers' Co-operative Association, Ltd.*, [1931] A.C. 456; 100 L.J.K.B. 271; 145 L.T. 73; 95 J.P. 115; 47 T.L.R. 308; 29 L.G.R. 279; [1926–31] 2 B.R.A. 886, H.L.; Digest Supp.

(7) *Moon (Lambeth Revenue Officer)* v. *London County Council*, [1931] A.C. 151; 100 L.J.K.B. 153; 144 L.T. 410; 95 J.P. 64; 47 T.L.R. 154; 29 L.G.R. 131; [1926–31] 2 B.R.A. 573, H.L.; Digest Supp.

(8) *Inland Revenue Officer* v. *Gunn, Collie, and Topping*, 1930 S.C. 389; Digest Supp.

(9) *Glasgow Assessor* v. *Henderson & Co.*, 1932 S.C. 337; 1932 S.L.T. 145; Digest Supp.

(10) *Aberdeen Assessor* v. *Lumsden's Heirs*, 1932 S.C. 379; 1932 S.L.T. 158; Digest Supp.

Appeal from an order of the Court of Appeal (GREER and SLESSER, L.JJ., SCRUTTON, L.J., dissenting), reported [1932] 1 K.B. 204, on a Special Case stated by order of FINLAY, J., and by consent of the parties under the Quarter Sessions Act, 1849.

The premises the subject of the appeal consisted of a single hereditament situate at Blighmount Park, Millbrook, near Southampton. They were described in the valuation list as a seed warehouse, offices, canteen, and outbuildings. Messrs. Toogood & Sons, Ltd., the appellants, objected before the assessment committee for the Southampton County Borough Assessment Area to the omission of this hereditament, of which they were the occupiers, from the draft special list prepared by the rating authority. The assessment committee determined that the hereditament was not an "industrial hereditament" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, and excluded the hereditament from the draft special list. The appellants entered an appeal to quarter sessions, and subsequently agreed with the respondent, the revenue officer for the Southampton County Borough Assessment Area, to the statement of this Special Case.

The appellants carried on the business of seedsmen at these premises, which were registered as a factory and workshop within the meaning of the provisions of the Factory and Workshop Acts, 1901 to 1920. The rateable value was £1,204. Prior to the re-assessment under the Rating and Valuation Act, 1925, the hereditament, which comprised (a) an extensive modern warehouse hereinafter called "warehouse No. 1"; (b) a block of administrative offices; and (c) a small corrugated iron warehouse adjoining the block of administrative offices, was assessed in parts, as to warehouse No. 1 in the sum of £710, as to the offices in the sum of £120, and as to the smaller warehouse in the sum of £16. The appellants and the respondent were agreed that, if the hereditament was an "industrial hereditament," it was not occupied and used wholly for industrial purposes, and that the net annual value thereof should have been shown in the special list as being apportioned between the occupation and user of the hereditament for industrial purposes and the occupation and user for other purposes.

Warehouse No. 1 consisted of seven floors with an aggregate floor area of 66,970 sq. ft. The smaller warehouse comprised two floors with an aggregate floor area of 3,588 sq. ft. The block of offices consisted of two floors and a store room in the roof. The total floor area of this block was 8,894 sq. ft. There was also a wooden hut with an aggregate floor area of 2,400 sq. ft. The nature of the user and occupation of the premises was as follows. The block of offices was used for the purpose of offices, the smaller warehouse was used for packeting seeds, and the wooden hut was used as a recreation room for the staff. It was conceded by the appellants that these buildings, comprising a floor area of 14,882 sq. ft., were occupied and used for purposes other than industrial purposes. As to warehouse No. 1 the work carried on in this building chiefly consisted of cleaning, testing, analysing and sorting seeds of two categories, namely, (a) vegetable and farm seeds and (b) flower seeds. The former category represented not less than 90 per cent. of the appellants' turnover in bulk. There was no warehousing as an end in itself of seeds in this building, the appellants having other property in Southampton which was used for that purpose. A small quantity was sent to a retail shop occupied by the appellants in Southampton. As to the remainder, orders for it were received by the appellants at their aforesaid office, and it was despatched direct to their customers from the said warehouse in fulfilment of such orders.

Warehouse No. 1 was specially constructed for seed cleaning. The floor areas were as follows. The roof floor contained 3,875 sq. ft., the fourth, third and second floors 10,292 sq. ft. each, the first floor 10,245 sq. ft., the ground floor 10,332 sq. ft., and the basement 11,642 sq. ft. The second, third and fourth floors, comprising a floor area of 30,876 sq. ft., were given up to machinery and accommodation for seeds passing through such machinery. A negligible part of the second floor was used for packeting seeds. On the first floor a hand machine was installed and used for cleaning small seeds, and apart from that the remaining floor area was used for packeting seeds. Apart from 1,500 sq. ft. which was used for hand picking of peas by machines, the whole of the ground floor was used for the storage of chattels, which were offered for sale by the appellants, and seeds awaiting despatch. The basement was used for mixing fertilisers and for hand picking and grading potatoes. In addition, seeds which were rejected for other purposes were ground down and converted into poultry and bird food. The roof floor was used as a testing station, and as and when it was required for the purpose it was also used as a place for conditioning seeds prior to machine treatment. When not in use as a conditioning room surplus office stores were sometimes accommodated there. The appellants did not claim that packeting of seeds or storing of chattels or the user of floor area for storing seeds awaiting despatch was an "industrial user" within the meaning of s. 4 of the Rating and Valuation (Apportionment) Act, 1928, and the floor area allocated to those purposes in warehouse No. 1 was 18,832 sq. ft.

With the exception of a negligible quantity, all seeds which came to the said hereditament were in a rough, unclean and impure state. All the seeds were submitted to various mechanical treatments which were a necessary preliminary to the sale of seed to comply with the provisions of the Seeds Act, 1920, or the standard required by the market in which the appellants traded. The use of machinery was essential. About 90 per cent. of the seed was within the provisions of the said Act and the statutory rules and orders made thereunder. These treatments were carried on as an integral part of the appellants' business of seedsmen. The appellants did not apply the said treatments or any of them to seeds belonging to third parties or for third parties. The average quantity of packeted seeds dealt with by the appellants at the said hereditament over a period of the last three years amounted to forty-six tons per annum, and the average quantity of seeds of all descriptions other than packeted seeds dealt with by the appellants at the said hereditament over the same period amounted to 1,836 tons per annum. No change in the nature of the individual seeds themselves took place as a result of the treatments hereinbefore referred to except as is herein stated. There was no ground on the said hereditament upon which seeds were grown.

The appellants contended (i) that the hereditament was an industrial hereditament in that (a) it was occupied and used as a factory and/or workshop within the meaning of the Factory and Workshops Acts, 1901 to 1920, and (b) it was not primarily occupied and used for one or other or for any combination of the following purposes, namely, a retail shop, or distributive wholesale business, or storage, or other purposes which were not the purposes of a factory or workshop within the meaning of the Factory and Workshops Acts, 1901 to 1920; (ii) that the purposes of a seedsman for which the said hereditament was used were the purposes of a factory and/or workshop as defined in the Factory and Workshops Acts, 1901 to 1920; and (iii) that the determination and order of the assessment committee was wrong in that the hereditament should be inserted and included in the special list and the proportion of the net annual value attributable to the occupation and user thereof for industrial purposes and that attributable for other purposes shown in the manner prescribed by s. 4 of the Rating and Valuation (Apportionment) Act, 1928. The respondent contended (i) that the decision of the assessment committee was right that the hereditament should not be included in the special list; (ii) that the hereditament was not an industrial hereditament within the meaning of the said Act; (iii) that the hereditament was primarily occupied and used for one or other or for a combination of the following purposes, namely, a retail shop, or distributive wholesale business, or storage, or other purposes not being the purposes of a factory or workshop; and (iv) that, even if the said premises were occupied and used as a factory or workshop, the said occupation and user was ancillary to the purposes of a seedsman, which were not the purposes of a factory or workshop.

In the Court of Appeal it was held (reversing the decision of the Divisional Court) per Greer, L.J., and Slesser, L.J. (Scrutton, L.J., dissenting), that where a factory is used for the purpose of adapting goods for sale by retail, and the business of the occupier consists of selling by retail and delivering from the hereditament the goods so adapted, then as a matter of law the hereditament is primarily occupied and used for the purposes of a "retail shop" within the meaning of the proviso to sub-s. (1) of s. 3 of the Rating and Valuation (Apportionment) Act, 1928, and, therefore, is not de-rateable. Where the hereditament is occupied by the one trade or business, and that is a retail trade or business, the production of goods for the supply of that retail trade or business is ancillary to the trade or business. This principle followed from the decisions of the House of Lords in *Finn* v. *Kerslake* (1), *Turpin* v. *Middlesbrough Assessment Committee* (2), and *Kaye* v. *Eyre Bros.*

A (3), decisions inconsistent with that of the Court of Appeal in *Pritchard* (*Cardiff Revenue Officer*) v. *William Lewis & Sons* (4), which must be treated as overruled: see observations of WARRINGTON, L.J., in *Consett Industrial and Provident Society* v. *Consett Iron Co.* (5) ([1922] 2 Ch.D. at p. 173).

The ratepayers appealed.

Singleton, K.C., *Pritt, K.C.*, and *C. L. Henderson* for the appellants.

B *The Attorney-General* (*Sir Thomas Inskip, K.C.*) and *Wilfrid Lewis* for the respondent.

The further hearing of the appeal to the House of Lords was adjourned on the ground that the Special Case did not afford sufficient information as to the exact nature of the respective uses to which the hereditament was put and the various C methods of disposal of the goods carried on in the premises. In answer to the request by the House it was agreed that the seeds were sold in approximately equal quantities to trade customers and to customers other than the trade; that the retail sales were effected either by travellers or by letters addressed to the hereditament, and, occasionally, by telephone; that the appellants sold only goods manufactured by themselves; and that they had no accommodation adapted for the purpose of the physical resort of customers.

D The House took time for consideration.

May 13. The following opinion of the House was read by

LORD THANKERTON.—The appellants are owners and occupiers of a hereditament situated at Blighmount Park, Millbrook, near Southampton, which is described in the valuation list as a seed warehouse, offices, canteen, and outbuildings. E The respondent is the revenue officer for the Southampton County Borough Assessment Area. The question in this appeal is whether the hereditament is an industrial hereditament within the meaning of s. 3 (1) of the Rating and Valuation (Apportionment) Act, 1928. The assessment committee determined that it was not, but, on appeal by Special Case under the Quarter Sessions Act, 1849, a Divisional Court of the King's Bench reversed that decision. On appeal from the F latter decision, the Court of Appeal restored the decision of the assessment committee.

The premises in question are registered as a factory and workshop under the Factory and Workshop Acts, 1901 to 1920, and will, therefore, fall to be classed as an industrial hereditament unless they are excluded by s. 3 (1) (b) of the Act of 1928. The Crown maintain that the hereditament is so excluded by the proviso G in respect that it is "primarily occupied and used for . . . (b) the purposes of a retail shop." Under s. 3 (4):

> " 'Retail shop' includes any premises of a similar character where retail trade or business (including repair work) is carried on."

The premises comprise the following buildings: Warehouse No. 1: An extensive modern warehouse, consisting of seven floors with an aggregate floor area of H 66,970 sq. ft. A smaller warehouse, consisting of two floors with an aggregate floor area of 3,588 sq. ft. A block of administrative offices, consisting of two floors and a store room in the roof with a total area of 8,894 sq. ft.; and a wooden hut, with a total floor area of 2,400 sq. ft.

The nature of the use and occupation of the premises is described in the Special Case as follows:

I

> "The block of offices is used for the purpose of offices and the smaller warehouse is used for packeting seeds, and the wooden hut is used as a recreation room for the staff. It is conceded by the appellants that these buildings, comprising a floor area of 14,882 sq. ft., are occupied and used for purposes other than industrial purposes. As to warehouse No. 1, the work carried on in this building chiefly consists of cleaning, testing, analysing and sorting seeds of two categories, namely, (a) vegetable and farm seeds and (b) flower seeds. The former category represents not less than 90 per cent. of the appellants' turnover in bulk. There is no warehousing as an end in itself in this

> building, the appellants having other property in Southampton which is used for that purpose." A

A detailed description of the purposes for which the seven floors of warehouse No. 1 are used shows that the roof floor is used as a testing station and that the fourth, third, and second floors are given up to seed-cleaning machinery; as regards the remaining floors, the Special Case states:

> "On the first floor a hand machine is installed and used for cleaning small B seeds and apart from that the remaining floor area is utilised for packeting seeds. Apart from 1,500 sq. ft. which is used for hand picking of peas by machines, the whole of the ground floor is used for the storage of chattels which are offered for sale by the appellants and seeds awaiting despatch. The basement is used for mixing fertilisers and for hand picking and grading C potatoes. In addition seeds which are rejected for other purposes are ground down and converted into poultry and bird food."

The Case further states:

> "With the exception of a negligible quantity all seeds which come to the said hereditament are in a rough, unclean and impure state. All seeds are submitted to one or other of the treatments hereinafter mentioned or to some D similar treatment and such treatment is a necessary preliminary to the sale of the seed in order to comply with the provisions of the Seeds Act, 1920 (10 & 11 Geo. 5, c. 54) or the standard required by the market in which the appellants trade. About 90 per cent. of the seed is within the provisions of the said Act and the statutory rules and orders made thereunder."

A detailed description of the methods of treatment is given, which it is unnecessary E to recapitulate. As regards the methods of disposal of their goods by the appellants, who are described as carrying on "the business of retail seedsmen," the Case states that:

> "All the seeds above referred to are sold to customers other than the trade. A small quantity is sent to a retail shop occupied by the appellants in F Southampton. As to the remainder, orders are received by the appellants at their aforesaid office and it is despatched direct to their customers from the said warehouse in fulfilment of such orders, [and, further,] the aforesaid treatments are carried on as an integral part of the appellants' business of seedsmen. The appellants do not apply the said treatments or any of them to seeds belonging to third parties. The average quantity of packeted seeds dealt G with by the appellants at the said hereditament over a period of the last three years amounts to forty-six tons per annum and the average quantity of seeds of all descriptions other than packeted seeds dealt with by the appellants at the said hereditament over the same period amounts to 1,836 tons per annum."

It was not disputed by the Crown that, in view of the decision of this House in *Hines* (*Ipswich Revenue Officer*) v. *Eastern Counties Farmers' Co-operative Association, Ltd.* (6), the cleaning and sorting of seeds in the present case, taken by H itself, was a factory purpose, but they maintained that, looking at the other use and occupation of the hereditament and the methods of disposal of goods carried on there, the hereditament was primarily used and occupied for the purposes of a retail shop within the meaning of the Act. In the course of the first hearing of the appeal your Lordships considered that the Special Case did not afford sufficient I information as to the exact nature of the respective uses to which the hereditament is put, and the various methods of disposal of the goods carried on in the premises, and the parties willingly undertook to adjust a further statement on the lines indicated by your Lordships. Accordingly, at the resumed hearing of the appeal, there were placed before your Lordships (i) a statement of additional facts agreed to and submitted by both parties, and (ii) a further statement of agreed facts submitted separately by the appellants. The second statement involved the correction of certain admitted errors in the Special Case, and the respondent was doubtful if he

A could completely agree to an alteration of the Special Case, but, if he could completely do so, he was willing to consent. Under s. 11 of the Quarter Sessions Act, 1849, the terms of the Special Case are settled by consent of the parties, subject to the order of a judge as provided, and, in my opinion, as also, as I understand, in the opinion of your Lordships, it is competent for the parties to consent to an amendment or alteration of the Case, subject to the approval of the court. I, B therefore, proceed to deal with the Special Case as amended by these two statements.

Before dealing with the main question, three matters may be referred to in order to dismiss them as having no material bearing. First, the parties were agreed that the small quantity of the goods sent by the appellants to their retail shop in Southampton is negligible and may be disregarded. Secondly, as already stated, C a portion of the ground floor of warehouse No. 1 is used for the storage of chattels which are offered for sale by the appellants. Only 600 sq. ft. are used for this purpose out of 10,332 sq. ft. on that floor; none of these chattels is manufactured on the premises, and the annual turnover in them is about £700, which represents a very small fraction of the appellants' total annual turnover. This matter may also be disregarded. Thirdly, it now appears that the appellants do D in fact clean seeds for other persons, but only to the negligible extent of about five or six tons per annum. Along with and as part of the two statements submitted, there are supplied plans of the ground floor of warehouse No. 1 and of the three floors of the offices, and a number of photographs of these two buildings, both external and internal. These make it quite clear that warehouse No. 1 is a modern factory warehouse in the ordinary sense, and that the offices are modern clerical E offices, with no physical feature which would characterise them as an ordinary retail shop. Indeed, this was recognised by counsel for the Crown in the resumed argument, as he relied solely on the extended definition of "retail shop" provided by s. 3 (4) of the Act.

The facts now agreed upon relative to the methods of disposal of the appellants' goods may be summarised as follows. The seeds sold by the appellants are not F sold only to customers other than the trade, as originally stated. The annual turnover of the seeds is 1,882 tons, which are disposed of as follows: (A) 955 tons to customers other than the trade (the trade being taken as including market gardeners), who number about 100,000, comprising 456 tons sold by travellers and agents, including certain sales at agricultural and horticultural shows throughout the country, and 499 tons, ordered by letters addressed to the hereditament, or G occasionally by telephone without the intervention of travellers or agents. It is stated that a few orders are received from customers actually calling at the offices. These orders only average about two a week and there is no staff specially detailed to attend to customers so calling. (B) 927 tons to trade customers, of which about half is sold to shopkeepers and half to market gardeners; these customers number nearly 5,000, and the sales are effected H as follows: 710 tons by travellers and agents, including sales at shows, and 217 tons by letters addressed to the hereditament, or occasionally by telephone. Of the staff employed by the appellants, fifty-four men and sixty-six women and girls are employed in warehouses Nos. 1 and 2, and eighteen men and sixty women and girls are employed in the offices. The appellants issue a series of catalogues yearly, of which the three chief ones are (i) a farm seed book, which is distributed I either by post or by travellers, mostly to farmers; (ii) and (iii) a larger and smaller (or abridged) general catalogue, copies of which are distributed mostly by post, and almost entirely to retail customers. These catalogues contain order forms. The appellants advertise in these catalogues certain articles which are not sold from the hereditaments, but are despatched direct by suppliers elsewhere on instructions given by the appellants on orders received by the appellants. These articles comprise beehives, motor mowers, rollers, and garden furniture and ornaments. These sales, in my opinion, do not materially affect the question, and thus the sale of third-parties' goods by the appellants may be ignored.

A manufacturer must get rid of his production by sale, and the disposal of his goods involves normally a clerical staff to deal with the matter of disposal, which may conveniently be housed on the same hereditament, and that of itself will, therefore, be a normal and integral adjunct of a manufacturing business. On the other hand, a person who stocks only goods manufactured by others, and sells them in premises adapted for the accommodation of any member of the public who chooses to resort there for the purchase of some of these goods for his own consumption, is clearly carrying on a retail business in a retail shop. As already explained, the present case may be taken as one in which the appellants sell only goods manufactured by themselves, and in which they have no accommodation adapted for the purpose of the physical resort of customers. The orders for goods are almost entirely obtained outside the hereditament, but they are dealt with on the hereditament. While it may be a question whether market gardeners are retail customers or not, it is common ground that at least half of the amount sold is sold to retail customers. I may pause here to point out, first, that the test, as laid down in *Moon* (*Lambeth Revenue Officer*) v. *London County Council* (7), is as to what is done on the hereditament in question, irrespective of what is done outside the hereditament, and, secondly, that the test is not whether the hereditament is mainly occupied and used for the purpose of a "retail business," but whether it is mainly occupied and used for the purposes of a "retail shop." This House has dealt with the question of "retail shop," as defined, in three decisions. First, I may refer to the case of the baker's shop, *Finn* v. *Kerslake* (1), upon which the Court of Appeal mainly base their decision in the present case. That decision was given on the Case as originally stated, but your Lordships found that statement unsatisfactory, and the Case, as now amended, shows clearly that it is only by resort to the extended definition of "retail shop" in s. 3 (4) that the Crown can hope to bring this case within s. 3 (1) (b).

I observe a tendency in certain of the judgments in the courts below to put a wider construction than is justified on the views expressed in this House in *Finn's Case* (1), whereas those views—e.g., as to dissection of a unified business—are expressly confined to the facts of that case. Admittedly, there was a retail shop on the hereditament in that case through which the whole production was disposed of. Further, Scrutton, L.J., in his opinion in the present case, appears to have misconceived the facts in *Inland Revenue Officer* v. *Gunn, Collie, and Topping* (8), in which Lord Hunter expressed the views, which were approved of by this House in *Finn's Case* (1), for the whole of the tailor's bespoke business to which Lord Hunter was referring, from start to finish was carried on in the same hereditament. The learned Lord Justice also refers to *Pritchard* (*Cardiff Revenue Officer*) v. *William Lewis & Sons* (4). Though I understand that an appeal was taken to this House, the appeal did not come before your Lordships, nor were the facts of the case referred to. But on a perusal of the facts stated in *Lewis's Case* (4) it is at least doubtful whether, as inferred by the learned Lord Justice, the main bulk of the orders were received and dealt with in the small retail shop. But that is a matter which should have been cleared up. In both *Finn's Case* (1) and *Lewis's Case* (4) there was admittedly a retail shop and recourse to the extended definition was unnecessary. Whereas in the present case the first question is whether the hereditament is used for the purposes of a retail shop as defined, and I turn to the two decisions of this House which deal with this question.

These two decisions were *Turpin* v. *Middlesbrough Assessment Committee* (2) and *Kaye* v. *Eyre Bros.* (3), which were both cases of a garage and motor repair depot. They were both held to fall within the extended definition of a retail shop; and, in particular, under the express inclusion of repair work. As these decisions are relied on by the Crown in the present case, it is well to have regard to the facts of these cases, which will be found in [1931] 1 K.B. 441, 442. In *Turpin's Case* (2) about half of the area was used for a repair workshop and space for cars while standing for repairs, a large part of the remaining space being used for entrance and exit of cars. In *Kaye's Case* (3), out of a total of 590 sq. yds., 520 sq. yds. were used for repair of cars and storage of cars undergoing or awaiting repairs. In delivering the judgment of this House in *Turpin's Case* (2), LORD DUNEDIN says ([1931] A.C. at p. 473):

> "Upon the facts found this hereditament is primarily occupied and used for the purposes of repair work done to cars and other objects brought or sent there by the owners, without the intervention of any middleman. I do not pause to inquire whether a person who does such repair work could not properly be said to be carrying on a retail trade or business. It may be that in strictness the words 'retail trade or business' are only applied with complete accuracy to cases of selling goods; or it may be that they may properly be applied to all trades and business which deal directly with the 'consuming' customer. In the present case all doubt is removed by the express inclusion of repair work in the term 'retail trade or business.' "

With regard to the words "of similar character," the learned and noble Lord says:

> "For myself I am unable to state what are the physical features the existence of which is essential to or distinctive of a retail shop. I am familiar with many physical features which are frequently and even commonly found in retail shops, such as counters and shop windows; but I am equally familiar with retail shops where no such features exist. In my opinion, it is not possible to say that the words 'of a similar character,' even if they include, are limited to, physical features of the premises. They must, as I read them, include also similarity of character in other respects. The character of the premises must be similar to the character of a retail shop. Now if we compare the hereditament here in question with a retail shop, do we find any common characteristics? I think we do; for they are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein. Moreover, once you include repair work in the words 'retail trade or business,' it can be truthfully said that there is a similarity between the type of business carried on in this building and the type of business carried on in a retail shop."

This decision also covered *Kaye's Case* (3). There can be no doubt that the resort of the public referred to in the above was physical resort, on the facts of that case.

In the recent Scottish case of *Glasgow Assessor* v. *Henderson & Co.* (9), LORD SANDS says (1932 S.L.T. at p. 146):

> "It is quite true that in the case of *Turpin* (2), LORD DUNEDIN ([1931] A.C. at p. 474) speaks of
>
> > 'buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein'
>
> —I think that when he used the word 'can' he must have meant 'do,' because there are comparatively few manufacturers who would not, on occasion, welcome members of the public to their premises."

I think this paraphrase is inaccurate, and that the true element is in the provision of accommodation in the premises for the public who may so resort, even if in fact the business is so unsuccessful that the public do not resort; but I agree with LORD SANDS' remark in *Aberdeen Assessor* v. *Lumsden's Heirs* (10) (1932 S.L.T. at p. 159), that LORD DUNEDIN'S dictum is limited to such needs as can be supplied by retail purchase extended by statute to include the need to have an article repaired. Such accommodation was provided in both *Turpin's Case* (2) and *Kaye's Case* (3). No such accommodation is provided in the present case. It is further to be noted in the present case that, of 1,882 tons of seeds disposed, 1,160 tons are sold by travellers and agents outside the premises, and the rest are sold on orders by letters addressed to the premises from outside, which are a normal and necessary element in the disposal of his production by a manufacturer. I am clearly of opinion that this hereditament is not used and occupied to any material extent for the purpose of a retail shop, including any premises of a similar character where retail trade or business (including repair work) is carried on, and that it is an industrial hereditament within the meaning of s. 3. Accordingly I am of opinion that the order of the Court of Appeal ought to be reversed, that the order of the King's Bench Division should be restored, and that the appellants should have their costs here and in the Court of Appeal.

Appeal allowed.

Solicitors: *Herbert Smith*; *Treasury Solicitor.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

GREENWOOD *v.* MARTIN'S BANK, LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Warrington, Lord Tomlin, Lord Thankerton and Lord Macmillan), June 2, 3, 6, July 5, 1932]

[Reported [1933] A.C. 51; 101 L.J.K.B. 623; 147 L.T. 441; 48 T.L.R. 601; 76 Sol. Jo. 544; 38 Com. Cas. 54]

Estoppel—Estoppel in pais—Estoppel by representation—Essential factors—Bank—Failure of customer to inform bank of presentation of forged cheques.

The essential factors giving rise to an estoppel by representation are (i) a representation, or conduct amounting to a representation, intended to induce a course of conduct on the part of the person to whom the representation is made; (ii) an act or omission by the person to whom the representation is made resulting from such representation or conduct; and (iii) detriment to such person as a consequence of the act or omission. Mere silence cannot generally amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.

The customer of a bank who becomes aware that forged cheques, drawn on his account, have been presented to the bank is under a duty to inform the bank of that fact, and, if he fails to do so with the result that the bank loses its right of action against the forger, he will be estopped from recovering from the bank the amount of the forged cheques.

Notes. With regard to the last point dealt with in the opinion of LORD TOMLIN (infra), by s. 3 (a) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the liability of a husband for his wife's torts, committed by her whether before or after marriage, was abolished.

Applied: *Re National Benefit Assurance Co.*, [1932] 2 Ch. 184. Considered: *Brewer* v. *Westminster Bank, Ltd.*, [1952] 2 All E.R. 650; *Lyle-Mellor* v. *A. Lewis & Co.* (*Westminster*), *Ltd.*, [1956] 1 All E.R. 247. Referred to: *Imperial Bank of Canada* v. *Begley*, [1936] 2 All E.R. 367; *Official Trustee of Charity Lands* v. *Ferriman Trust, Ltd.*, [1937] 3 All E.R. 85; *Refuge Assurance Co.* v. *Pearlberg*, [1938] 2 All E.R. 25; *Tungsten Electric Co. and Tungsten Industrial Products, Ltd.* v. *Tool Metal Manufacturing Co.*, [1955] 2 All E.R. 657.

As to forged cheques, see 2 HALSBURY'S LAWS (3rd Edn.) 204 et seq., and as to estoppel by representation, see ibid., vol. 15, 223 et seq. For cases see 3 DIGEST 230–235 and 21 DIGEST 290 et seq.

Cases referred to:

(1) *Liverpool Adelphi Loan Association* v. *Fairhurst* (1854), 9 Exch. 422; 2 C.L.R. 512; 22 L.T.O.S. 318; 18 Jur. 191; 2 W.R. 233; sub nom. *Fairhurst* v. *Liverpool Adelphi Loan Association*, 23 L.J.Ex. 163; 27 Digest (Repl.) 210, *1670.*

A (2) *Earle* v. *Kingscote*, [1900] 2 Ch. 585; 69 L.J.Ch. 725; 83 L.T. 377; 49 W.R. 3; 16 T.L.R. 511; 44 Sol. Jo. 625, C.A.; 27 Digest (Repl.) 210, *1667*.

(3) *Edwards* v. *Porter*, [1925] A.C. 1; 94 L.J.K.B. 65; 132 L.T. 496; 41 T.L.R. 57; 69 Sol. Jo. 87, H.L.; 27 Digest (Repl.) 206, *1635*.

(4) *East India Co.* v. *Tritton* (1824), 3 B. & C. 280; 5 Dow. & Ry.K.B. 214; 3 L.J.O.S.K.B. 24; 107 E.R. 738; 3 Digest 207, *484*.

B (5) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1918] 2 K.B. 623; 87 L.J.K.B. 1223; 119 L.T. 321; 34 T.L.R. 427, C.A.; 6 Digest 161, *1037*.

(6) *McNeall* v. *Hawes*, [1923] 2 K.B. 538; 92 L.J.K.B. 729; 129 L.T. 170; 39 T.L.R. 362; 67 Sol. Jo. 483, C.A.; 27 Digest (Repl.) 210, *1672*.

Appeal from an order of the Court of Appeal (SCRUTTON, GREER and ROMER, L.JJ., reported [1932] 1 K.B. 371).

C The plaintiff, who had a banking account with the defendants, claimed that he was entitled to a declaration that a sum of £410 6s. had been wrongfully, and without his authority, debited by the defendants to his account, and that he was entitled to be credited by the defendants therewith. In November, 1928, an account had been opened in the plaintiff's name alone. On this account he drew nineteen genuine cheques, but forty-four forged cheques, totalling £410 6s., were D drawn by his wife. Some of the plaintiff's forged signatures were very suspicious, and MR. COMMISSIONER DU PARCQ, after examining the cheques and hearing the evidence of the bank officials, found that the forty-four signatures were not merely not genuine, but were honoured through the carelessness of the bank officials. In October, 1929, the plaintiff, wanting to draw £20 out of the account, asked his wife for the cheque-book. She told him there was no money in the bank as it had all E been drawn out for her sister to enable her to fight a case for a house, and she asked the plaintiff not to go to the bank until the case was finished. He consented, in the expectation that, as the result of the trial of the sister's case, he might receive the amount of the forgeries. No signatures were forged after October, 1929, but the plaintiff did not tell the bank of the forgeries. In June, 1930, the plaintiff, having found that he had been deceived, told his wife that he was going to the F bank. She thereupon shot herself. The plaintiff then informed the bank, and, after ascertaining the position of his account, brought the present action. The defendants admitted that the cheques were forged, but said that the plaintiff was disentitled to succeed in the action because (i) he had ratified the act of his wife in putting his name to the cheques; or (ii) had adopted that act; or (iii) was estopped by his negligence from alleging that the signatures were not his.

G The commissioner held that the plaintiff was not estopped by his conduct from alleging that the signatures were not his and were unauthorised. On appeal, the Court of Appeal held, reversing the decision of MR. COMMISSIONER DU PARCQ, (i) that ratification had no applicability to a forged cheque; (ii) that, while the carelessness of the bank was a proximate cause of the bank's loss in paying the forged cheques, it was not the proximate cause of the bank losing its right of action against the H forger which was caused by the failure of the plaintiff to inform the bank of the forgery until his wife was dead, and the cause of action was lost; and (iii) that the plaintiff was, therefore, estopped from alleging that the cheques were forged, and his action against the bank failed. The plaintiff appealed.

Cyril Atkinson, K.C., *J. C. Jolly*, and *R. A. Eastwood* for the appellant.

T. Eastham, K.C., and *B. R. Rice-Jones* for the respondent bank.

I The House took time for consideration.

July 5. The following opinions were read.

LORD TOMLIN.—On March 6, 1926, the appellant, who was carrying on a dairyman's business at Blackpool, opened with the respondents at their branch in Clifton Street, Blackpool, a joint account in the name of himself and his wife. It was arranged with the respondents that cheques on this account should bear the signatures both of the appellant and of his wife. On Nov. 8, 1928, the appellant opened a further banking account in his own name at the same branch of the respondents' bank. Cheques upon this account were to bear the signature of the appellant alone. The pass-books and cheque-books in respect of these accounts were kept by the appellant's wife, who gave her husband a cheque from the cheque-book when he asked for it. In October, 1929, the appellant asked his wife to bring him a cheque, saying that he wanted to draw £20 from his separate account with the respondents, whereupon the appellant's wife informed the appellant that there was no money in the bank and told him that she had used the money to help her sister in legal proceedings relating to a house and had drawn it out. The appellant thereupon asked her who had forged his name, and she would not tell him. She begged the appellant not to inform the respondents of the forgeries until her sister's case was over. In the hope of a favourable result in the sister's action, and for his wife's sake, the appellant said nothing to the respondents. On June 5, 1930, the appellant discovered that there were no legal proceedings instituted by his wife's sister and that his wife had deceived him. Thereupon the appellant informed his wife that he would go at once to the respondents. He returned to the house that evening without having gone to the bank. On his return his wife shot herself. After his wife's death the appellant ascertained that he had been debited by the respondents in his separate account with the sum of £410 6s. in respect of forged cheques. At this time the appellant was not aware that anything irregular had occurred in connection with the joint account of himself and his wife.

On Aug. 19, 1930, the appellant began an action against the respondents in the King's Bench Division, Preston district, for a declaration that he was entitled to be credited by the respondents with the sum of £410 6s. with which, he alleged, they had wrongfully debited him. In their defence the respondents denied the forgeries, and, alternatively pleaded that they were caused to pay the money by reason of the appellant's own negligence, and, further, that he was estopped from saying that the respondents paid the money wrongfully or without his authority, or that the signatures on the cheques were placed there without his authority. At the trial, ratification, adoption, and estoppel were all relied upon by the respondents.

The action was tried at the Manchester Assizes on May 12, 1931, before MR. COMMISSIONER DU PARCQ, K.C. (now DU PARCQ, J.), and in the course of the trial the following facts with regard to the separate account were admitted or proved, namely:

(i) Between Nov. 14, 1928, and Oct. 20, 1929, the appellant's wife, Emma Greenwood, drew forty-four "order" cheques upon the appellant's separate banking account and forged the name of the appellant as drawer of the said cheques. The value in the aggregate of such cheques was the sum of £410 6s. Forty-two of such cheques were expressed to be in favour of a non-existent person, Emily Greenwood, and in the remaining two of them, dated respectively Jan. 14, 1929, and May 16, 1929, the name of the payee inserted was "Emma Greenwood." The cheques purported to be endorsed by the drawees, but by whom the endorsements were made was not proved. (ii) The forged cheques were presented for payment, and, through the negligence of the respondents' officials in failing to detect that the signatures thereon were not genuine, were honoured and paid. The respondents debited the appellant's account with sums amounting in all to £410 6s. in respect of such cheques. (iii) Some of the cheques were presented for payment by the appellant's wife in person, and others by some other woman who was not definitely identified. It did not appear how many or which of the cheques were presented by the appellant's wife. (iv) The appellant did not give the respondents any information in regard to the matter until after his wife's death, and until after such death the respondents remained in ignorance of the forgeries. It further appeared in the course of the proceedings, and the appellant then for the first time became aware, that there had been grave irregularities in connection with the joint account and that his wife had drawn upon that account by eleven cheques to which she had forged his name, and that she had closed the account by drawing out the balance with a cheque signed by herself alone, and notwithstanding the absence of the appellant's signature, honoured by the respondents.

The commissioner held that the appellant was entitled to succeed, taking the view that the respondents' negligence was the proximate cause of their loss, and that, therefore, they could not set up an estoppel against the appellant. The Court of Appeal were unanimous in reversing the learned commissioner. SCRUTTON, L.J., held that there was a duty on the appellant to disclose the forgeries, and that in the circumstances the failure to disclose gave rise to an estoppel because the failure to disclose deprived the respondents of their opportunity to proceed against the forger. The reasoning of the other Lords Justices was on the same lines.

It may be said at once that there can be no question of ratification or of adoption in this case. The necessary elements for ratification were not present, and adoption, as understood in English law, requires valuable consideration, which is not even suggested here. The sole question is whether in the circumstances of this case the respondents are entitled to set up an estoppel. Now the essential factors giving rise to an estoppel are, I think: (i) A representation, or conduct amounting to a representation, intended to induce a course of conduct on the part of the person to whom the representation is made; (ii) An act or omission by the person to whom the representation is made resulting from such representation or conduct; (iii) Detriment to such person as a consequence of the act or omission. Mere silence cannot amount to a representation, but when there is a duty to disclose deliberate silence may become significant and amount to a representation.

The existence of a duty on the part of the customer of a bank to disclose to the bank his knowledge of such a forgery as the one in question in this case was rightly admitted. The respondents' case is that the duty ought to have been discharged by the appellant immediately upon his discovery in October, 1929, and that, if it had been then discharged, they could have sued the appellant's wife in tort and the appellant himself would have been responsible for his wife's tort. They claim that his silence until after his wife's death amounted in these circumstances to a representation that the cheques were not forgeries and deprived the respondents of their remedy. The appellant, on his part, says: (i) That there was no representation, express or implied; (ii) that the respondents' omission to sue, and any resulting loss, was the consequence of their own initial negligence, and was not due, at any rate exclusively, to the appellant's omission; and (iii) that there was in fact no loss or detriment because the only remedy of the respondents against the appellant's wife would have been in contract and not in tort and because such a remedy would have been fruitless against the wife and the appellant would not have been responsible.

The evidence of the respondent's cashier, which was accepted by the learned commissioner, was that the appellant, after his wife's death, said to the respondents' officials "that he had known about it since last October, that he did not wish to cause any bother and he did not want to give his wife away." The appellant's silence, therefore, was deliberate, and intended to produce the effect which it in fact produced, namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them against the appellant's wife. The deliberate abstention from speaking in those circumstances seems to me to amount to a representation to the respondents that the forged cheques were in fact in order, and, assuming that detriment to the respondents followed, there were, I think, present all the elements essential to estoppel. Further, I do not think that it is any answer to say that, if the respondents had not been negligent initially, the detriment would not have occurred. The course of conduct relied upon as founding the estoppel was adopted in order to leave the respondents in the condition of ignorance in which the appellant knew they were. It was the duty of the appellant to remove that condition, however caused. It is the existence of this duty, coupled with the appellant's deliberate intention to maintain the respondents in their condition of ignorance, that gives its significance to the appellant's silence. What difference can it make that the condition of ignorance was primarily induced by the respondents' own negligence? In my judgment, it can make none. For the purposes of the estoppel, which is a procedural matter, the cause of the ignorance is an irrelevant consideration.

The question remains whether the respondents in fact suffered loss or detriment. Now, notwithstanding the Married Women's Property Act, 1882, a husband is still liable for the torts of his wife committed during coverture unless the tort is directly connected with a contract with her and is "the means of effecting it and parcel of the transaction": see *Liverpool Adelphi Loan Association* v. *Fairhurst* (1); *Earle* v. *Kingscote* (2); and *Edwards* v. *Porter* (3). If, therefore, for example, the tort consists in a fraudulent misrepresentation by the wife inducing a third party to contract with her the husband is not liable: see *Liverpool Adelphi Loan Association* v. *Fairhurst* (1). Here there is no contract between the respondents and the wife unless such a contract can be implied from the circumstances in which the cheques were presented and honoured. It is urged on behalf of the appellant that the wife must be treated as having warranted to the respondents the genuineness of the cheques in consideration of their cashing them. There are, it seems to me, two answers to this argument, namely, first, that it has not been proved in regard to any particular cheque that it was, in fact, presented for payment by the wife; and, secondly, that the holder of a bill of exchange does not, by presenting it for payment, warrant its genuineness: see *East India Co.* v. *Tritton* (4) (3 B. & C. at pp. 289 and 291); and *Guaranty Trust Co. of New York* v. *Hannay & Co.* (5) ([1918] 2 K.B. at pp. 631 and 632), and that there is nothing in the circumstances of the present case from which a special warranty can be implied. In this connection I desire to say that I am not prepared, without further consideration, to accept as well decided *McNeall* v. *Hawes* (6), to which reference was made in the course of the argument. It follows from what I have said that, in my opinion, this appeal fails and ought to be dismissed with costs.

LORD ATKIN, LORD WARRINGTON, LORD THANKERTON and **LORD MACMILLAN** concurred.

Appeal dismissed.

Solicitors: *Indermaur & Brown*, for *Woosnam & Co.*, Blackpool; *Haslewood, Hare, & Co.*, for *A. Kidd Whitaker*, Blackpool.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

MATTHEWS *v.* MATTHEWS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Langton, J.), May 24, 1932]

[Reported [1932] P. 103; 101 L.J.P. 41; 147 L.T. 240; 96 J.P. 290; 48 T.L.R. 511; 76 Sol. Jo. 495; 30 L.G.R. 365, 29 Cox, C.C. 503]

Justices—Husband and wife—Maintenance—Summons on ground of wilful neglect to maintain—Defence—Agreement by wife not to claim maintenance—No bar to complaint—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict., c.* 39), *s.* 4.

By a separation agreement, dated July 15, 1931, the husband agreed to make certain payments to the wife in consideration of which she undertook not to "make any claim or demand [on him] for maintenance or institute any legal proceedings against him in respect thereof and will at all future times wholly support and maintain herself."

Held: the agreement was of evidential value only and had no value by way of estoppel and so did not act as a bar to a claim by the wife for maintenance under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895; on such a claim the court had to determine whether the husband had wilfully neglected to provide reasonable maintenance for the wife, and in so doing to consider the agreement to ascertain what the husband had done and was doing.

Notes. Considered: *Morton* v. *Morton*, [1942] 1 All E.R. 273. Referred to: *Gillman* v. *Gillman* (1946), 174 L.T. 272.

As to the power of a magistrates' court to make maintenance and other orders, see 12 HALSBURY'S LAWS (3rd Edn.) 479 et seq., and for cases see 27 DIGEST (Repl.) 693 et seq. For Summary Jurisdiction (Married Women) Act, 1895, see 11 HALSBURY'S STATUTES (2nd Edn.) 849.

Cases referred to:

(1) *Diggins* v. *Diggins*, [1927] P. 88; 96 L.J.P. 14; 136 L.T. 224; 90 J.P. 208; 43 T.L.R. 37, D.C.; Digest Supp.

(2) *Adamson* v. *Adamson* (1907), 23 T.L.R. 434; 27 Digest (Repl.) 223, *1787*.

(3) *Holroyd* v. *Holroyd* (1920), 36 T.L.R. 479; 27 Digest (Repl.) 224, *1788*.

Appeal against an order made by a metropolitan magistrate.

The appellant, George E. Matthews, appealed against a maintenance order made against him by the magistrate at Westminster Police Court on the ground of wilful neglect to provide reasonable maintenance for his wife, by which he was directed to pay her 5s. a week.

The parties were married in April, 1922. There were no children. In February, 1932, the wife took out a summons for wilful neglect to maintain. She said in her evidence that they had lived together at Bexhill, and, after opening a shop there, her husband left her in May, 1931. On July 15, 1931, she and her husband executed a separation agreement, whereby he agreed to pay her £100 and make certain disbursements on her behalf. The agreement provided:

> "In consideration of the agreements on the part of the husband herein the wife agrees with the husband that so long as he observes and performs the said agreements herein on his part, the wife will not at any time hereafter make any claim or demand upon the husband for maintenance or institute any legal proceedings against him in respect thereof and will at all future times wholly support and maintain herself."

She carried on a florist's business until the end of November, 1931, when she had to give it up as it was being carried on at a loss. The husband in his evidence said that he had fulfilled his covenants. There was no duress on his wife to sign the agreement. He was not now in business, having had to enter into a composition with his creditors at 4s. in the pound. He had no means. His father paid £1 a week for his lodgings. He had offered his wife a home with his grandmother. The magistrate made an order for 5s. a week, and, in doing so, stated that he was satisfied: (i) That the complainant was in very poor circumstances, and that, though the defendant was himself in financial difficulties, he was in a position to make a small contribution to her maintenance; (ii) that no payment had been made by the defendant to the complainant since Dec. 14, 1931, when the last instalment of £10 due under the separation agreement of July, 1931, was paid; and (iii) that the statement of the complainant that she was in great financial difficulties when she signed the separation agreement and that she did so in order to get money to pay her rent, rates, and taxes was true. The learned magistrate continued:

> "I was of opinion that she signed the separation agreement in the belief that, if she was paid the £50 and five instalments of £10, she might save her business and be able to maintain herself. It was contended on behalf of the defendant that he had not been guilty of wilful neglect to maintain the complainant in that, as he had complied with the provisions of the agreement, the complainant had released him from all further liability for her maintenance. I was of opinion that, although the complainant did agree not to make any claim or demand upon the defendant for maintenance or institute any legal proceedings against him in respect thereof, that was not in itself a bar to her at any future time obtaining an order for maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, if she were in a position to show that she was unable to maintain herself and that the defendant, being in a position to contribute to her maintenance, had wilfully neglected to do so."

The husband appealed on the grounds that there was no evidence on which the magistrate could find that the appellant was guilty of wilful neglect to maintain, that the magistrate was wrong in not taking into consideration the appellant's offer of a home for his wife, and he was wrong in law in holding that the agreement not to claim maintenance was not binding on the wife.

Victor Russell for the husband.

J. C. Moore for the wife.

LORD MERRIVALE, P.—Like many cases under s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, as amended by the Act of 1925, the facts raise an interesting question of law, but when the law is examined it is found that the governing consideration here is that which it has been found to be in a variety of cases where the operation of the statute has had to be considered. Some of them have been cited. New cases come up, because cases almost inevitably differ in their detail, and none of the cases which have been referred to is decisive of this case. No doubt the case nearest to it is *Diggins* v. *Diggins* (1). *Adamson* v. *Adamson* (2) and *Holroyd* v. *Holroyd* (3) were cases of coercion where agreements were avoided because they had no operative effect against the party who was proceeding notwithstanding the signing of the agreements. This is not a case of that sort.

The facts here are that the husband and wife were not getting on well together and they came to the conclusion that they would not live together, or, at any rate, that the wife should have a separate business and that the husband should make some contribution toward the business. Upon that footing he and she entered into the agreement on which he now founds his main ground of defence—the agreement of July 15, 1931—whereby provision was made for the better establishment of the business which the wife intended to carry on or contemplated carrying on. One of the principal means agreed upon was a series of payments amounting to £100—£50 down and the remaining £50 by monthly instalments of £10 each. What the parties supposed was that with good fortune the wife would be able to maintain herself by that business, and that, in consideration of the husband's provision under the agreement, she would not at any time thereafter make any claim or demand upon him for maintenance, or institute any legal proceedings against him in respect thereof, and would at all future times wholly support and maintain herself. As between two people who were not limited in their common law rights by statute, or were not provided with privileges by statute, no doubt it would have been a good agreement to exclude a subsequent claim, but the matter is between husband and wife. The business failed and the husband, who was in business as a builder and at that time able to put down £50 in ready money and to arrange for monthly payments of £10 a month, entered shortly afterwards into a composition with his creditors, and thereupon said to the wife, having failed in the business: "You can go and live with a relative. She is ready to receive you and I shall not be able to make any payment to you." Perhaps he put it in a stronger way than that. The wife, being under the necessity of obtaining maintenance, resorted to the police court under the Summary Jurisdiction (Married Women) Acts and the magistrate, after a patient hearing of the case, ordered the husband to pay 5s. a week.

It is said that there is no jurisdiction, that the agreement between the parties bound the learned magistrate and binds this court, and that the wife has excluded herself from any possible benefit under the Separation and Maintenance Acts. It is said also, that there was no evidence before the learned magistrate on which he could find that the husband should provide anything for the wife.

As to the first point the language of the statute supplies the test. The question before the magistrate was not whether this was an agreement which would be good at common law between independent parties and would exclude subsequent proceedings. What he had to determine was whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife, and in order to do that he had, of course, to look at what had taken place between the parties and to look at the agreement and to see what the husband had done and was doing, but he still had to determine judicially whether the husband had been guilty of wilful neglect to provide reasonable maintenance for his wife. That depended on two things: first, whether he had failed to maintain her, and secondly, whether he had done it wilfully. The magistrate took the view that, although the husband had made a composition with his creditors and was living under the shelter of his father's protection, he was wilfully neglecting to provide some maintenance for his wife, and the magistrate found what sum he could provide. He applied his mind, in my judgment, to the right question and gave to the agreement between the parties its proper value, which was evidential value and not value by way of estoppel. He gave the proper effect to the agreement, that is, coming to the conclusion that it left it open to him to determine the question in the case and did not exclude the jurisdiction of the court, he considered the husband's position. When one sees what the husband's position is, what he was doing last July, what his protestations were at the hearing before the magistrate, and what had happened in the meantime, it is not unnatural that the learned magistrate, being a man of experience as well as a man of law, came to the conclusion that this defence of having no possibility of paying anything was unfounded. He said: "At any rate he can pay 5s. a week; I am clear about that on the facts before me." I think that the magistrate took a moderate, as well as a just, view of the case, and that his judgment is correct on both the points in respect of which it has been assailed.

LANGTON, J.—I agree. This is not altogether an easy case. As my Lord has said, the magistrate has addressed his mind to what is the real, right and correct point here. The point is whether the husband has been guilty of wilful neglect to provide reasonable maintenance. He sets up a deed of separation between himself and his wife as a bar to the jurisdiction of the court. In my judgment, in that he is wrong. I do not think it is any such bar. As my Lord has said, it is a matter of evidence whether such deed or agreement does, in fact, provide reasonable maintenance. I do not say that in this particular case when the parties entered into that agreement, they had not a perfectly bona fide belief that it would produce reasonable maintenance and that they did not mean it so to do, but matters turned out quite differently from what they had expected. Therefore, what the learned magistrate had to do was not merely to look at this deed, but also to look at the Act of Parliament. I think that when one looks at his judgment, and his reasons which are admitted to have the status of a judgment, it is quite clear that he addressed his mind to the correct point and arrived at the correct conclusion. But it has not, I think, gone quite so far as the wife's counsel claimed in saying that she was constrained by duress to enter into this agreement. The magistrate examined the agreement exactly as it stands and all the circumstances. I think that is the right way to look at this agreement, and he has given it the proper evidential value. He said:

> "It is an agreement into which they entered with their eyes open. I see what they have done and quite understand why they did it. I am not saying they did anything wrong, but I have still got to go further than that, and see whether to-day this man is right or wrong under the statute. I have come to the conclusion that in his circumstances to-day, which again I agree are very poor circumstances, he is guilty of wilful neglect to provide reasonable maintenance."

Having arrived at that conclusion, he has said that the man should in those circumstances contribute a small sum—and he has made it purposely small—to the maintenance of his wife. I cannot help feeling that he has given the best possible consideration to this case, and has arrived at a very excellent result. This appeal should certainly be dismissed.

Appeal dismissed.

Solicitors: *Henry I. Sydney & Co.*; *Parfitt, Cresswell, & Williams.*

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

THE CHR. KNUDSEN

[Probate, Divorce and Admiralty Division (Bateson, J.), July 7, 1932]

[Reported [1932] P. 153; 101 L.J.P. 72; 148 L.T. 60; 48 T.L.R. 619; 18 Asp.M.L.C. 347]

Admiralty—Jurisdiction—Action in rem—"Damage done by a ship"—Collision—Barge sunk in dock—Expenses of raising and disposing of the wreck—Action in rem by harbour authority—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo*. 5, *c*. 49), *s*. 22 (1) (*a*) (*iv*).

In consequence of a collision between the barge *A.B.* and the Norwegian steamship *C.K.*, belonging to the defendants, the *A.B.* sank in a dock of which the plaintiffs were the owners and the harbour authority. Notice of abandonment was given by the owners of the *A.B.* The plaintiffs, in order to render their dock fit and safe for navigation, raised the wreck of the *A.B.* and incurred expenses in so doing, and in lighting, buoying, and destroying the wreck. They then began an action in rem against the *C.K.*, claiming to recover such expenses. On a motion to set aside the writ,

Held: the action was maintainable because the obstruction caused in the dock by the wreck was "damage done by a ship" within the meaning of s. 22 (1) (a) (iv) of the Supreme Court of Judicature (Consolidation) Act, 1925; and, therefore, the expenses of removing such obstruction could be sued for in an action in rem against the vessel alleged to have been negligent.

A **Notes.** Section 22 (1) (a) (iv) of the Judicature Act, 1925, has been repealed: a similar provision as to "damage done by a ship" is now made by s. 1 (i) (d) of the Administration of Justice Act, 1956.

Considered: *The Minerva*, [1933] All E.R.Rep. 870; *The Millie*, [1940] P. 1; *Stonedale No. 1* (*Owners*) v. *Manchester Ship Canal Co.*, [1955] 2 All E. R. 689.

As to the meaning of "damage done by a ship," see 1 Halsbury's Laws (3rd
B Edn.) 60, para. 119, text and notes (s)–(f), and for cases on the subject see 41 Digest 140 et seq., *473* et seq. For the Administration of Justice Act, 1956, s. 1 (i) (d), see 36 Halsbury's Statutes (2nd Edn.) 3.

Cases referred to:

(1) *The Ella*, [1915] P. 111; 84 L.J.K.B. 97; 30 T.L.R. 566; 41 Digest 820, *6797*.

C (2) *The Dee Conservancy Board* v. *McConnell*, [1928] 2 K.B. 159; 97 L.J.K.B. 487; 138 L.T. 656; 92 J.P. 54; 26 L.G.R. 204; 17 Asp.M.L.C. 433, C.A.; 44 Digest 120, *966*.

(3) *The Solway Prince* (1914), 31 T.L.R. 56; 7 Digest (Repl.) 145, *468*.

(4) *The Nightwatch* (1862), 1 Lush. 542; 32 L.J.P.M. & A. 47; 7 L.T. 396; 8 Jur.N.S. 1161; 11 W.R. 189; 1 Mar.L.C. 260; 167 E.R. 244; 41 Digest
D 793, *6539*.

(5) *The Clara Killam* (1870), L.R. 3 A. & E. 161; 39 L.J.Adm. 50; 23 L.T. 27; 19 W.R. 25; 3 Mar.L.C. 463; 1 Digest 141, *493*.

(6) *The Beta* (1869), 6 Moo.P.C.C.N.S. 55; L.R. 2 P.C. 447; 38 L.J.Adm. 50; 20 L.T. 988; 17 W.R. 933; 16 E.R. 647, P.C.; 1 Digest 144, *511*.

(7) *The Industrie* (1871), L.R. 3 A. & E. 303; 40 L.J.Adm. 26; 24 L.T. 446; 19
E W.R. 728; 1 Asp.M.L.C. 17; S.C. No. 473; 1 Digest 139, *469*.

(8) *The Port Victoria*, [1902] P. 25; 71 L.J.P. 36; 86 L.T. 804; 50 W.R. 383; 18 T.L.R. 165; 9 Asp.M.L.C. 314; 41 Digest 770, *6251*.

Motion to set aside a writ in rem.

The plaintiffs, the London, Midland, and Scottish Railway, claimed in an action
F in rem

> "the expenses incurred in and about the lighting, buoying, removal and destruction of the barge *Ada Burton* which was sunk in the plaintiffs' harbour by the negligence of the defendants or their servants in the month of June, 1932."

The defendants were the owners of the Norwegian steamship *Chr. Knudsen*.

G On June 16, 1932, the *Chr. Knudsen* came into collision with the barge *Ada Burton* in Stalbridge Dock, Garston, in consequence of which the *Ada Burton* was sunk and became a total loss. The plaintiffs, as owners of Stalbridge Dock, accordingly raised the wreck of the *Ada Burton* and removed it from the dock, and incurred expenses in so doing and in lighting, buoying, and disposing of the wreck. Notice of abandonment had been given by the owners of the *Ada Burton*.
H The plaintiffs then commenced the present action claiming to recover the expenses so incurred, and threatened to arrest the *Chr. Knudsen*. An undertaking to appear and put in bail was given under protest, and the defendants moved to set aside the writ.

Lewis Noad for the defendants, the owners of the ship.—It is conceded that an action in personam may be brought to recover expenses of this nature: see *The*
I *Ella* (1); *The Dee Conservancy Board* v. *McConnell* (2). An action in rem for such expenses is without precedent and will not lie. The damage claimed is not "damage done by a ship" within the meaning of s. 22 (1) (a) (iv) of the Judicature (Consolidation) Act, 1925. In order to maintain an action for such damage the plaintiff must have some right or interest in the thing or chattel or property damaged. Here the plaintiffs had no interest in the *Ada Burton*. Their claim is not a claim for damage at all, but is a claim for expenses incurred after the damage had been done. In any case the writ is bad, because the endorsement does not show in what capacity these expenses are alleged to have been incurred.

Geoffrey Hutchinson for the plaintiffs, the owners of the dock. The damage is "damage done by a ship." It is only necessary that the damage should be done by negligent navigation in order to found the jurisdiction in rem. Here it is alleged that the Stalbridge Dock was damaged by the negligence of the defendants' servants in causing the *Ada Burton* to sink in the dock, and these expenses had to be incurred in order to make the dock fit and safe again for navigation. No physical contact is necessary between the defendants' vessel and the thing damaged; there are many instances where an action in rem is brought for damage not resulting from contact with the plaintiffs' property, e.g., claims for personal injury; the claim of the master and crew suing for their lost effects; also, where a vessel grounded owing to negligence in towing; where an anchor and cable was lost by dragging owing to the negligence of another vessel; and where a telegraph cable was cut with an axe in order to free the propeller.

Noad replied.

Reference was made to *The Solway Prince* (3); *The Nightwatch* (4); *The Clara Killam* (5); *The Beta* (6); *The Industrie* (7); *The Port Victoria* (8).

BATESON, J.—I think that this motion must fail. On June 16 of this year a collision took place between a vessel called the *Chr. Knudsen* and a barge called the *Ada Burton*, whereby the *Ada Burton* was sunk in the Stalbridge Dock. The dock is at Garston, near Liverpool, and is owned by the London, Midland, and Scottish Rail. Co., the plaintiffs. The affidavit of Mr. Hartley, who deposes to the facts in the case on behalf of the defendants, is to the effect that the *Ada Burton* was removed by the plaintiffs from the dock to the bank outside. The affidavit of the representative of the plaintiffs is that the wreck was an obstruction in the dock and rendered it unfit and unsafe for navigation and that in order to remove such obstruction and make the dock properly safe and fit for navigation the plaintiffs had to raise and remove the wreck from the dock. The owners of the *Ada Burton*, or their representatives, gave notice of abandonment of their barge on June 18. On the same day the owners of the *Ada Burton*, or their representatives, issued a writ against the defendants in this case, the owners of the *Chr. Knudsen*, for their damage. On the same date the plaintiffs gave notice to the owners of the *Chr. Knudsen*, the defendants, of a claim and of their intention to arrest and detain the *Chr. Knudsen* until bail was given to meet their claim. On June 23 the plaintiffs issued their writ in the present action, and the endorsement on it was as follows:

> "The plaintiffs claim for expenses incurred in and about the lighting, buoying, removal, and destruction of the barge *Ada Burton* which was sunk in the plaintiffs' harbour by the negligence of the defendants or their servants in the month of June, 1932."

That is a writ claiming damages for negligence and specifies that the damages consisted in lighting, buoying, removal, and destruction of the wreck of the *Ada Burton*. On June 24 the solicitors for the defendants gave their undertaking, under protest, to appear and put in bail.

It is now contended for the defendants that there is no right in rem by the plaintiffs against the *Chr. Knudsen*, and that contention is based on the ground that what the plaintiffs claim is not "damage done by a ship." The contention put forward by counsel for the defendants was that a right to arrest the ship and proceed in rem was only given in Admiralty to the party who had the ownership of the chattel damaged, and that, therefore, as the plaintiffs had no title or interest in the chattel damaged, which he says is the barge, at the time of the accident or at any other time, they had no remedy in rem.

Counsel for the plaintiffs relies on the Supreme Court of Judicature (Consolidation) Act, 1925, which by s. 22 (1) (a) (iv) repeats the words of s. 7 of the Admiralty Court Act, 1861, and gives jurisdiction in rem over "any claim for damage done by a ship." The question, therefore, which I have to determine is whether the claim of the plaintiff is for damage done by a ship. I have not the least doubt that it is. The plaintiffs are the owners of the Stalbridge Dock and the *Chr. Knudsen* did

A damage to that dock by sinking the barge and causing an obstruction in the dock. Whether they were negligent in so doing can only be ascertained when the case comes to be tried, but the allegation of the plaintiffs is that the defendants have been negligent, and I must assume that that is true for the purposes of this motion and that they have suffered damage to their property by reason of the alleged negligence of the *Chr. Knudsen*. In those circumstances, it seems to me, without B any doubt, that they are covered by the words of s. 22.

Counsel for the plaintiffs also says that there is no question as to the right of the plaintiffs to recover by an action in personam as for a tort. That was decided in *The Ella* (1). He also referred me to numerous cases in which claimants had recovered by action in rem, although there had been no physical contact between the property injured and the ship. For instance, he referred to claims for personal C injuries, to claims by master and crew for loss of effects, to a claim by a diver, to cases of damage done by a wash of a ship, to the case of a ship forced to run aground by the negligence of another ship, and to the case in which a telegraph cable was cut with an axe, in order to free the propeller, by the mate of a ship. There are a great many cases of that kind in which it has been held to be damage done by ship although there has been no physical damage done directly by the ship.

D Counsel for the plaintiffs said that damage done by a ship means damage done by the navigation of a ship. I think that probably he is right, but in this case it is not necessary to consider or determine that having regard to my view that the owners of the dock have suffered damage by reason of this ship causing an obstruction in this dock. That obstruction had to be removed, and the plaintiffs claim to recover as damages the expenses of lighting, buoying, removing, and destroying that E obstruction, and so reducing the damage done by the defendants' ship.

In my opinion the plaintiffs' claim is a perfectly good one on the face of it. Whether they will be able to prove their allegation of negligence is quite another matter. Counsel for the defendants tried to frighten me by saying what a terrible thing it would be if all dock companies were entitled to sue in rem when a ship had the misfortune to sink another ship in dock or harbour. That does not frighten F me in the least, if they can bring their claims within s. 22, and although the exhaustive research undertaken by counsel for the defendants and those who instruct him has failed to find a precedent for such an action as this being brought in rem, I am not deterred from coming to the conclusion at which I have arrived. The explanation probably is that nobody ever before thought there was anything in the point raised by the defendants on this motion. That is the answer which can G always be made when there is failure to find authority for a particular point. The motion must be dismissed.

Motion dismissed.

Solicitors: *Pritchard & Sons*, for *Batesons & Co.*, Liverpool; *Alexander Eddy*.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

BRADSTREETS BRITISH, LTD. *v.* MITCHELL AND ANOTHER

[CHANCERY DIVISION (Luxmoore, J.), April 5, 6, 7, July 28, 1932]

[Reported [1933] Ch. 190; 102 L.J.Ch. 34; 148 L.T. 111; 48 T.L.R. 670]

Contract—Illegality—Agreement not to disclose information—Indemnity against damage suffered through breach—Breach of agreement—Measure of damages.

The plaintiffs, mercantile inquiry agents, furnished reports on the financial stability of companies and persons engaged in trade to subscribers who undertook not to reveal the information to any party other than a person in their employ, and, further, agreed to indemnify the plaintiffs in respect of any loss or damage suffered or incurred from the breach by the subscriber of that undertaking. The first defendant, one of the subscribers to the plaintiffs' service of information, communicated information supplied to him by the plaintiffs to the person who was the subject of that information. That person brought an action against the plaintiffs for libel contained in the information, and the plaintiffs admitted the libel and paid into court a sum as damages. In an action by the plaintiffs against the first defendant and another for a declaration that the defendants were liable to indemnify the plaintiffs against all loss or damage which they might suffer through the disclosure of the information,

Held: (i) the contract between the parties was not one by which the defendants agreed to indemnify the plaintiffs against the result of the publication of a libel by them, but was a contract not to disclose information which was to be supplied, with a provision for an indemnity in respect of any loss or damage which might be suffered from the breach of the contract not to disclose; and, therefore, the contract was not void as being against public policy; but (ii) on the true construction of the contract, any damages for which the plaintiffs were liable resulted from the publication by them to the defendant of the libellous matter and not from his breach of contract in disclosing the information, and, therefore, the plaintiffs were entitled only to nominal damages for that breach.

Weld-Blundell v. *Stephens* (1), [1920] A.C. 956, applied.

Notes. By s. 11 of the Defamation Act, 1952, an agreement for indemnifying any person against civil liability for libel in respect of the publication of any matter shall not be unlawful unless at the time of the publication that person knows that the matter is defamatory and does not reasonably believe there is a good defence to any action brought upon it.

Considered: *Howard* v. *Odhams Press, Ltd.*, [1937] 2 All E.R. 509.

As to agreements contrary to public policy see 8 HALSBURY'S LAWS (3rd Edn.) 130 et seq., and for cases see 12 DIGEST (Repl.) 269 et seq., 299, 300.

Cases referred to:

(1) *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520; 88 L.J.K.B. 689; 120 L.T. 494; 35 T.L.R. 245; 63 Sol. Jo. 301, C.A.; affirmed, [1920] A.C. 956, H.L.; 89 L.J.K.B. 705; 123 L.T. 593; 36 T.L.R. 640; 64 Sol. Jo. 529, H.L.; 32 Digest 80, *1104*.

(2) *W. H. Smith & Son* v. *Clinton and Harris* (1908), 99 L.T. 840; 25 T.L.R. 34; 12 Digest (Repl.) 299, *2307*.

(3) *Saunders* v. *Seyd and Kelly's Credit Index Co., Ltd., Seyd and Kelly's Credit Index Co., Ltd.* v. *Saunders and Chapman* (1896), 75 L.T. 193; 12 T.L.R. 546, C.A.; 1 Digest 35, *268*.

(4) *Gartside* v. *Outram* (1856), 26 L.J.Ch. 113; 28 L.T.O.S. 120; 3 Jur.N.S. 39; 5 W.R. 35; 18 Digest 143, *926*.

Action for injunction and declaration.

The following statement of the facts are taken from the judgment: The plaintiff company was at all material times carrying on the business of a mercantile inquiry agency, the course of that business being to furnish reports on the financial stability of companies, persons, and firms engaged in trade. The reports are furnished in confidence to persons who are accepted by the plaintiff company as subscribers for a series of reports at an inclusive fee varying in amount according to the number of reports required. The plaintiff company does not accept subscribers indiscriminately and no person or company can become a subscriber unless and until approved by the plaintiff company. Each applicant for acceptance is required to sign a standard application form, and, if the application is accepted, the conditions which are printed on the application form constitute the contract between the plaintiff company and the subscriber. The material terms are contained in cll. (ii), (iii), (iv) and (viii), which are as follows:

> "(ii) that all information whatsoever furnished by the company or by any of its officers, employees, or agents to the subscriber is supplied in strict confidence for the exclusive use of the latter in his business. The subscriber undertakes that in no circumstances will he reveal either the nature of the information or the fact that it has been supplied by the company to any party directly or indirectly other than a person in his employ at the time in his business, whose duty it is to receive such information as the subscriber's representative or otherwise on his behalf. (iii) That the subscriber will neither ask for information for the use of other parties, nor wilfully or negligently suffer this to be done by any other person. (iv) That the company, while using every endeavour to ensure accuracy, does not guarantee the correctness of all or any of the information contained in its reports. (viii) That the subscriber shall indemnify the company and its officers, agents, and employees in respect of any loss or damage whatsoever which it or they may suffer or incur directly or indirectly from the breach by the subscriber or by any of his employees or agents, or any other party through or by him of any of these conditions. In the event of such breach the company may cancel the subscription without any reimbursement in respect thereof."

Each subscriber is supplied with a book of inquiry forms, and if he wishes to inquire about a particular person, firm, or company he fills in one of these forms and sends it to the plaintiff company. The defendant company, Carapanayoti & Co., Ltd., carries on business in England for the sale of products coming from the Sudan and has for some time past been, and still is, the sole agent for a company named in the statement of claim, but which was referred to in the conduct of the case as "X & Co." At all material times the defendant company was a subscriber to the plaintiff company. On March 4, 1931, the defendant company signed and sent to the plaintiff company a form in these words:

> "We desire to renew our subscription with you and shall be glad if you will accordingly supply us—subject to the conditions of your service—with a book of twenty-five inquiry forms at your current tariff rate, for which we enclose our cheque value £3 3s."

On the back of the form are printed the conditions of the service to which I have already referred. The defendant company was accepted by the plaintiff company as a subscriber on the basis that the conditions on the application form constituted the contract between the plaintiff and defendant companies. The defendant company had experienced difficulty in obtaining contracts in its capacity as agent for "X & Co.," and, rightly or wrongly, it attributed the want of success to the fact that unfavourable reports were current as to the commercial standing of "X. & Co." On Nov. 1, 1931, the defendant company sent to the plaintiff company an inquiry form duly filled in requiring information concerning the responsibility, credit, character, and reputation of "X. & Co." In due course, the plaintiff company sent a reply to this inquiry to the defendant company. The reply was of an unfavourable character. The defendant company's solicitors were consulted with regard to it, but no steps were then taken. The result of the consultation was communicated by Mr. Carapanayoti, the managing director of the defendant company, to his co-director, the defendant Mitchell.

Mitchell, though a director, has only one preference share in the defendant company and receives a salary of £200 per annum for his services. He was, and is, according to his own evidence, without means apart from this salary. After this communication the defendant Mitchell applied to the plaintiff company to become a subscriber to its service. His application was made by a letter dated Nov. 10, 1931, in these terms:

> "I shall be obliged if you will be good enough to let me have particulars of your various services, with respective literature, if any. By the same opportunity, please let me have particulars of subscription to obtain credit reports regarding the standing of my clients and correspondents in this country and abroad."

This letter was written on paper specially printed for the purpose with the heading "Harold Mitchell, General Merchant, 118, Chitts-lane, Chadwell Heath, Essex." It was not the fact that Mitchell was carrying on the business of a general merchant or, indeed, any other business on his own account, nor had he any clients or correspondents of his own in this country or abroad as represented in the letter. The plaintiff company sent to Mitchell in due course one of its forms applying for acceptance as a subscriber, which he filled in and returned to the plaintiff company. On Nov. 17, 1931, the plaintiff company wrote to Mitchell a letter which, so far as material, is in these terms:

> "We find, however, that we have no information on our records regarding your good self, and, as we do not accept subscriptions from firms whose status is unknown to us, we are taking the liberty of enclosing herewith a personal statement form which we would ask you to complete and return at your early convenience."

Mitchell replied, on Nov. 18, 1931:

> "In answer to your letter of yesterday, I have been employed by the firm of Carapanayoti & Co., Ltd., 29, Mincing Lane, London, E.C.3, for the last twelve years, and at the present time am an active director of the firm. I am now organising a business on my own account, and for the present this is done from my private address. For references you may apply to Messrs. Carapanayoti & Co., Ltd., 29, Mincing Lane, E.C.3, Messrs. C. M. Coutrie & Co., 57, Mincing Lane, E.C.3."

The statement that Mitchell was organising a business on his own account was untrue.

The plaintiff company accepted Mitchell as a subscriber and sent him the necessary forms in accordance with his application. On Nov. 21, 1931, Mitchell sent to the plaintiff company one of the forms asking for information with regard to the responsibility, credit, character, and reputation of "X. & Co." On Nov. 23, 1931, the plaintiff company sent to Mitchell a report about "X. & Co.," which was in precisely the same terms as the report sent by the plaintiff company to the defendant company. Having received it, Mitchell communicated the report to his co-director, Carapanayoti, who went to the same firm of solicitors as had been consulted on behalf of the defendant company, and, he instructed them on behalf of "X. & Co." Obviously, the whole proceeding was engineered so as to avoid the incurring by the defendant company of any liability for breach of its contract with the plaintiff company, Mitchell, as a man of straw, being ready and willing to incur the risk personally. As the result of this communication the solicitors for "X. & Co." wrote to the plaintiff company on Nov. 24, 1931:

> "Our clients, Messrs. X. & Co. and Mr. X., its managing director, have for many months past been considerably mystified by unexpected and unexplained difficulties encountered by them in dealing with customers abroad, and particularly by the sudden failure at a late date in the negotiations of some important business in New York, as a result, as the customers said, of 'bad reports.' Our clients have, as a result, made it their business to find what

> reports with regard to their credit have been circulated by banks and concerns such as your own, and now learn the contents of a so-called 'Credit Report' which has no doubt been issued by your company and its associated companies to a number of their subscribers purporting to relate to the financial stability and credit of the company, its directors, and other persons. The statements contained in this report are almost without any exception entirely inaccurate, defamatory, and malicious. We are instructed now to inform you that our clients have undoubtedly suffered considerable damage by reason of the publication referred to, and are compelled to institute proceedings to re-establish their credit and reputation and to recover damages in the absence of some adequate adjustment of the matter being promptly come to. The primary object of this letter is to inquire whether you are prepared to give an immediate undertaking not to repeat or circulate anything in the nature of the statements contained in the document referred to or any other inaccurate information as to our clients pending the trial of the proceedings we propose to institute. If you are not we shall be compelled to apply to the court for an injunction."

The plaintiff company wrote at once to the defendant company withdrawing the report sent on Nov. 3, 1931, about "X. & Co." and asking for its return. The plaintiff company also asked for an assurance that the contents of the report had not been disclosed by the defendant company. A similar letter with regard to the report of Nov. 23, 1931, was also sent to the defendant Mitchell. On Nov. 27, 1931, the defendant company and Mitchell returned the reports sent by the plaintiff company. Neither the defendant company nor Mitchell gave any reply to the inquiry about disclosure. It appears that a photostatic copy of the report to Mitchell was made and retained. On Nov. 27, 1931, the solicitors for the plaintiff company wrote to the solicitors for "X. & Co." in these terms:

> "With reference to your letter of the 24th inst. addressed to Messrs. Bradstreets British, Ltd., we shall be glad to know whether it is definitely alleged that our clients have issued reports which are defamatory of 'X. & Co.,' together with the date of the reports, the persons to whom the reports were issued, and the nature of the reports issued. In view of your letter our clients readily undertake not to report upon 'X. & Co.' for the time being."

On Nov. 30, 1931, a writ was issued in the King's Bench Division by "X. & Co." against the plaintiff company claiming damages for libel. In that action the plaintiff company has admitted the libel and has paid into court a sum which it claims is sufficient to cover any damage suffered by "X. & Co." On Dec. 3, 1931, the plaintiff company issued the writ in this action against the defendant company and Mitchell claiming (i) an injunction to restrain the disclosure or communication to any person or company of the report of Nov. 23, 1931, namely, the report to Mitchell, or of the report of Nov. 3, 1931, namely, the report to the defendant company, and also the disclosure of the fact that the plaintiff company supplied such reports, (ii) a declaration that the defendants are respectively liable to indemnify the plaintiff company against all loss or damage which the plaintiff company might suffer or incur directly or indirectly by the disclosure of the reports, and (iii) damages for breach of contract.

Swords, *K.C.*, and *A. Guest Mathews* for the plaintiffs.

Wallington for the defendants.

Cur. adv. vult.

July 28.—**LUXMOORE, J.**, read a judgment in which he stated the facts and continued: I am satisfied on the evidence that the defendant company did not, in fact, disclose the report of Nov. 3, 1931, to any person other than its solicitors for the purpose of obtaining advice as to the position of the defendant company. I am also satisfied by that evidence that as the result of a suggestion on the part of Mitchell and an arrangement between Mitchell and Carapanayoti, the former became a subscriber to the plaintiff company's service and that he did so for the sole purpose of obtaining a report as to "X. & Co." and of disclosing that report to that A company. There is no sufficient evidence to prove that either Mitchell or Carapanayoti, in anything that was done for the purpose of obtaining the report of Nov. 23, or with regard to its disclosure to "X. & Co.," was acting as the agent of the defendant company or in any way on its behalf. It is, therefore, impossible for me to hold that any breach of contract committed by Mitchell was induced by any act of the defendant company. In those circumstances the action against the B defendant company must fail, for the disclosure of the report of Nov. 3, 1931, to the solicitors for the defendant company did not, in my judgment, constitute any breach by the defendant company of its contract with the plaintiff company within the true meaning of that contract.

The defendant Mitchell has undoubtedly committed a breach of his contract with the plaintiff company. It is argued on his behalf that he is not liable because the C contract is wholly void as being contrary to public policy. The attack is founded on the provisions of conditions (ii), (iii), (iv) and (viii). The argument relied on to support the attack is that the fundamental element in the contract is the desire on the part of the plaintiff company to protect itself against the risk of actions for libel resulting from reports made and issued by it to subscribers and that the contract in substance enables the plaintiff company to commit a misdemeanour D with impunity, because the contract furnishes a complete indemnity against the consequences of the libel. *Smith & Son* v. *Clinton and Harris* (2) was relied upon. In that case the defendants gave to W. H. Smith & Son, who were printing and publishing a paper for them, an undertaking that they would indemnify W. H. Smith & Son against any claims whatever that might be made against them in respect of any libel that might appear in the paper. A libel was inserted in the E paper with the knowledge of the staff of W. H. Smith & Son. An action was brought against them in respect of the libel, and they compromised the action by payment of a sum of money and the costs of the action. W. H. Smith & Son sued the defendant on the undertaking to indemnify, and it was held in that action that the undertaking could not be enforced in law. LORD COLERIDGE said (99 L.T. at p. 841): F

> "To print or publish a libel is an illegal act. Everyone who prints or publishes a libel or authorises its printing or publishing by his agent is individually and personally committing an illegal act. . . . To indemnify against publishing a libel is to indemnify against doing a wrongful and illegal act. . . . This, then, being an action brought by one party who has committed a wrongful and illegal act against another party who has committed the same wrongful and illegal act G to indemnify the one party from the wrongful or illegal act committed by both, I am of opinion that such a contract cannot be enforced by law."

I do not think that this decision really affects the present case. The contract, as I read it, is not to indemnify anyone against the result of a libel published by him. It is a contract not to disclose information to be supplied, with a provision for H indemnity in respect of any loss or damage which may be suffered or incurred directly or indirectly from the breach of the contract not to disclose.

I think the case is really covered by the decision in *Weld-Blundell* v. *Stephens* (1). In that case, the plaintiff, Weld-Blundell, employed the defendant, Stephens, who was a chartered accountant, to look into the affairs of a company in which Weld-Blundell was interested. His letter of instructions contained libellous state- I ments relating to certain officers of the company named Lowe and Comins. Stephens handed this letter to his partner, who negligently left it at the company's office. The manager of the company found it, read it, and communicated its contents to Lowe and Comins. These persons sued Weld-Blundell for the libel contained in the letter and recovered damages against him, the jury in each case finding that Weld-Blundell was actuated by malice. Weld-Blundell then sued Stephens for damages for breach of an implied duty to keep secret the letter of instructions. The jury in that action found that it was the duty of Stephens to

A keep the letter secret, that he had neglected his duty, and that the action of libel and the damages recovered therein were the natural consequence of his negligence. DARLING, J., held that the contract between the parties did not contain any implied term to keep the letter secret, and that the defendant had committed no breach of duty towards Weld-Blundell. The Court of Appeal reversed this decision. It was argued on behalf of Stephens in the Court of Appeal that, assuming that there was B an agreement to keep the libels secret, such an agreement would be against public policy and void. The court unanimously refused to accept this argument. BANKES, L.J., said ([1919] 1 K.B. at p. 527):

> "Counsel for the respondent contended that for the purpose of considering the respondent's duty in the matter, the appellant's letter must be treated as a C criminal libel, and the appellant himself as having been guilty of a crime, and that no contract to conceal a crime could be lawful. In the first place I do not agree that a contract not to disclose the fact that a crime has been committed is necessarily either illegal or against public policy, and I need only to refer to the instance I have already mentioned of a solicitor employed to defend a prisoner to whom the prisoner admits that he has committed the crime D with which he stands charged. In the second place I do not think that the respondent is entitled to treat the appellant as a person who has committed a crime by writing and publishing the libels in question. The parties libelled might possibly have taken criminal proceedings, but they did not do so. They preferred to treat the letter as a civil wrong. If the appellant had been indicted it does not at all follow that he would have been convicted; and, unless E and until he is convicted, he is, in my opinion, just as much entitled to say that he is innocent of the crime of libel as he was entitled to say, up to the time when a jury found that he had been actuated by express malice, that he had committed no civil wrong."

He proceeds a little later on:

> F "No direct authority upon this branch of the case appears to exist. In *Saunders* v. *Seyd and Kelly's Credit Index Co., Ltd.* (3), LINDLEY, L.J., appears to have considered that a contract might lawfully be made not to disclose the contents of a defamatory publication, and contracts of that kind are habitually made between trade societies and their customers with reference to the information supplied as to the credit or antecedents of persons with G whom the customers may be concerned in business. It is not suggested that the publication to the respondent caused any special damage to the persons who ultimately brought actions against the appellant. The contract was one which in no sense encouraged the committing of any wrong. On the contrary, its effect must necessarily be to reduce any injury resulting from the wrong already done to a minimum, and to render it unlikely that any breach of the H peace could result from the wrong having been committed. Under these circumstances I do not myself see any objection to holding that the contract as found by the jury in the present case was neither an illegal contract nor one contrary to public policy."

WARRINGTON, L.J., said this: ([1919] 1 K.B. at p. 532):

> I "The first question is, Was the defendant under an implied obligation to take reasonable care that the contents of the letter should not be disclosed? The letter was clearly one of the class of documents to which his general obligation as confidential agent extended, and I think it is for him to make out that its nature as a libellous document excludes it from the class. The defendant contends in the first place that the letter was a criminal libel and that it would be contrary to public policy to treat as valid and binding even an express obligation to conceal a crime, and a fortiori that the law would not imply such an obligation."

This shows clearly that for the purpose of the argument the case was treated as if there was a contract containing an express provision against disclosure. WARRINGTON, L.J., continues:

> "Is there, then, anything in law to render invalid an obligation not to disclose a document which is libellous, or which contains evidence of a private wrong, or to exclude such a document from the implied obligation as to secrecy cast upon a confidential agent."

He then deals with the judgment of WOOD, V.-C., in *Gartside* v. *Outram* (4), to which I need not refer, and continues ([1919] 1 K.B. at p. 534):

> "No other authority in point has been cited to us, but there are expressions in the judgment of LINDLEY, L.J., in *Saunders* v. *Seyd and Kelly's Credit Index, Ltd.* (3), which show that it did not occur to him that there was any objection in law to an obligation not to disclose a libellous document. Such a principle, if it existed, would be of very widespread application. A man discloses to his confidential agent that he has committed a trespass to land or goods, and the agent might with impunity communicate this to the persons concerned with disastrous results to his employer. Indeed, I can see no distinction in this respect between the cases of contract and cases of tort. Unless there be such a distinction, the disclosure by the agent of evidence of a breach of contract on his employer's part would be no breach of his duty to his employer. On the whole I can see no reason founded on public policy or any other ground why an agent should be at liberty to disclose evidence of a private wrong committed by his principal."

SCRUTTON, L.J., said this ([1918] 1 K.B. at p. 547):

> "Even if Mr. Weld-Blundell must be taken to have known that he was doing wrong in sending a letter which the jury have found to be malicious on an occasion otherwise privileged, is there anything contrary to public policy in an agreement with the recipient to take reasonable care not to disclose such a letter? Or, to put it in another form, is it in accordance with public policy to enforce such an agreement? The law looks favourably on attempts to discover and prevent crimes. It frees a person from liability if he prosecutes an innocent man, provided he does so with reasonable and probable cause and without malice. It cannot be contrary to public policy to make full inquiries through competent agents, such as detectives and accountants, before prosecuting; inquiries which may easily involve communication by the parties to the inquiry, each to the other, of statements primâ facie libellous about third persons. In view of the fact that to disclose a primâ facie libellous statement to others may easily involve a risk of actions, and a risk of the jury's finding of malice destroying privilege, I can see nothing contrary to public policy in an agreement to use reasonable care not to disclose such statements to others. Judges and counsel are given absolute privilege in legal proceedings, because of the difficulty in doing their work, if they were to be exposed to actions inviting the jury to find that they acted maliciously and so lost their privilege. I can see nothing contrary to public policy in agreements between employers and employed to afford no opportunity for such actions. The duty of a solicitor employed in defence of a client to keep secret his client's communications, though evidence of that client's crimes, unless compelled to disclose them by legal authority, is a clear case of such a valid agreement. I think an agreement by a detective, private inquiry agent, or accountant to use reasonable care to keep secret the communications of his client as to the matter he is investigating is in accordance with the public policy and should be enforced."

The case went to the House of Lords, but the decision of the Court of Appeal was not challenged on this point. LORD WRENBURY, however, referred to it and said this about it ([1920] A.C. at p. 1000):

> "We have heard little, and I have so far said nothing, as to the question discussed below and on which the Court of Appeal expressed an opinion, namely, whether the duty (although the Court of Appeal call it a contract) found by the jury to keep secret the letter of May 4 was contrary to public policy. All the lords justices held that it was not. I fully agree. The contrary proposition would seem to be that public policy requires that a man should spread a malicious libel to the best of his ability, or at least that he should inform the party libelled—if he does not already know it—in order that he may be induced to bring an action. I do not think public policy requires anything of the kind."

In my judgment, the decision I have referred to covers the present case, and I hold, following that decision, that the agreement not to disclose is a valid and binding agreement.

The question then arises: What damages can be recovered for the breach by the defendant Mitchell? Again, I think the decision in *Weld-Blundell* v. *Stephens* (1) covers the case. The second question there was whether the damages recovered against Weld-Blundell in respect of the libels contained in the letter of instruction were the natural and probable consequence of Stephens's breach of duty not to disclose that letter to any other person. There was considerable difference of judicial opinion on the point. The Court of Appeal held by a majority—SCRUTTON, L.J., being the dissentient judge—that such damages did not result from Stephens's breach of duty and consequently—no other damage having been proved—that Weld-Blundell was only entitled to nominal damages. This decision was upheld in the House of Lords by a majority of three to two. LORD WRENBURY, in his speech, puts the question with great clarity and succinctness. He says ([1920] A.C. at p. 997):

> "The plaintiff, Weld-Blundell, published to the defendant, Stephens, with express malice, a libel upon certain persons, including Lowe and Comins. The relevant facts for the moment stop there. Whether Lowe and Comins knew it or not, there existed, by reason of those facts, a cause of action against Weld-Blundell at the suit of each of them. He lay under a legal obligation to pay damages for his wrongful act. They subsequently learned that they had this cause of action. Each of them sued and recovered damages and costs. Those damages were, of course, the pecuniary equivalent of the wrong done to the parties libelled. Weld-Blundell in those actions suffered no damage at all. He had to pay money, but a defendant is in no sense damaged by being compelled by legal process to satisfy his legal obligation. In that state of facts Weld-Blundell, in the present action, seeks to recover from Stephens the money he has had to pay to Lowe and Comins. He is entitled, he says, to recover it because Stephens, in breach of duty to him, did such acts as that Lowe and Comins became aware that they had the above right of action. If Stephens had not committed that breach of duty Lowe and Comins would not have known that they had, or might not have known that they had, and would not have exercised their right of action, and Weld-Blundell would not have been compelled to pay money. He is damaged, he says, by the amount of money he has had to pay, and Stephens is liable to him in the amount of damages and costs in the libel actions as damages for Stephens's negligence and breach of duty."

If you omit the reference to express malice and substitute the name of the plaintiff company for that of Weld-Blundell, the name of Mitchell for the name of Stephens, and the name of "X. & Co." for the names of Lowe and Comins, and you substitute breach of contract for breach of duty, LORD WRENBURY's statement for all practical purposes fits the present case, with the exception that, instead of "X. & Co." having recovered damages against the plaintiff company, the plaintiff company has admitted liability to pay damages, which have not yet been ascertained. LORD WRENBURY continues:

> "There is, in my judgment, more than one answer to this contention. The relations between Weld-Blundell and Stephens were such that the latter no doubt owed a duty to the former, and in that duty he was negligent. Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence but from his own wrongful act in indulging in libel (I have omitted the word 'malicious' before 'libel') and the amount he had to pay was measured by his own wrongful act. It bore no pecuniary relation to Stephens's wrongful act. Stephens's act was not the cause (whether with or without the word 'effective') of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not causa causans but at most causa sine qua non. In discharging his liability to pay damages for malicious libel Weld-Blundell suffered no damage at all. A man is not damnified by being compelled to satisfy his legal obligation."

Then he cites several cases, and continues: "In the present case Weld-Blundell did an unlawful act in libelling Lowe and Comins. He cannot by legal process reimburse himself for the consequences and throw the cost upon another." Again make the same substitutions and the necessary consequential alterations in the actual language of this passage, as I suggested should be made in the earlier passage that I have read from Lord Wrenbury's speech, and this passage as altered will entirely fit the present case. Lord Wrenbury sums up the matter in this sentence ([1920] A.C. at p. 999):

> "Nothing that Stephens did created the liability under which Weld-Blundell lay. I am quite unable to follow the proposition that the damages given in the libel actions are in any way damages resulting from anything which Stephens did in breach of duty."

Applying that here, the disclosure of Mitchell, although a breach of his contract, did not create the liability under which the plaintiff company lies for the publication to Mitchell. The liability for damages for libel does not arise directly or indirectly out of any act of the defendant Mitchell, and is not, therefore, within the scope of the express indemnity contained in condition (viii) of the contract.

In my judgment, on the true construction of the contract, the defendant Mitchell can only be made liable for damages resulting from his own breach of contract, and these do not include any damage resulting from the publication of the libels to Mitchell. No special damage other than the damage for libel is suggested, and, therefore, the only damages recoverable for Mitchell's breach are nominal damages. The defendant Mitchell has by his counsel stated that there is no intention to make any further disclosure of the report in question, and that he is willing in the circumstances to give an undertaking not to make any further disclosure so long as that undertaking does not preclude his giving such evidence as may be necessary at the trial of the action for libel. In those circumstances there will be judgment for the plaintiffs against Mitchell for 40s. damages and liberty to apply as to an injunction. The plaintiff company must pay the costs of the defendant company and the defendant Mitchell must pay those of the plaintiff company.

Solicitors: *Oswald, Hickson, Collier & Co.*; *Cosmo Cran & Co.*

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

A

FARR *v.* BUTTERS BROS. & CO.

[COURT OF APPEAL (Scrutton, Lawrence and Greer, L.JJ.), June 24, 27, 28, 1932]
[Reported [1932] 2 K.B. 606; 101 L.J.K.B. 768; 147 L.T. 427]

B *Negligence—Duty of manufacturer to user—No contractual relation—Possibility of examination of product before use—Defect in crane discovered during erection—Injury to workman when crane operated.*

The effect of the decision in *Donoghue* v. *Stevenson* (1) (ante p. 1) may enable a workman to succeed in an action for negligence against a manufacturer who has put on the market, with the knowledge that it will be used by a workman, a machine defective in construction in such a way that no C reasonable examination can be expected to discover the defect, and as a result the workman suffers injury, but where the defect is capable of discovery by reasonable inspection, and a fortiori where it has in fact been discovered, no such action can succeed.

The defendants, the manufacturers of a crane, sold it, in parts, to a firm of builders for whom it was assembled under the supervision of one F., an D experienced crane erector in their employ. In the course of the assembly F. noticed that the mesh of certain cog-wheels did not fit, marked the places of the defect in chalk, and observed that he would have to report the matter to his employers. Notwithstanding, F. continued to assemble the crane, and then operated it before the defect was remedied. While he was standing under the jib of the crane, it fell upon him by reason of the defect he had E noticed, and he was killed. In an action by his widow under the Fatal Accidents Act, 1846, against the manufacturers of the crane,

Held: the defect in the crane being discoverable, and having in fact been discovered, there was no breach of duty towards F. by the defendants, the manufacturers.

F *Practice—Trial—Withdrawal of case from jury—Personal injuries—Plaintiff's evidence consistent with accident having been caused by his own act.*

Where the plaintiff in an action for personal injuries gives evidence which is consistent with the accident having been caused by his own act or negligence the judge should withdraw the case from the jury instead of leaving it to them to say whether the admitted facts constituted negligence.

G **Notes.** Compare *Davie* v. *New Merton Board Mills, Ltd.*, [1958] 1 All E.R. 67. Considered: *Otto* v. *Bolton and Norris*, [1936] 1 All E.R. 960; *Dransfield* v. *British Insulated Cables, Ltd.*, [1937] 4 All E.R. 382; *Herschtal* v. *Stewart and Arden, Ltd.*, [1939] 4 All E.R. 123; *Buckner* v. *Ashby and Horner, Ltd.*, [1941] 1 K.B. 321; *Denny* v. *Supplies and Transport Co. and Scruttons, Ltd.* (1950), 66 (pt. 1) T.L.R. 1168. Referred to: *Haseldine* v. *Daw & Son, Ltd.*, [1941] H 3 All E.R. 156; *Travers* v. *Gloucester Corpn.*, [1946] 2 All E.R. 506.

As to a manufacturer's duty to a consumer or user of the manufactured article see 23 HALSBURY'S LAWS (2nd Edn.) 632–634, and for cases see 36 DIGEST (Repl.) 85 et seq.

Cases referred to:

(1) *Donoghue* v. *Stevenson*, ante, p. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 I L.T. 281; 48 T.L.R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 850, H.L.; 36 Digest (Repl.) 85, *458*.

(2) *Caledonian Rail. Co.* v. *Mulholland*, [1898] A.C. 216; 67 L.J.P.C. 1; 46 W.R. 236; 14 T.L.R. 41; sub nom. *Caledonian Rail. Co.* v. *Warwick*, 77 L.T. 570, H.L.; 36 Digest (Repl.) 14, *54*.

(3) *Thomas* v. *Winchester* (1852), 6 New York Rep. 397.

(4) *McPherson* v. *Buick Motor Co.* (1916), 217 New York Rep. 382.

(5) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

(6) *Le Lievre* v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27*.

(7) *Bradford Corpn.* v. *Pickles*, [1895] A.C. 587; 64 L.J.Ch. 759; 73 L.T. 353; 60 J.P. 3; 44 W.R. 190; 11 T.L.R. 555; 11 R. 286, H.L.; 36 Digest (Repl.) 256, *67*.

(8) *Sorrell* v. *Smith*, [1925] A.C. 700; 94 L.J.Ch. 347; 133 L.T. 370; 41 T.L.R. 529; 42 Digest 985, *156*.

(9) *Mullen* v. *Barr & Co., Ltd.*, *M'Gowan* v. *Barr & Co., Ltd.*, 1929 S.C. 461; 36 Digest (Repl.) 19, **69*.

Caledonian Railway v. *Mulholland* (*or Warwick*) (2), [1898] A.C. 216, applied.
Donoghue v. *Stevenson* (1), ante, p. 1, distinguished.

Appeal from an order of McCardie, J., in an action tried by him with a jury.

The plaintiff in the action, which was brought under the Fatal Accidents Act, 1846, was the widow of one Farr, a foreman in charge of a crane, who was killed by the jib falling upon him. The crane was purchased from the defendants, who had manufactured it, by a firm of builders, and was delivered to them in parts. Farr, a foreman erector in the service of the builders, while assembling the parts, noticed that the mesh of cog-wheels which would be used when the crane was working did not fit accurately. He marked in chalk the places where the cogs did not fit accurately, and said that he would have to report the fact to his employers. Notwithstanding this, Farr continued to assemble the crane, and, before the defect had been remedied, commenced to use it. While Farr was standing under the jib of the crane, by reason of the very defect that he had noticed, the jib fell on him and killed him.

The widow, by her statement of claim, alleged that her husband had been killed by reason of breach of duty by the defendants, the manufacturers, in that they were responsible for the safe and efficient working of the crane, and the accident was the result of their negligence in that (a)

> "the said crane was defective in construction and assembled without proper care in that the gear-wheels had not been trimmed to mesh properly, with the result that they jammed and broke, so letting the jib fall";

and (b) that the defendants failed to test the crane before it was delivered or assembled. McCardie, J., held that there was no evidence to go to the jury in support of the plaintiff's case and entered judgment for the defendants. He said that the defect in the crane as supplied by the defendants was not latent, and Farr was guilty in negligence in that, when aware of the defect, he commenced to work the crane. The decision of the House of Lords in *Donoghue* v. *Stevenson* (1) was given after the decision of McCardie, J. The plaintiff appealed, basing her appeal inter alia on the decision in *Donoghue* v. *Stevenson* (1).

Somervell, K.C., and *Edgar Dale* for the plaintiff.
Hilbery, K.C., and *P. Vos* for the defendants.

SCRUTTON, L.J.—This case is of interest, because between the date of the judgment in it given by McCardie, J., and the hearing of this appeal the House of Lords has delivered the very important judgment in *Donoghue* v. *Stevenson* (1). I do not intend to deliver a complete judgment on the effect of that decision; all I propose to deal with are the facts of the present case, and to see how far they are affected by the principles laid down by the House of Lords in *Donoghue's Case* (1).

The action out of which the present appeal arises was brought under the Fatal Accidents Act, 1846, by the widow of a foreman erector of cranes who was killed by the falling of a jib of a crane which he had been responsible for erecting. The action is brought against the manufacturers of the crane who had sold it in parts to a firm of builders, who were themselves to assemble the parts and who, in fact, did this under the supervision of the man who was killed. It seems to be clear that two of the cog-wheels used in the working of the crane did not fit accurately.

The extent of the inaccuracy might be a question of doubt; it might be no more than was to be expected in a new crane, and in erecting it the inaccuracy would be discovered and put right. On the other hand, it might be, and I will assume that in this case the inaccuracy was, more than a slight difference in measurement which might be expected and put right when the crane was erected. The action against the seller of the crane is not by the purchaser of the parts to be assembled. The question, therefore, is: Was there any liability on the part of the manufacturers to the employee of the purchaser? Was there a liability in tort?

The judge did not allow the case to go to the jury, and the evidence on which he came to his conclusion included the testimony of three men who were working with the deceased man and were under his control. All three agreed that the deceased, while the crane was being assembled, ascertained that the cog-wheels did not fit properly, that their inaccuracy was such that the crane was working with unusual stiffness; that he examined the cog-wheels and found where the inaccuracy required to be corrected, that he marked those inaccuracies with chalk in order that they might be corrected, and that he said that he would have to report the matter to his principals. In spite of this discovery and marking and statement of his intention to report, he began working the crane before the inaccuracies had been corrected. In working it in that condition he was, while standing under the jib, killed by its fall, which was due to the effect of the inaccuracies which he had discovered.

This evidence leads to one conclusion only, namely, that after the manufacturers had supplied the parts of the crane to their purchasers there was an opportunity for examination in that the purchasers were going to assemble the parts and that that opportunity was used by their skilled erector who examined the wheels, found their condition, and did not rectify it. There is no dispute about these facts, and we have repeatedly held that when a plaintiff gives evidence which is consistent with the accident having been caused by his own act or negligence the judge ought to withdraw the case from the jury instead of leaving it to them to say whether the admitted facts constituted negligence. MCCARDIE, J., took the view that I have just stated. He said:

> "I repeat in this case that, so far from asking the defendants to erect this machine, Mr. Smith left it to his own men, not to inexperienced men, because again and again in the course of the testimony in this case it was pointed out that Farr was a man of exceptional experience, with full responsibility, and trustworthy in every way. Where then was the concealed defect? I can only say this, that if there had been a case in my view fit to leave to the jury, if there was negligence on the part of the defendants with regard to this meshing, then a fortiori there was negligence on the part of Farr who knew the exact state of affairs, who allowed the crane to be worked with a knowledge of the state of affairs, and who was the first to be responsible for the use of the crane which led to the accident. I cannot see on the authorities, therefore, that there is any cause of action for this negligence by the defendants, if there was negligence."

That is exactly the view I have endeavoured to state.

The learned judge dealt with another matter. There has been a difference of opinion between the judges of the United States and the judges of this country as to the circumstances in which a vendor, in respect of defects in goods sold by him, may be liable to persons with whom he had no contract. The American law on this subject began with *Thomas* v. *Winchester* (3). There the vendor was asked for dandelion extract, but carelessly sold extract of belladonna instead, with the result that a person with whom he had no contract used the extract and suffered injury. In that case the court held that the supplier was liable in tort. LORD ATKIN in his judgment in *Donoghue's Case* (1) referred to the latest case in America on this subject, the decision of CARDOZO, J., in *McPherson* v. *Buick Motor Co.* (4), where the same principle was applied in the case of the purchase from a dealer of a motor car which had been sold to the dealer by the manufacturer, and the purchaser was injured through a defective wheel which could have been discovered by reasonable inspection. The purchaser sued, not the dealer from whom he had bought the car, but the manufacturer. I notice that in his very careful judgment Cardozo, J., points out that the manufacturer could have discovered the defect by reasonable inspection. There does not seem to have been any discussion of the question whether the purchaser could have discovered any defect.

The cases cited in that judgment in some of their results differ very widely from the judgment of the House of Lords in *Donoghue* v. *Stevenson* (1). McCardie, J., in the present case said that, if he had been left to himself unfettered by authority, he would have come to the same conclusion as that at which Lord Esher arrived in *Heaven* v. *Pender* (5). That remark, I think, must have been due to momentary forgetfulness, because Lord Esher in *Le Lievre* v. *Gould* (6) said that his proposition in *Heaven* v. *Pender* (5) had been imperfectly expressed and should be restricted. If he had been left to himself McCardie, J., would have agreed with the American authorities. I agree with what Lord Atkin said in *Donoghue* v. *Stevenson* (1) (ante, p. 13; [1932] A.C. at p. 583):

> "I venture to say that in the branch of the law which deals with civil wrongs, dependent in England, at any rate, entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts, that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges."

English judges have been slow about stating principles going far beyond the facts they are considering. They find themselves in a difficulty if they state too wide propositions and find that they do not suit the actual facts.

In approaching the decision of the House of Lords in *Donoghue's Case* (1), we have to see exactly what they have stated and how they have limited their propositions. Lord Atkin begins by stating this proposition (ante, p. 11; [1932] A.C. at p. 580):

> "The rule that you are to love your neighbour becomes in law: you must not injure your neighbour, and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you could reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be: Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

That is very like the way in which Lord Esher re-stated his proposition in *Le Lievre* v. *Gould* (6). There a surveyor of a building contract gave certificates that certain stages of the work had been reached. These certificates were negligently given and were inaccurate. On the faith of them mortgagees advanced money. Later, finding out the inaccuracies, the mortgagees sued the surveyor for negligently giving the certificates. His answer was that he owed no duty to the mortgagees, and it was held by the Court of Appeal, including Lord Esher, that the defendant was right in that contention. Lord Esher re-stated his proposition thus ([1893] 1 Q.B. at p. 497):

> "If one man is near to another or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property."

With the greatest respect to Lord Esher, that is not accurate. A man may be near to another, he may have a plot adjoining that on which the other has just erected a house, and the second man may build a house which shuts out the view of the first house and depreciates its value. He owes no legal duty not to do this, but he has caused injury to the man near to him, and, yet, is he not within the language used by Lord Esher? Again, a shopkeeper finds a shop erected next door to him with a view to injure him, the second shopkeeper selling the same class of goods at half the price charged by the other. The second man intends to injure the first, but the first has no cause of action although the two are near to each other. Again, a person may on his own land interfere with underground water with the intention to injure his neighbour, but no cause of action arises: *Bradford Corpn.* v. *Pickles* (7). It is quite clear that the statement of Lord Esher and that of Lord Atkin needs a qualification which they have not inserted and the nature of which was discussed by the House of Lords in *Sorrell* v. *Smith* (8).

Apart from the general proposition stated by Lord Atkin which, it seems to me, is wider than is necessary, the House of Lords, in my view, have very definitely limited in the case before them the point at which liability exists on the part of the manufacturer to a person who ultimately uses the goods which the manufacturer has sold. In the particular case the facts were these. A manufacturer of ginger beer sold his ginger beer in opaque bottles. Into one of the bottles a snail had crept. In an earlier Scottish case—*Mullen* v. *Barr & Co.* (9)—the facts were that a mouse had got into a bottle. The manufacturer filled the bottle without noticing the presence of the snail and corked it up. The bottle being opaque no one could see the snail even if the bottle were held up. Ultimately the bottle with the snail in it passed to a consumer who drank the contents, and having been made ill, sued the manufacturer. The Court of Session held that there was no privity between the manufacturer and the consumer. The House of Lords reversed that decision, basing their judgment on the fact that the consumer was in such a proximate relation to the manufacturer that legal relations resulted; and they rested that finding of proximate relationship on the fact that the manufacturer sent out his goods in such a container that no one could discover the defect until the consumer had begun to consume the ginger beer, for the snail did not necessarily come out when the ginger beer was poured out. There was thus no opportunity of independent examination between the manufacturer and the consumer.

That proximate relationship, according to the three law lords who constituted the majority, created the liability of the manufacturer. Lord Thankerton said (ante, p. 22; [1932] A.C. at p. 602):

> "The present case is that of a manufacturer and a consumer, with whom he has no contractual relation, of an article which the manufacturer did not know to be dangerous, and, unless the consumer can establish a special relationship with the manufacturer, it is clear, in my opinion, that neither the law of Scotland nor the law of England will hold that the manufacturer has any duty towards the consumer to exercise diligence. In such a case the remedy of the consumer, if any, will lie against the intervening party from whom he has procured the article. I am aware that the American courts, in the decisions referred to by my noble and learned friend, Lord Macmillan, have taken a view more favourable to the consumer."

There, obviously the liability is rested upon the fact that the manufacturer sends out the ginger beer in such a condition that it cannot be inspected until it is consumed. The possibility of no intermediate examination makes the relation so proximate that there is a liability. Lord Macmillan puts it in this way (ante, p. 31; [1932] A.C. at p. 622):

> "It may be a good general rule to regard responsibility as ceasing when control ceases. So, also, where between the manufacturer and the user there is interposed a party who has the means and opportunity of examining the manufacturer's product before he reissues it to the actual user. But where, as in

> the present case, the article of consumption is so prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with, I regard his control as remaining effective until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded."

That is substantially the same ground. LORD ATKIN winds up his judgment with these words (ante, p, 20; [1932] A.C. at p. 599):

> "If your Lordships accept the view that this [the appellant's] pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

There again the liability is rested upon no reasonable possibility of examination between the manufacturer and consumer.

Among the authorities cited by LORD ATKIN he referred to the decision in *Caledonian Rail. Co.* v. *Mulholland* (2), which was binding upon him. There the owners of a wagon hired it out to carry goods knowing that it would leave their railway and pass on to the line of another railway, where it would be discharged by workmen of the second railway company or of a customer of that railway. The House of Lords held that there was no liability in those circumstances by the owners of the wagon to the workman who was injured by using it. LORD ATKIN distinguished that case by saying that there was ample opportunity of inspection by the second railway; the relations were not proximate. Throughout his judgment, in passage after passage, he made the liability turn upon the question of proximate relationship and rests the proximate relationship on the fact that there could be no intervention between the manufacturer in that case and the consumer, because the way in which the ginger beer was put up prevented examination, or because there was no intermediate person who could or would examine the container.

If that is the line on which *Donoghue's Case* (1) proceeded, how does the decision in that case apply to the facts in the present case? The manufacturers of this crane sent out the crane in parts; they were not to assemble the parts. If there were defects in the parts, they might be in the class of defects that would be discovered by whoever put the parts together. The purchasers, through their foreman, the deceased man, discovered the defects in assembling the parts, and saw that they required to be remedied, but, nevertheless, the foreman took upon himself the responsibility of working the crane before the defects had been remedied. Those facts bring the case clearly within the principle of *Caledonian Rail. Co.* v. *Mulholland* (2), and equally clearly do not bring it within that of *Donoghue's Case* (1). In the present case there was ample opportunity for intermediate examination before the deceased man met with his accident. It has been said by counsel for the appellant that any question of contributory negligence ought to have been left to the jury. It appears to me that the difficulty arises earlier than that on the decision of the House of Lords in *Caledonian Rail. Co.* v. *Mulholland* (2), and, by exclusion, on that in *Donoghue's Case* (1). In the present case McCARDIE, J., was right in deciding as he did, and in those circumstances the appeal must be dismissed in spite of the new view involved in the recent decision of the House of Lords.

LAWRENCE, L.J.—I agree. In the special circumstances of this case I am clearly of opinion that it does not come within the principle of *Donoghue's Case* (1).

A From the judgments of the majority of the House it appears clearly that the principle laid down was not intended to apply to a case like the present, where the facts were that the manufactured article was supplied by the manufacturers in parts to be assembled by the purchasers before use. There was a defect in certain of the parts which was patent and discoverable and was in fact discovered by the deceased man before he put the crane in operation. Counsel for the plaintiff has B said that, though the defects might be visible, and no doubt were, they contained a latent danger, but to the erector of a crane the fact of cog-wheels not fitting must have brought home to him that there was something wrong in the manufactured article which he was going to put into use, and on the admitted facts he took his chance of operating the crane without remedying the defects and without even testing the crane before putting it into operation. I need not refer to the C fact that he himself stood under the jib while it was being lowered for the first time after the parts had been assembled.

GREER, L.J.—I have come to the same conclusion. By her statement of claim the plaintiff set out to establish that her husband had been killed by reason of a breach of duty by the defendants, the breach of duty alleged being that the crane D was supplied by the defendants, who were responsible for its safe and efficient working, and the accident was the result of the negligence of the defendants, their servants, or agents, in that (a)

> "the said crane was defective in construction and assembled without proper care in that the gear-wheels had not been trimmed to mesh properly, with the result that they jammed and broke, so letting the jib fall";

E and (b) "the defendants failed to test the crane before it was delivered or assembled." That, of course, means failure to discover by testing that the defect mentioned had in fact existed when the crane was delivered. I agree that the plaintiff's witnesses gave evidence showing that the cog-wheels had not been trimmed to mesh properly, and that, if the wheels had been trimmed to mesh properly when the crane was delivered to the purchasers, this accident would not F have happened. The question is whether that in law would justify a finding for the plaintiff.

It is common knowledge among lawyers that mere negligence in itself is not a cause of action. To give a cause of action there must be negligence which amounts to a breach of duty towards the person claiming. There are many cases where there has been clear negligence in the absence of which the damage would not G have happened, and yet there is no liability under English law. A person may carelessly leave his keys about whereby another is able to steal a valuable piece of property and sell it, but unless the sale was in market overt the purchaser gets no property in the article, notwithstanding that it was very careless of the owner to leave his keys about, thus enabling the theft to be committed. Take another example, that of a negligent misrepresentation of fact. Even the person directly H affected by that may not be entitled to a remedy. That may be regarded as a serious defect in the law where it is shown that the common law has established no duty towards the person who has been injured by the negligence.

It has been contended that the law laid down in *Donoghue's Case* (1) has established a rule which is sufficient here to justify the plaintiff's claim. Upon the facts proved in that case the decision of the majority of the House can be regarded I as a reasonable interpretation of the law, but it was a very different case from that with which we are concerned. I agree that the decision in *Donoghue's Case* (1) may enable a workman to succeed where the manufacturer has put upon the market, with the knowledge that it was going to be used by a workman, a machine defective in construction in such a way that no reasonable examination can be expected to discover the defect. I have very little doubt that this decision of the House of Lords may be extended to such a case. In the present case the particular defect complained of was not only capable of discovery by reasonable inspection, but was in fact discovered by this unfortunate man himself. As I read the judgments in the House of Lords, the fact that the defect has not been discovered by such a reasonable examination as ought to be anticipated breaks in such a case the chain between the manufacturer and the person using the article sold so that it is impossible to say in law that the manufacturer has committed a breach of any duty which he owes to the user of the article. In Lord Atkin's judgment I find that in dealing with *Heaven* v. *Pender* (5) he said this (ante, p. 12; [1932] A.C. at p. 582):

> "I draw particular attention to the fact that Lord Esher emphasises the necessity of goods having to be 'used immediately' and 'used at once before a reasonable opportunity of inspection.' "

Again, Lord Atkin refers to the relationship which may be brought about where inspection by the person using the article might reasonably be interposed. Further, he said (ante, p. 20; [1932] A.C. at p. 599):

> "If your Lordships accept the view that this (the appellant's) pleading discloses a relevant cause of action, you will be affirming the proposition that by Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

That is the principle on which he based his judgment. I understand him to mean that if the manufacturer had left a reasonable possibility of examination, either through an intermediate person or by its use, the liability would not arise because there would be no duty in those circumstances.

In this case another question might have to be determined—whether or not, assuming a duty on the part of the manufacturers, the accident to the deceased was due to his own negligence. It may well be that on the facts the negligence was his, because it looks as if any experienced user of the crane ought to have known that in the condition in which it was to his knowledge there was considerable risk of an accident. I prefer not to base my decision upon that. I base it upon the point that there was no evidence that the accident was caused through any breach of duty towards the deceased by the defendants, the manufacturers.

Appeal dismissed.

Solicitors: *W. H. Thompson*; *William Charles Crocker.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

FITZGERALD *v.* S.S. LONA (OWNERS)

[KING'S BENCH DIVISION (Roche, J.), November 24, 25, 1932]

[Reported 148 L.T. 166; 49 T.L.R. 77; 18 Asp.M.L.C. 364;
44 Ll.L.R. 212]

Shipping—Cargo—Discharge—Right of consignee to select method—Selected method ceasing to be available during discharge—Resultant right of consignee.

A charterparty provided for various methods of discharging cargo, the consignees having the right to select any one or more of these methods if customary and available at the time of discharge. The consignees selected discharge into lighters and sent lighters alongside the ship to take delivery. Before delivery could be made this method of discharge was rendered impossible by a strike of lightermen, and the shipowners discharged on the quay, which was the only other method customary at the port in question. In an action by the consignees to recover loss they had sustained by the adoption of this method of discharge,

Held: the principles governing the doctrine of election did not apply to the selection by the consignees of the method of discharge; if the method selected by the consignees ceased to be available during the process of discharging, the right of the consignees to insist on discharge by the method which they had selected also ceased, and their right would then be limited to discharge in accordance with a method which was in fact available; where lighters, but not lightermen, were available the consignees were not entitled to claim discharge into lighters; and, therefore, the action failed.

Notes. This case was explained by the Court of Appeal in *Rederiaktiebolaget Macedonia* v. *Slaughter* (1935), 40 Com. Cas. 227, where GREER, L.J. (at p. 240) said that he did not regard the decision in the present case as being that the shipowners were under a duty to discharge on the quay and so put themselves under obligations which might be onerous. The most that could be said was that when the time came when they could discharge on the quay under the custom, they were entitled to discharge by that means.

Referred to: *S.A. Maritime et Commerciale of Geneva* v. *Anglo-Iranian Oil Co.*, [1953] 2 All E.R. 1325.

As to method of discharging cargo see 30 HALSBURY'S LAWS (2nd Edn.) 530 et seq., and for cases see 41 DIGEST 531 et seq.

Action tried by ROCHE, J., without a jury.

The plaintiffs were the owners of a quantity of timber shipped from the Baltic to London in the defendants' ship *Lona*, and they claimed damages for an alleged breach of contract caused by the defendants having discharged the cargo in a manner differing from that provided for in the charterparty.

The plaintiffs held in respect of their goods five bills of lading which incorporated the terms of the charterparty, which was in "Baltwood" form and contained the following clause (cl. 15):

> "The cargo shall . . . be discharged by the vessel in the customary manner as fast as the vessel can deliver during the ordinary working hours of the port on to the quay, and/or into lighters and/or craft, and/or rafts, and/or wagons, and/or on to bogies, and thereon stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary or available at the time of discharge."

The *Lona* arrived at the Surrey Commercial Docks on Jan. 1, 1932, at which date there was in progress a strike of lightermen at the Port of London. The plaintiffs selected as the method of discharge delivery into lighters, which they said were available when the ship arrived at the docks, and their complaint was that the defendants ignored this selection and delivered on the quay, whereby they (the plaintiffs) became liable for extra charges. Having made their selection at a time when lighters were available, they contended that they were not obliged to make a fresh selection if that method became unavailable during the progress of the discharging. The defendants said that at the material time the method of discharge into lighters was not available.

Dickinson, *K.C.*, and *Stranger* for the plaintiffs.
Le Quesne, *K.C.*, and *McNair* for the defendants.

ROCHE, J.—This action raises an interesting point upon the construction and effect of a charterparty used for the importation of timber into this country, and upon the methods of discharge adopted for the delivery of timber cargoes in the Port of London. The action is between the plaintiffs, who were the holders of five bills of lading, and the defendants, owners of a foreign steamship called the *Lona*. The plaintiffs' claim is that they shall be repaid certain landing and other charges they have incurred, and expenses they have been put to, in respect of the cargo covered by their bills of lading. The grounds upon which the plaintiffs seek to recover the sums of money in question are, as they, the plaintiffs, allege, that the shipowners have broken their contract with them, inasmuch as they have discharged on the quay and have thereby given rise to the extra expense, whereas they ought either to have discharged into lighters, or to have given the plaintiffs notice before they did what they, in fact, did do, namely, discharge on the quay.

The *Lona*, having loaded a cargo of timber at Norsundet, in Scandinavia, arrived with that cargo in London, and was ready to discharge by Jan. 1, 1932. At that time there had been an agreement between the employers in the Port of London and most of the unions which represent various grades of dock and port labour for a reduction in wages. One of the two unions in which lightermen, one of the classes of labour concerned, are enrolled was not a party to the agreement. During the discharge those men, who are described as "blue ticket" men, struck work. The plaintiffs were desirous of securing the discharge into lighters and had made arrangements to that effect. They sent three firms of lightermen to take delivery of the goods, and some of the men in charge of those lighters were "blue ticket" men, and they struck. The lightermen belonging to the other union were instructed not to strike, since those in the executive office of their union had agreed to the reduction; but, nevertheless, some of these men did strike, partly out of sympathy with the "blue ticket" men, and partly, I suppose, out of a natural disinclination to accept a reduction in their pay. Further, the men who were engaged on board the ship, the stevedores, became involved to a certain extent. For some time they were unwilling to work, and at a later stage they were told not to involve themselves in this very confused dispute and only to discharge into lighters where there was a union man, a man with a "white ticket," in charge. In those circumstances the cargo which the plaintiffs would have got into lighters was put on the quay, it being possible to discharge on the quay when it was impossible to discharge into lighters, and thereby the landing charges were incurred, which are the matters complained of in this action.

Before examining the documents upon which the solution of this controversy depends, I think my judgment will be more intelligible if I mention quite broadly what the contractual position was, and what the contention of the plaintiffs is in this matter. Broadly speaking, the contractual position was that the consignees had the right of choice between various methods of discharge and the shipowners were obliged to discharge by that method if it was available. The contentions of the plaintiffs with regard to the matter are threefold. They say, first, that the charterparty meant that if lighters were available, then the method of discharge by lighters was available, and that the question of the men who manned the lighters was not really material to the question of the availability of the lighters. That last question, in regard to men and the effect of their absence, was covered, not by the discharge clause, but by the strike clause. Secondly, the plaintiffs say that the material clause, cl. 15 of the charterparty, contemplated selection or election

A by the consignees, and that it contemplated that that should take place before the discharge began, or, at all events, that the consignees might make it before the discharge began, and, if they made it they were not obliged to change it. It was conceded that at the time the plaintiffs made their choice the chosen method had to be available, but it was said that, if it was so chosen, the choice was within the rights of the consignees, and it was irrevocable in the sense that they were not B obliged to change it afterwards. Thirdly, the plaintiffs say that the shipowners had no right when the circumstances arose which did arise on Jan. 4, suddenly to change without notice into discharging on the quay, and that they ought to have given both notice and opportunity sufficient to allow the consignees to change their plans for themselves.

In the light of these contentions I turn to the charterparty, which is for this C purpose the material document. The contract between the parties is contained in the bills of lading, but inasmuch as the bills of lading incorporated all the terms and conditions of the charterparty, it is sufficient to deal with the matter as if it fell under the charterparty itself. Clause 1 of the charterparty provides for the carriage and for the payment of freight and other charges, and it provides, partly in express words and partly by reference to a schedule, for the incidence D and payment of other and further charges if a more expensive method of discharge is chosen than discharge on a quay. The next material clause is cl. 15, which provides for discharge by the shipowner in the customary manner in ordinary working hours. Then follow these words:

> "On to the quay and/or into lighters and/or craft and/or rafts . . . and thereon E stowed and/or stacked as customary at the port of discharge, the consignees having the right to select any one or more of these alternatives if customary or available at the time of discharge."

There follow further stipulations as to the payment of expenses and another reference to the schedule of apportionment, which deals with the various ports and provides what is to be done if the ship is discharged by hand or by ship's F tackle. It provides for it being roughly stacked on the quay and for it being stowed if it is discharged into lighters. Then it stipulates what is to be paid in respect of these various operations. The last clause which I think is relevant to this matter, cl. 20, is one on which much reliance was placed by the plaintiffs. That clause provides for the payment of freight and charges in various proportions, or percentages, which involve, so it is said, the charges and the amounts being G accurately known at the time when the discharge begins, or before it begins. The importance of that is that it involves the selection or election of the method of discharge before it begins; otherwise, it could not be known how much the charges would be and it could not be known how much a given percentage of the freight and charges would amount to.

Those being the relevant clauses of the charterparty and the contentions of the H plaintiffs, I now proceed to deal with them. I think my judgment will be most easily understood if I deal with the last of them first, namely, the question whether the shipowner could act as he did without further notice than was given in this case and without allowing further time for the consignees to act for themselves. In my view, this charterparty provides for the doing of all the work of discharging by the shipowners and not by the consignees, and it was not merely the right but I the duty of the shipowner to incur these charges, and to land the goods, if that was the proper way of dealing with them. Therefore, no question arises of allowing the consignees the opportunity of themselves doing that which in fact the shipowner did.

That being the scheme of this charterparty, I have to consider the main contention, namely, that the consignees had a right to select the method of discharge before the discharge began, and had neither right nor obligation to change it afterwards. I think that that is a mistaken view of cl. 15. In my opinion, this is not a matter of election at all, and the principles which govern election do not apply to it. I do not suppose the parties meant to exclude this doctrine by an inadvertent use of the word "select," but I think that word is well chosen. In my judgment, the right or the duty of the consignees was not to declare an election at any specified time. No doubt, there might be business necessity and there may have been implications in the charterparty that reasonable notice should be given as to what course it was proposed to adopt in order that the shipowner on his part might make appropriate preparations; but so far as the clause itself is concerned, the right of the consignees was to have the cargo discharged in such method as was available at the time when it had to be discharged. In my opinion, if the discharge occupied a fortnight and the method of discharge into lighters was available during the first week and then ceased to be available, the right of the consignees to insist upon discharge into lighters would cease and their right would then be limited to discharge in the method which was in fact available. The words "at the time of discharge" and the fact that obviously the method to be adopted is at the choice of the consignees, point in the direction of the conclusion which I have adopted. I think the defendants' argument as to the effect of conferring the choice upon the consignees points very strongly in that direction. As to the argument of the plaintiffs based upon cl. 20, I think that that clause is quite capable of being both read and carried out without involving the necessity that there should be an irrevocable fixing of the amount of charges to be incurred before the discharge began. No doubt, the payments on account of freight and charges would have to be made, as to the earlier of them, upon the basis of the charges which would accrue due if the method of discharge then contemplated and declared were adopted and followed throughout, but there is nothing in cl. 20 to prevent an adjustment at the end of the discharge in respect of any change in the amount of charges, any more than there is to prevent an adjustment of a matter which is expressly dealt with in cl. 20 itself, namely, an adjustment as to the amount of cargo in respect of which freight had to be paid.

That being the construction I adopt of cl. 15, it remains for me to deal with one other matter of construction. The point is whether, if lighters are available, but men are not available, cl. 15 allows the consignee to claim discharge by means of lighters. The answer to that question is, in my judgment, emphatically in the negative. The clause reads "the consignees having the right to elect any one or more of these alternatives." The alternatives are not lighters, but the method of discharge into lighters, and that method is not available inasmuch as the lighter is not equipped and furnished with the necessary crew.

Solicitors: *Wm. A. Crump & Son*; *Botterell & Roche.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

BIRMINGHAM AND MIDLAND MOTOR OMNIBUS CO., LTD. *v.* NELSON

[King's Bench Division (Lord Hewart, C.J., Talbot and Humphreys, JJ.), July 13, 1932]

[Reported [1933] 1 K.B. 188; 102 L.J.K.B. 47; 147 L.T. 435; 96 J.P. 385; 48 T.L.R. 620; 30 L.G.R. 390; 29 Cox, C.C. 529]

Road Traffic—Express carriage—Combined road and rail excursion—Agreement for hire of motor omnibus between omnibus owner and railway company—No fares paid by passengers to omnibus owners—"Special occasion"—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 61 (1) (*b*), *s.* 61 (2).

A company which owned motor omnibuses entered into an agreement with a railway company whereby they undertook to provide motor vehicles for the conveyance of passengers arriving by specified trains at a named station to a neighbouring works, where conducted tours took place. Persons taking part in these combined rail and road excursions obtained from the railway company two tickets, one for the rail journey and the other for the journey by road from the station to the works, and did not pay any fare direct to the motor omnibus owners, who received from the railway company a certain sum for each passenger carried. Part of the sum paid by the railway company was contributed by the owners of the works where the conducted tours took place. Neither the railway company nor the motor omnibus owners held a road service licence to operate public service vehicles in connection with the visits to the works.

Held: the motor omnibus owners were guilty of an offence under s. 72 of the Road Traffic Act, 1930, as their vehicles were being operated as "express carriages" within the meaning of s. 61 (1) (b), and they were not protected by the proviso to that section, as the vehicles were not being used "for the conveyance of a private party" nor (Talbot and Humphreys, JJ., dubitantibus on this point) "on a special occasion."

Notes. Section 61 of the Road Traffic Act, 1930, has been replaced by s. 39 and s. 40 of and Sched. 6 to the Road Traffic Act, 1956, for which see 36 Halsbury's Statutes (2nd Edn.) 842–844.

Considered: *Miller* v. *Pill*, [1933] All E.R.Rep. 34.

As to public service vehicles and "special occasions," see 31 Halsbury's Laws (2nd Edn.) 728 et seq., and for cases see Digest Supps., tit. Street Traffic, case no. 76a et seq.

Case Stated by the Birmingham stipendiary magistrate.

Informations were preferred by the respondent Nelson, a person duly authorised in that behalf by the Traffic Commissioners for the West Midland Traffic Area, under s. 72 of the Road Traffic Act, 1930, against the appellants, the Birmingham and Midland Motor Omnibus Co., and also against the Southern Rail. Co. and the Great Western Rail. Co., alleging that they, on Sept. 30 and Oct. 7, 1931, unlawfully used a motor omnibus without a road service licence, in contravention of the above section. On the hearing of the informations the following facts were proved or admitted:

The Southern Rail. Co. advertised visits from various places in the south of England to the works of Cadbury Bros., Ltd., at Bournville, and the visits took place on Sept. 30 and Oct. 7, 1931. Those and other similar trips were organised by the Southern Rail. Co. and Cadbury Bros., Ltd., in conjunction with the Great Western Rail. Co. The arrangements provided that any member of the public buying a ticket from the Southern Rail. Co. should be conveyed by train to Snow Hill Station, Birmingham—by the Southern Railway as far as Basingstoke—and thence by the Great Western Railway, and should be conveyed from Snow Hill Station to Bournville and back to Snow Hill Station by the motor vehicles of the appellants. There was evidence that a member of the public desirous of joining one of the organised trips might obtain from the Great Western Rail. Co. at Snow Hill a ticket for the journey by motor only from Snow Hill to Bournville and back, but there was no evidence that any such ticket was issued either on Sept. 30 or Oct. 7. Arrangements were made by Cadbury Bros., Ltd., for conducted tours of Bournville works and garden village, and for the entertainment of the visitors at tea. In addition, they issued a certain number of white tickets for distribution by their retailers which were regarded as an invitation from Cadbury Bros., Ltd., to the holders entitling them to special privileges. The appellants received from the Great Western Rail. Co. some weeks' notice of the dates on which motor vehicles were required for those visits, and then decided whether they would undertake to supply the vehicles required. They did so undertake for Sept. 30 and Oct. 7, and were informed by the Great Western Rail. Co. by telephone of the number of persons to be carried about one and a quarter hours before the arrival on each occasion of the train at Snow Hill Station. The appellants could then calculate the number of vehicles required. In all, eighteen excursions from various towns were arranged during 1931. The appellants received from the Great Western Rail. Co. 1s. 8d. for each person carried. Of that sum the Great Western Rail. Co. collected 1s. 3d. from the Southern Rail. Co. and the balance of 5d. from Cadbury Bros., Ltd. The appellants' vehicles were provided exclusively for those who had obtained tickets either from the Southern Rail. Co. or the Great Western Rail. Co., and no other persons were in fact carried on the vehicles. No person carried on any of the vehicles either on Sept. 30 or Oct. 7 paid anything directly to the appellants, whose name did not appear on any advertisement or ticket issued in connection with the trips. The Southern Rail. Co. issued to each passenger booking to Bournville two tickets, one for the rail journey and the other for the journey in the appellants' vehicles from Snow Hill. On Sept. 30 and Oct. 7 neither the appellants nor either of the railway companies held a road service licence to operate public service vehicles in connection with the visits to Bournville, but, after a letter from the Traffic Commissioners to the appellants which stated that "it would appear that a road service licence is required for this service," application was made, and a licence was granted on Nov. 18, 1931.

The appellants contended that the vehicles were contract carriages as defined in s. 61 (1) of the Road Traffic Act, 1930; that they were used on special occasions for the conveyance of private parties, and that they therefore came within the proviso to s. 61 (2); and that no road service licence was necessary. The respondent contended that the vehicles were express carriages within s. 61 and were not being used on special occasions for the conveyance of private parties. The magistrate was of opinion that the vehicles were used as express carriages, contrary to s. 72, and held that the appellants were guilty of the offences charged and that the railway companies were guilty of aiding and abetting them, but he dismissed the summonses under the Probation of Offenders Act, 1907, on payment of five guineas costs.

By the Road Traffic Act, 1930, s. 61:

> "(1) Public service vehicles shall, for the purposes of this Part of this Act and the regulations made thereunder, be divided into the following classes: . . . (b) Express carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than 1s. for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question. (c) Contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum . . . (2) It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the

> vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares whether the payments are solely in respect of the journey or not: Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

W. T. Monckton, K.C., and *J. W. Morris* for the appellants.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Wilfrid Lewis* for the respondent.

LORD HEWART, C.J.—In my opinion, the decision of the learned stipendiary magistrate in this case was manifestly right. Section 61 (2) of the Road Traffic Act, 1930, provides that

> "where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not."

Those words seem to me to apply quite clearly to this case.

It has been argued faintly by counsel for the appellants that the proviso applies, but that argument involves two things—that the vehicle referred to was being used on a special occasion and for the conveyance of a private party. I cannot myself see any ground upon which the occasion here referred to can properly be called a special occasion; but to say that the party was a private party seems to me to be quite clearly in contradiction of the facts. It was a party got together by means of advertisements issued to the public as a whole. For those reasons, without entering into others, I think that the contentions on the part of the respondent were good, and that the decision of the learned stipendiary ought to be upheld. I think, in other words, that this appeal fails and ought to be dismissed.

TALBOT, J.—I am of the same opinion. The question is whether the appellants are liable to a penalty for using a vehicle as an express carriage without obtaining a licence prescribed by s. 72 of the Act of 1930, and the question is practically, therefore, whether their vehicles, used in the way which appears in this Case, are "express carriages" within the meaning of s. 61 (1) (b) of the Act. They say that they are not, but that they are contract carriages within para. (c) of the same sub-section. It may be true (indeed it probably is) that if you read para. (c) without the explanation provided by the Act itself the words include a case in which passengers are carried on the road in pursuance of a contract made for the hire of the use of the vehicle in which they are carried with the persons who have the control and ownership of the vehicle. They are carried by someone who hires it in order to carry passengers, and they pay those who control the vehicle for the use of it; that is to say, the contract in this particular case is by the railway company with the appellants to carry certain passengers who reach by the railway the point at which the omnibus or coach starts on the outward journey. But that is restricted and explained by the second sub-section of s. 61, and I am bound to say that it appears to me that the intention and the effect of that sub-section are perfectly plain. The Act provides:

> "It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them . . ."

Those words are perfectly plain. They disregard all questions as to the ownership of the vehicle or the way in which the passengers are brought to it or go to it, the way in which they pay, or how much they pay. The condition is that they should be carried in a motor vehicle in consideration of separate payments. In order to be entitled to ride in a motor vehicle they must get the consent of those who have

A the control of that vehicle. They can get that consent either gratis or for payment and if they do pay, they are carried in the vehicle in consideration of separate payments made by them. To guard against any possible ambiguity the words are added

> "whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not." B

That provision about carrying for hire or reward at separate fares takes us back to the first two divisions of public service vehicles in the earlier part of the section, namely, stage carriages and express carriages; and it says that, if that is done, as it was done in this case, the vehicle is to come within whichever of these categories C is appropriate to the particular circumstances. In other words, the appellants are left without any alternative to the position that these vehicles were express carriages within the meaning of the statute.

They have only one way of avoiding that conclusion, and that is to bring themselves within the proviso to sub-s. (2). I need not read that again, but it exempts from this category, to put it shortly, vehicles used on a special occasion for the D conveyance of a private party. It is quite obvious that there may be questions very difficult to decide in particular cases whether the use is on a special occasion, and whether the use is for the conveyance of a private party. I do not think the question whether this use was on a special occasion is wholly free from doubt, but with regard to the other matter which it is equally incumbent on the appellants to prove if they are to escape the provisions of the first part of the section, namely, E whether this was for the conveyance of a private party, that seems to me really almost incapable of argument, and, indeed, it could only be supported by the learned counsel by giving to the word "private" the very remote construction (remote, I mean, from any meaning which, as far as I know, has ever been attributed to the word "private" in any connection): "a party assembled by some person other than the proprietors of the vehicle." I agree with my Lord that the F decision of the learned magistrate was quite correct in this case, and that the appeal should be dismissed.

HUMPHREYS, J.—I entirely agree with the judgments which have been delivered. I should like to say that for my own part I share the doubt expressed by my brother TALBOT as to whether this occasion may properly be described as a "special occasion," but I express no opinion about that. G

Appeal dismissed.

Solicitors: *Sydney Morse & Co.*; *Treasury Solicitor.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re DE CARTERET. FORSTER *v.* DE CARTERET

[Chancery Division (Maugham, J.), June 21, 22, 1932]

[Reported [1933] Ch. 103; 102 L.J.Ch. 52; 148 L.T. 188; 48 T.L.R. 555; 76 Sol. Jo. 474]

Charity—Relief of poverty—"Poor people"—Gift for allowances to widows and spinsters with incomes between £80 and £120 with preference to widows having dependent young children.

A testator by his will gave a sum of money to his trustees to invest and apply the income at their discretion in annual allowances of £40 to widows or spinsters in England whose annual income otherwise should not be less than £80 or more than £120, preference to be given to widows with young children dependent on them.

Held: the class to be benefited were "poor people," and this was, therefore, a good charitable trust, because

(i) in practice the beneficiaries would be limited to widows with young children dependent on them;

(ii) "poor people" is not necessarily confined to the destitute poor, but includes persons of limited means whose circumstances are such that it is very reasonable that some contribution should be made to them to enable them to carry out their duties as citizens, and so that the words would include these beneficiaries.

Re Gardom (1), [1914] 1 Ch. 662, and *Re Clarke* (2), [1923] 2 Ch. 407, followed.

Notes. Considered: *Re Central Employment Bureau for Women and Students Careers Association, Inc.*, [1942] 1 All E.R. 232. Referred to: *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund, Ryan* v. *Forrest*, [1945] 2 All E.R. 711.

As to the meaning of "poor," see 4 Halsbury's Laws (3rd Edn.) 214, para. 492 text and note (d), as to gifts to persons of moderate and limited means, see ibid. 215, text and notes (n)–(p); and for cases on the subject see 8 Digest (Repl.) 316–319, *13–48*. For the preamble to the Statute 43 Eliz. 1, c. 4 (the Charitable Uses Act, 1601), see 2 Halsbury's Statutes (2nd Edn.) 916.

Cases referred to:

(1) *Re Gardom, Le Page* v. *A.-G.*, [1914] 1 Ch. 662; 83 L.J.Ch. 681; 108 L.T. 955; reversed sub nom. *Le Page* v. *Gardom* (1915), 84 L.J.Ch. 749, H.L.; 8 Digest (Repl.) 324, *78*.

(2) *Re Clarke, Bracey* v. *Royal National Lifeboat Institution*, [1923] 2 Ch. 407; 92 L.J.Ch. 629; 129 L.T. 310; 39 T.L.R. 433; 67 Sol. Jo. 680; 8 Digest (Repl.) 324, *80*.

(3) *Re Estlin, Pritchard* v. *Thomas* (1903), 72 L.J.Ch. 687; 89 L.T. 88; 47 Sol. Jo. 691; 8 Digest (Repl.) 323, *77*.

(4) *Re Dudgeon, Truman* v. *Pope* (1896), 74 L.T. 613; 12 T.L.R. 465; 8 Digest (Repl.) 317, *35*.

(5) *Mary Clark Home, Trustees* v. *Anderson*, [1904] 2 K.B. 645; 73 L.J.K.B. 806; 91 L.T. 457; 20 T.L.R. 626; 5 Tax. Cas. 48; 28 Digest 13, *63*.

(6) *Morice* v. *The Bishop of Durham* (1804), 9 Ves. 399; affirmed (1805), 10 Ves. 522; 32 E.R. 947, L.C.; 8 Digest (Repl.) 390, *836*.

(7) *Spiller* v. *Maude* (1864), 5 New Rep. 30; 11 L.T. 329; 28 J.P. 804; 10 Jur.N.S. 1089; 13 W.R. 69; subsequent proceedings (1881), 32 Ch.D. 158, n.; 8 Digest (Repl.) 355, *342*.

(8) *Re Lacy, Royal General Theatrical Fund Association* v. *Kydd*, [1899] 2 Ch. 149; 68 L.J.Ch. 488; 80 L.T. 706; 46 W.R. 664; 8 Digest (Repl.) 356, *351*.

(9) *Cunnack* v. *Edwards*, [1896] 2 Ch. 679; 65 L.J.Ch. 801; 75 L.T. 122; 61 J.P. 36; 45 W.R. 99; 12 T.L.R. 614, C.A.; 8 Digest (Repl.) 355, *344*.

(10) *A.-G.* v. *Wilkinson* (1839), 1 Bear. 370; 3 Jur. 358; 48 E.R. 983; 8 Digest (Repl.) 430, *1195*.

By his will, dated June 5, 1931, the testator bequeathed

> "the sum of seven thousand pounds, free of duty, to trustees upon trust to invest the same . . . and to use the income thereof in providing allowances of forty pounds each to widows or spinsters in England, whose income otherwise shall not be less than eighty or more than one hundred and twenty pounds per annum. . . . preference to be given to widows with young children dependent on them and, in all cases, the allowances to be renewable each year at the discretion of the trustees with due regard to any altered circumstances of the beneficiaries."

By this summons the executors asked whether the trusts were valid charitable trusts.

Hon. Denys Buckley for the trustees.

Roxburgh, for the residuary legatees, relied on *Re Estlin, Pritchard* v. *Thomas* (3), *Re Clarke, Bracey* v. *National Lifeboat Institution* (2), *Re Dudgeon* (4), and *Mary Clark Home, Trustees* v. *Anderson* (5).

Stafford Crossman, for the Attorney-General, cited *Morice* v. *Bishop of Durham* (6), *Spiller* v. *Maude* (7), *Re Clarke* (2), *Re Dudgeon* (4), and *Mary Clark Home, Trustees* v. *Anderson* (5).

June 22.—**MAUGHAM, J.**, stated the facts, and continued: The question that arises is whether that is or is not a charitable disposition. The following observations are, I think, beyond dispute. First, the persons to benefit under the trust are persons who are widows or spinsters and therefore have not a husband or, it may be said, in all probability, a man to assist in supporting them; secondly, they are to be a somewhat special class—namely, a class with an income of not less than £80 or more than £120 per annum; thirdly, as was admitted by counsel for the residuary legatees in his able argument, there is preference to be given to widows with young children dependent on them; and, as there must be many widows with young children dependent on them in this country who satisfy the condition, and the preference is compulsory, I must treat the bequest as if, in substance, it were given for widows with young children dependent on them who otherwise comply with the conditions; and finally the testator has told the trustees that each year they are to reconsider the matter of the allowances, with due regard to the then circumstances of the beneficiaries. The difficulty in the case arises from the fact that the beneficiaries are not to be absolutely poor; they must have not less than £80 per annum and not more than £120 per annum; and it is said, not without force, that people with incomes within those amounts are not within the phrase "poor people" as found in the first part of the enumeration of charitable objects which is contained in the preamble to the Statute of Elizabeth. [I.e. the Charitable Uses Act, 1601 (43 Eliz. 1, c. 4), the preamble to which is expressly preserved by and set out in the Mortmain and Charitable Uses Act, 1888, s. 13 (2), Schedule].

In considering whether this is a good charity I am not in a position to treat the matter de novo, because the whole question is a matter of case law at the present time. It would be difficult, if not impossible, to suggest any new principle of interpretation as applicable to the question before me. I am, I think, justified, according to existing authorities, in saying that objects analogous to those mentioned in the statute are, in certain circumstances, admitted to be charities, and the precise words contained in the preamble to the statute are not final in coming to a conclusion as to whether a particular trust is charitable in the legal sense. In the present case the charity is sought to be supported on the ground that it is a charity for the relief of poverty in a wide sense, and I propose to

A consider it from that point of view. The decisions show beyond question that "poverty" does not mean destitution.

The first case to which I think I may usefully refer is *Spiller* v. *Maude* (7), decided by SIR GEORGE JESSEL, M.R., in 1881. SIR GEORGE was there dealing with a society called the York Theatrical Fund Society, and the report shows that the rules and regulations provided, amongst other things, for the granting of annuities
B to contributors to the fund

> "on becoming incapacitated either by age, accident, or other infirmity from exercising the duties of his or her profession as an actor or actress and not possessing an independent income of more than £50 per annum."

SIR GEORGE, having gone through the rules of the society, came to the conclusion
C that the whole fund was a charity, and he thought that poverty was clearly an ingredient in the qualification of members who were to receive the benefits of the society.

Accordingly I may take that decision as showing that from the year 1881 a person possessing an income of £50 per annum was treated by the court as a proper object of charity in the legal sense, and that a fund for that purpose might well be a trust
D providing for the relief of poverty. Questions relating to the Royal General Theatrical Fund Association, which I may observe was incorporated by Royal Charter as long ago as 1853, came before STIRLING, J., in *Re Lacy, Royal General Theatrical Association* v. *Kydd* (8). In the report of that case there is a statement of the rules of the Association, and it is to be remarked that r. 15 provided for certain annuities for life, and r. 18 provided that

> E "no member of class A who shall be in receipt of £120 per annum, of the class B who shall be in receipt of £200 per annum, or of the class C, who shall be in receipt of £250 per annum, derivable from whatever property or source, independent of his or her claim on the fund of this Association, shall be entitled to an annuity out of such fund";

and there was a somewhat similar provision in r. 19. Counsel for the plaintiff
F argued that the Association was not charitable, but STIRLING, J., who reserved judgment, began his judgment in these terms ([1899] 2 Ch. at p. 156):

> "The first point is whether the Royal General Theatrical Fund Association is or is not a charity. This turns on the terms of the charter dated Jan. 29, 1853, and the rules therein referred to, particularly rules 15, 18, and 19. It was considered in *Spiller* v. *Maude* (7) by SIR GEORGE JESSEL, M.R., who held that
> G the Association was a charity, and with that opinion I respectfully agree."

STIRLING, J., then added: "I do not consider that *Spiller* v. *Maude* (7) was overruled or intended to be overruled, by *Cunnack* v. *Edwards* (9)." That is, therefore, a clear expression of opinion by STIRLING, J., that the Royal General Theatrical Fund Association is a good charity, that is to say, a charity for the relief of poverty or a closely analogous object.

H Those are also reported cases as to institutions, and I refer to them for the purpose of showing that an institution whose objects are, amongst other things, to benefit persons whose incomes may be as much as £250 a year are yet to be considered, in proper cases, to be charitable institutions. I do not think that, as a general rule, a person must or may be considered to be a poor person if his income is, for example, £200 a year; but those cases go to show that the institutions
I may be charitable, although a person to be benefited has an income of that size. Accordingly, there may be a good charity in the sense of a charity for the relief of poverty, although persons to be benefited are by no means destitute.

There have been some far more recent decisions which seem to me to tend in the same direction. In *Re Gardom, Le Page* v. *A.-G.* (1), EVE, J., had to deal with a gift which was to be applied "for the maintenance of a temporary house of residence for ladies of limited means." There were other points, to which I need not refer, as they are irrelevant to the present purpose. The learned judge said ([1914] 1 Ch. at p. 667):

> "Primâ facie, the institution referred to by the testatrix would appear to be of a charitable nature. It is not contemplated that it will be self-supporting, and the obvious intention of the testatrix is that her money is to be used for the purpose of providing a temporary home for ladies whose means are too restricted to permit of their providing or enjoying unassisted the advantages of such a home. The validity of the bequest as a good charitable trust is challenged upon two grounds, the one that the object is not in fact charity, and the other that, even if it be so, the subsequent bequests in the will, the one in the nature of an alternative bequest, if the house is considered unnecessary, and the other the bequest of the residue, introduce alternative objects which may or may not be charitable, and that the whole disposition is thereby rendered void for uncertainty. I do not think either of these contentions has been established. It is true that ladies of limited means are not destitute, and that the expression 'limited means' may vary in its significance according to the standard by which the means are measured, but these arguments provoke the rejoinder that there are degrees of poverty less acute than abject poverty or destitution, but poverty nevertheless, and further that in this case the limitation of means contemplated is presumably a limitation such as will necessitate some contribution from the bounty of the testatrix before the recipient would be able to defray the expense of a temporary sojourn in the home. In other words, the objects to be benefited by the bequest are ladies too poor to provide themselves with a temporary home without outside assistance. I think it is a good charitable trust and am fortified in this view by some observations of CHANNELL, J., in *Mary Clark Home, Trustees* v. *Anderson* (5). He says:
>
> > 'I do not know any standard of poverty, nor how I can lay down any rule; the only thing to guide me is this: these ladies go to the institution for the sole reason that they are poor, and the institution is absolutely charitable'."

Then EVE, J., continued:

> "I think those words apply exactly to the section of the public and to the institution which the testatrix here intended to benefit and to subsidise."

I accept the statement of the learned judge there as a correct view of poverty as a phrase implied in the first words of the preamble to the Statute of Elizabeth: and I think the learned judge was properly, if I may say so, expressing the opinion that in the Statute of Elizabeth the expression "poor people" is not necessarily confined to the destitute poor, and that it would include persons who, having regard to the circumstances in which they are placed, and perhaps to the class from which they have come, may properly be regarded as persons within the language or spirit of that preamble. That view, I think, is also expressed by ROMER, J., in *Re Clarke, Bracey* v. *National Lifeboat Institution* (2). There were a number of points discussed in that case, but the only point that is material to the present purpose was this. The testator had given a portion of his residue

> "to (a) such institution society or nursing home or nursing homes or similar institutions as assist or provide for persons of moderate means such as clerks governesses and others who may not be able or eligible to benefit under the National Health Insurance Act Old Age Pensions Act or other Act of a like character to have either surgical operations performed together with medical treatment or medical treatment alone on payment of some moderate contribution. . . ."

There was a society which claimed that it carried out those purposes, namely, the Lister Institute of Preventive Medicine; and on their behalf it was contended that the gift was a good charitable gift. The contrary was contended, and there was an elaborate argument on both sides. ROMER, J., in the course of a reserved judgment, said ([1923] 2 Ch. at p. 411):

A "It was contended on behalf of the next-of-kin that the objects designated under heading (a) [that is the heading that I have already stated] are not charitable, because the persons to be benefited by the institution, society, or nursing homes are not poor persons but persons of moderate means, and because such persons can only benefit on payment by themselves of some moderate contribution. But in *Mary Clark Home, Trustees* v. *Anderson* (5)
B a home for ladies in reduced circumstances, of which the inmates were to be ladies of fifty years old or upwards, possessed or in the actual enjoyment of a fixed yearly income of not less than £25 and not more than £55, was held to be exempt from landlord's property tax and inhabited house duty as being a 'house provided for the reception and relief of poor persons.' CHANNELL, J., in the course of his judgment, after referring to the case of *A.-G.* v. *Wilkinson*
C (10), said:

> 'That seems to lead to the conclusion that the expression "poor person" in a trust for the benefit of poor persons does not mean the very poorest, the absolutely destitute; the word "poor" is more or less relative'."

Then, after citing another passage, to which I have already referred, in the
D judgment of CHANNELL, J., and after referring to the decision of EVE, J., in *Re Gardom, Le Page* v. *A.-G.* (1), and citing the passage on which I have relied, the learned judge continues as follows:

> "In the present case I think that the words of CHANNELL, J., and the words of EVE, J., which I have quoted, apply exactly to the sections of the public and to the institutions which the testator intended to benefit and to subsidise. The
> E 'moderate means' to which he refers are presumably means so moderate as to necessitate some contribution from the bounty of the testator before the recipient would be able to procure the surgical operation or medical treatment of which the recipient might stand in need. In *Re Estlin* (3) it was moreover held by KEKEWICH, J., that a bequest for the purpose of establishing a home of rest for lady teachers was none the less charitable because each lady was re-
> F quired to contribute 10s. a week for board and lodging. I therefore hold that the objects under heading (a) are charitable objects."

It is true that the gifts in the cases to which I have referred are gifts to institutions or for the establishment of institutions. When the question, however, is as to the ambit of the preamble to the Statute of Elizabeth, and particularly with regard to the limits that must be placed on charities for the relief of poverty,
G I am of opinion that I may safely regard those cases as establishing the correctness of the passages which I have read from *Re Gardom, Le Page* v. *A.-G.* (1), and may properly hold that in the case of a gift to trustees for the purpose of relieving persons of limited means—in the present case, persons whose means are between £80 and £120 per annum—whose circumstances are such that it is very reasonable that some contribution from the bounty of the testator should be made to them to
H enable them to carry out their duties as citizens, such an object is a good charitable object, and may properly be supported by the court without any departure from the principles on which the court is accustomed to act. In the present case, as I have pointed out, the gift is, in effect, for widows with young children dependent on them. I should have hesitated to hold that it was a good charitable gift had it been merely for "widows and spinsters"; but I think that, in
I confining it, as I do, in effect, to widows with young children dependent on them, I am within the decisions to which I have referred.

Solicitors: *Gray & Dodsworth*; *Treasury Solicitor.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

FANTON *v.* DENVILLE

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), March 16, April 22, 1932]

[Reported [1932] 2 K.B. 309; 101 L.J.K.B. 641; 147 L.T. 243;
48 T.L.R. 433]

Master and Servant—Duty of master—Provision of safe plant—Delegation of duty to competent persons—Provision of means to perform duty.

A master is only liable in respect of an injury to his servant if he is personally guilty of negligence causing the injury. He does not warrant that the plant and property used in his business are safe. He only promises that he will use reasonable care to see that they are safe, and he fulfils that promise by using reasonable care to appoint competent persons to see that safe machinery, plant and appliances are provided and maintained for the use of his workpeople and furnishing them with adequate resources to get the necessary plant and materials and do the work properly. If he does so, he is not liable for the negligence of the persons so appointed.

Wilson v. *Merry* (1) (1868), L.R. 1 H.L. Sc. 326, applied.
Smith v. *Baker & Sons* (2), [1891] A.C. 325, distinguished.
Toronto Power Co., Ltd. v. *Paskwan* (3), [1915] A.C. 734, doubted.

Notes. Considered: *Knott* v. *London County Council*, [1933] All E.R. Rep. 172; *Hunt* v. *Rice & Son, Ltd.*, [1937] 3 All E.R. 715. Doubted: *Wilsons and Clyde Coal Co.* v. *English*, [1937] 3 All E.R. 628. Referred to: *Rudd* v. *Elder Dempster & Co.*, [1933] 1 K.B. 566; *Russell* v. *Criterion Film Productions*, [1936] 3 All E.R. 627; *Radcliffe* v. *Ribble Motor Services, Ltd.*, [1938] 1 All E.R. 71; *Youngman* v. *Pirelli General Cable Works, Ltd.*, [1940] 1 K.B. 1; *Speed* v. *Thomas Swift & Co.*, [1943] 1 All E.R. 539; *Alexander* v. *Tredegar Iron and Coal Co.*, [1945] 2 All E.R. 275.

As to the liability of a master in the case of injury to his servant, see 22 HALSBURY'S LAWS (2nd Edn.) 187 and 191, and for cases see 34 DIGEST 194 et seq.

Cases referred to:

(1) *Wilson* v. *Merry* (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675, H.L.; 34 Digest 211, *1747*.

(2) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 40 W.R. 392; 7 T.L.R. 679, H.L.; 36 Digest (Repl.) 154, *812*.

(3) *Toronto Power Co., Ltd.* v. *Paskwan*, [1915] A.C. 734; 84 L.J.P.C. 148; 113 L.T. 353, P.C.; 34 Digest 196, *1611*.

(4) *Priestley* v. *Fowler* (1837), 3 M. & W. 1; Murp. & H. 305; 7 L.J.Ex. 42; 1 Jur. 987; 150 E.R. 1030; 34 Digest 71, *479*.

(5) *Young* v. *Hoffman Manufacturing Co., Ltd.*, [1907] 2 K.B. 646; 76 L.J.K.B. 993; 97 L.T. 230; 23 T.L.R. 671, C.A.; 34 Digest 42, *180*.

(6) *Hutchinson* v. *York, Newcastle, and Berwick Rail. Co.* (1850), 5 Exch. 343; 6 Ry. & Can. Cas. 580; 19 L.J.Ex. 296; 15 L.T.O.S. 230; 14 Jur. 837; 155 E.R. 150; 34 Digest 207, *1697*.

(7) *Wigmore* v. *Jay* (1850), 5 Exch. 354; 6 Ry. & Can. Cas. 589; 19 L.J.Ex. 300; 15 L.T.O.S. 206; 14 J.P. 387; 14 Jur. 837; 155 E.R. 155; 34 Digest 208, *1698*.

(8) *Riley* v. *Baxendale* (1861), 6 H. & N. 445; 30 L.J.Ex. 87; 25 J.P. 407; 9 W.R. 347; 158 E.R. 183; 34 Digest 195, *1593*.

(9) *Seymour* v. *Maddox* (1851), 16 Q.B. 326; 20 L.J.Q.B. 327; 16 L.T.O.S. 387; 15 Jur. 723; 117 E.R. 904; 34 Digest 199, *1628*.

(10) *Potts* v. *Port Carlisle Dock and Rail. Co.* (1860), 2 L.T. 283; 8 W.R. 524; 34 Digest 206, *1683*.

(11) *Brown* v. *Accrington Cotton Spinning and Manufacturing Co., Ltd.* (1865), 3 H. & C. 511; 34 L.J.Ex. 208; 13 L.T. 94; 29 J.P. 744; 159 E.R. 631; 34 Digest 206, *1684*.

(12) *Feltham* v. *England* (1866), L.R. 2 Q.B. 33; 7 B. & S. 676; 36 L.J.Q.B. 14; 31 J.P. 212; 15 W.R. 151; 34 Digest 213, *1759.*

(13) *Cribb* v. *Kynoch, Ltd.*, [1907] 2 K.B. 548; 76 L.J.K.B. 948; 97 L.T. 181; 23 T.L.R. 550, D.C.; 34 Digest 211, *1742.*

(14) *Cole* v. *De Trafford (No. 2)*, [1918] 2 K.B. 523; 87 L.J.K.B. 1254; 119 L.T. 476; 62 Sol. Jo. 635, C.A.; 34 Digest 198, *1621.*

(15) *Tarrant* v. *Webb* (1856), 18 C.B. 797; 25 L.J.C.P. 261; 27 L.T.O.S. 202; 20 J.P. 711; 4 W.R. 640; 139 E.R. 1585; 34 Digest 217, *1791.*

(16) *Burr* v. *Theatre Royal, Drury Lane, Ltd.*, [1907] 1 K.B. 544; 76 L.J.K.B. 459; 96 L.T. 447; 23 T.L.R. 299; 51 Sol. Jo. 265, C.A.; 34 Digest 210, *1728.*

(17) *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 4 Jur.N.S. 767; sub nom. *Bartonshill Coal Co.* v. *Clark*, 6 W.R. 664, H.L.; 34 Digest 126, *971.*

(18) *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338; 68 L.J.Q.B. 918; 81 L.T. 62; 47 W.R. 680; 15 T.L.R. 468, C.A.; 34 Digest 195, *1590.*

(19) *Laubach* v. *Co-optimists Entertainment Syndicate, Ltd.* (1926), 43 T.L.R. 30; 34 Digest 220, *1824.*

(20) *Hedley* v. *Pinkney & Sons S.S. Co.*, [1894] A.C. 222; 63 L.J.Q.B. 419; 70 L.T. 630; 42 W.R. 497; 10 T.L.R. 347; 7 Asp.M.L.C. 483; 6 R. 106, H.L.; 34 Digest 210, *1726.*

(21) *Coldrick* v. *Partridge, Jones & Co., Ltd.*, [1910] A.C. 77; 79 L.J.K.B. 173; 101 L.T. 835; 26 T.L.R. 164; 54 Sol. Jo. 132, H.L.; 34 Digest 211, *1741.*

(22) *Searle* v. *Lindsay* (1861), 11 C.B.N.S. 429; 31 L.J.C.P. 106; 5 L.T. 427; 8 Jur.N.S. 746; 10 W.R. 89; 142 E.R. 863; 34 Digest 213, *1761.*

(23) *Sword* v. *Cameron*, 1839, 1 Dunl. (Ct. of Sess.) 493; 34 Digest 199, *1624 vii.*

(24) *Bartonshill Coal Co.* v. *McGuire* (1858), 3 Macq. 300; 31 L.T.O.S. 258; 4 Jur.N.S. 772; sub nom. *Bartonshill Coal Co.* v. *Stewart*, 6 W.R. 697, H.L.; 34 Digest 126, *972.*

(25) *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685; 56 L.J.Q.B. 340; 57 L.T. 537; 51 J.P. 516; 35 W.R. 555; 3 T.L.R. 495, C.A.; 34 Digest 232, *1976.*

(26) *Johnson* v. *Lindsay & Co.*, [1891] A.C. 371; 61 L.J.Q.B. 90; 65 L.T. 97; 55 J.P. 644; 40 W.R. 405; 7 T.L.R. 715, H.L.; 34 Digest 22, *24.*

(27) *Swainson* v. *North Eastern Rail. Co.* (1878), 3 Ex.D. 341; 47 L.J.Q.B. 372; 38 L.T. 201; 42 J.P. 357; 26 W.R. 413, C.A.; 34 Digest 214, *1769.*

(28) *Paterson* v. *Wallace & Co.* (1854), 1 Macq. 748; 23 L.T.O.S. 249, H.L.; 34 Digest 194, *1586.*

(29) *Lovegrove* v. *London, Brighton and South Coast Rail. Co.*, *Gallagher* v. *Piper* (1864), 16 C.B.N.S. 669; 4 New Rep. 291; 33 L.J.C.P. 329; 10 L.T. 718; 10 Jur.N.S. 879; 12 W.R. 988; 143 E.R. 1289; 34 Digest 204, *1673.*

(30) *Skipp* v. *Eastern Counties Rail. Co.* (1853), 9 Exch. 223; 2 C.L.R. 185; 23 L.J.Ex. 23; 156 E.R. 95; sub nom. *Skeipp* v. *Eastern Counties Rail. Co.*, 22 L.T.O.S. 123; 36 Digest (Repl.) 156, *824.*

Appeal from an order of Hawke, J., in an action tried by him with a common jury at the Northumberland Assizes.

The plaintiff, an actor, was engaged by the defendant, who ran several touring companies, to appear in a play at Gateshead. The play the company were to produce was a melodrama in which the execution of a murderer by hanging was to be shown. The defendant had given instructions that this scene should not be acted as so many people objected to it. The defendant's brother, Charles, who was the business manager, and one Rean, the producer, however, decided to include the scene, and offered the plaintiff, who played the part of the "murderer," a "double" if he did not care to undertake it. At the rehearsal, which was conducted by the producer, a scaffold with a drop and a mattress upon which the "murderer" should fall were provided. Both the business manager and the stage manager went successfully through the drop, but the plaintiff, when attempting it, fell and broke his ankle.

The plaintiff sued the defendant, alleging that it was the duty of the latter to provide fit and safe machinery, plant and properties, and further that it was the duty of the defendant or his servants to take reasonable precautions to prevent danger to the plaintiff. The questions put to the jury with their answers were as follows: (i) Was the property as a whole reasonably fit for the purpose for which it was applied?—No. (ii) If not, did the defendant know it was not safe?—Yes. (iii) If not, was or were some person or persons engaged by the defendant to provide the property guilty of negligence?—Yes. (iv) Was the plaintiff guilty of contributory negligence?—No. (v) If the property was dangerous, did the plaintiff know of the dangerous nature of the property?—No. (vi) If the property was dangerous, did the plaintiff agree to take the risk upon himself?—No answer. (vii) Was the plaintiff ordered by Charles Denville or any other person authorised by the defendant to undertake the drop?—Yes. (viii) Was it within Charles Denville's authority to give such order?—Yes. (ix) Was the drop scene authorised by the defendant?—Yes. (x) Was the incident of trying the drop when the plaintiff sustained his injury an authorised test of the drop?—Yes. (xi) Damages?—£93 1s. 6d. Judgment was entered for the plaintiff and the defendant appealed.

J. Alan Bell for the defendant.
C. B. Fenwick for the plaintiff.

Cur. adv. vult.

April 22. The following judgments were read.

SCRUTTON, L.J.—This appeal from a judgment of HAWKE, J., after trial at the Northumberland Assizes with a common jury, raises interesting questions both of fact and law. The plaintiff, Frederick Fanton, was an actor, and the defendant, Alfred Denville, had for years run for his profit several touring companies, known as stock companies, who act various plays in various towns of the provinces, usually a week at each town. He did not himself travel with the stock companies, though he occasionally visited them. The defendant had engaged the plaintiff to act any part he was required to take in the stock company, "subject to the usual rules of the profession." In the middle of December, 1930, this stock company was performing at a theatre in Gateshead. There was apparently an agreement between the defendant and the owners of the theatre by which the owners of the theatre provided stock scenery and stock properties; the visiting company provided special scenery and properties. In the week in question the visiting company was going to perform a very thrilling and popular melodrama representing the murder of Maria Marten of the Red Barn. There is a scene in the complete version of this play showing the execution of the murderer by hanging. This scene does not always suit the tastes of provincial audiences, and the actual hanging of the murderer is frequently omitted, the curtain going down before the actual hanging. There was evidence by Alfred Denville that he had given instructions not to play this scene, as people did not like it; this was confirmed by his producer, and the plaintiff said he knew that on previous occasions Alfred Denville had objected to the scene. The defendant had as his representatives with the touring company his brother, Charles Denville, as business manager, Starber, the stage manager, and Rean, the producer. There was some conflict of evidence how the execution scene came to be put in; it was said that the local theatre wanted it; anyhow, Charles Denville and Starber told the plaintiff, who was the "murderer," it was going to be done, and offered him a "double" if he did not like to do the drop himself. There was to be a rehearsal at 1.30 p.m., which would be under the control of Rean the producer. The local theatre had put together a scaffold with a drop, and a mattress on which to drop had been provided. I think it must be taken to have been provided by the touring company, though the evidence was obscure. Before 1.30 p.m. Charles Denville, Starber, and the plaintiff were on the stage. Rean had not arrived. The scaffold was there and the mattress. Starber went through the drop first with perfect safety; he was said to have acrobatic experience.

Charles Denville did the same drop, also in safety. Then the plaintiff tried; obviously it is necessary, when the platform suddenly gives way beneath the man being hanged, that he should simultaneously bend his knees to break the force of the fall. The plaintiff did not do this apparently, and broke his ankle. When the scene was performed during the week, extra thicknesses of baize were laid on the mattress, and no accident occurred.

The statement of claim alleged negligence of the defendant or his servants, and that it was the duty of the defendant to provide fit and safe machinery and plant and properties for the carrying on of the business, and of the defendant or his servants to take reasonable precautions to prevent danger to the plaintiff. It further alleged that the defendant failed to provide safe properties or plant, and the defendant, or his servants Denville or Starber, failed to use a sufficient mattress to make the plaintiff's fall safe.

The jury were asked a number of questions. They found that the mattress was not reasonably safe, and, in my opinion, there was evidence on which they could so find. They were asked whether the defendant knew that it was not safe, and they said he did. In my opinion, there was no evidence on which they could give this answer. If it is suggested that it means that Charles Denville or Starber knew that it was unsafe, the jury were not asked this, and, considering that both Charles Denville and Starber dropped in safety before the plaintiff, it would be odd if they knew it was unsafe. The jury found that some person unnamed engaged by the defendant was guilty of negligence, and that the plaintiff was not guilty of contributory negligence. They were not asked if the defendant had used reasonable care to appoint competent persons to manage the production and rehearsals, and, in my opinion, there was no evidence on which they could have answered this question in the negative. One act of negligence is not, in my opinion, evidence of general incompetence, still less of the fact that the employer did not take reasonable care to secure competence. The jury found that the plaintiff did not know of the dangerous character of the mattress, and did not answer the question whether he agreed to take the risk on himself, presumably because they found he did not know of the risk. They found that Charles Denville was authorised to order the plaintiff to undertake the drop and did so. As Charles Denville was business manager and there was a producer, it is doubtful whether this answer could stand, especially as Charles Denville asked if the plaintiff objected, and offered him a "double." The plaintiff admits that he was asked if he objected, and said "No." The jury then found that the execution scene was authorised by the defendant. There was, in my opinion, no evidence to justify this finding, unless it means that the defendant's servants authorised the drop scene; all the evidence is that the defendant always objected to the execution scene. The nearest evidence is that the producer was told by someone that the defendant had authorised the drop scene. This hearsay evidence is not sufficient to justify the answer. The jury found £93 damages, and the judge entered judgment for that sum.

These facts and findings seem to me to raise the question of law whether an employer warrants that the plant and property of the business are safe, or only promises that he will use reasonable care to see that they are safe, and whether he fulfils that promise by using reasonable care to appoint competent persons to undertake that duty, and, if he does so, is not liable for the negligence of his delegates, the servant injured not being entitled to complain of the negligence of a fellow-servant by reason of the doctrine of common employment identified with *Priestley* v. *Fowler* (4), because, in the words of KENNEDY, L.J., in *Young* v. *Hoffman Manufacturing Co., Ltd.* (5) ([1907] 2 K.B. at p. 657),

> "the master does not undertake to indemnify the servant against the consequences of the negligence of any person except the master himself."

[His Lordship discussed the defence of common employment, which was abolished by the Law Reform (Personal Injuries) Act, 1948, and continued:]

It will be seen that so far the "doctrine of common employment" protects the master from liability to one servant for loss caused by the negligence of a fellow-servant, but leaves vague what duties, if any, lie on the master himself as to the provision of suitable plant and competent fellow-servants. Is the master's duty to make good an absolute warranty of the fitness of buildings and plant employed in his business for their purpose, or is it an obligation merely personally to use reasonable care to see that they are fit, and does the master fulfil this duty by using reasonable care to appoint competent servants, in which case he is not liable if they act negligently?

The point was first considered in the same year in which *Hutchinson* v. *York, Newcastle and Berwick Rail. Co.* (6) was decided and by the same court. In *Wigmore* v. *Jay* (7), the employer was erecting a building, and employed persons as to whom there was no evidence that they were incompetent to erect a scaffolding for that purpose. Those persons used an unsound scaffold pole after its unsoundness had been pointed out to the foreman. The pole broke in use and the plaintiff, a bricklayer on it, was injured and sued the master. It was held that the plaintiff could not recover, as there was no evidence that the master had employed an incompetent person to erect the scaffolding. This case is quite inconsistent with any absolute undertaking to provide suitable plant. In 1861, in *Riley* v. *Baxendale* (8), where a turntable was so constructed as to be dangerous if a particular size of truck was used, the declaration alleged a duty on the employer to take due and ordinary care not to expose the servant to extraordinary danger in the employment. The court refused to recognise such a duty, and MARTIN, B., said he had frequently so ruled, and his decision had never been questioned. POLLOCK, C.B., said (30 L.J.Ex. at p. 88):

> "This is an attempt to nullify the decision of the court in *Priestley* v. *Fowler* (4), and to enlarge the case in which persons in the relation of master or employer are to be made responsible for injuries incurred by those in their employment, who are in general much more able to judge of the probability and extent of the risk they run in the service, than those who employ them."

In *Seymour* v. *Maddox* (9) in 1851 the declaration alleged a duty by an employer to a servant to provide well-lighted and fenced premises in which the servant was to be employed, and knowledge by the employer that the premises were not well-lighted and fenced, but the Court of Queen's Bench held that there was no such duty as alleged. In *Potts* v. *Port Carlisle Dock and Rail. Co.* (10) in 1860, the fact that a turntable was defective in construction whereby a servant was killed was held ineffective to make the employers liable in the absence of evidence that the employers had engaged incompetent persons to construct it. CROMPTON, J., speaks (8 W.R. at p. 524) of

> "that species of negligence for which alone they could be rendered liable in this action, namely, that they had negligently employed incompetent persons to make the turntable."

In *Brown* v. *Accrington Cotton Spinning and Manufacturing Co.* (11), the headnote (in 3 H. & C. 511) is:

> "A person who erects a building by contract, and employs a clerk of the works to superintend the erection, is not liable for injury occasioned to a workman in the building by reason of its negligent construction, unless he personally interfered or negligently appointed an incompetent clerk of the works with knowledge of his incompetency."

In *Feltham* v. *England* (12) in 1866, where new piers of brickwork collapsed the first time they were used, killing a servant, it was held that the master was not liable, as there was no evidence of personal negligence on his part in employing an incompetent foreman, or in employing incompetent persons to build the piers, or that he knew or ought to have known that the piers were insufficient.

A In *Cribb* v. *Kynoch, Ltd.* (13), a Divisional Court, in an exhaustive judgment examining the cases, delivered by Bray, J., held that, though there was a duty on an employer to give instructions to a young and inexperienced person engaged in a dangerous work, he fulfilled that duty by delegating its performance to a competent foreman, and was not liable if that foreman was negligent in the matter. The whole judgment repays careful perusal, especially as in the same B year, in *Young* v. *Hoffman Manufacturing Co.* (5), the Court of Appeal approved and adopted it. In that case Kennedy, L.J., puts the obligation of the master (a) to use reasonable care to select competent fellow-servants, but not to indemnify the servant against the negligence of such fellow-servants; and (b) to use reasonable care in having and keeping his machinery in proper condition and free from defect. The lord justice does not expressly say that the master can perform the C latter obligation by appointing competent persons to perform it, but he does say that the master can perform his duty as to warning and instructing as to the use of dangerous machinery by such an appointment. This and the judgment in *Wilson* v. *Merry* (1) next to be referred to, appear to cover the proposition that the master's duty may be fulfilled by appointing competent persons to perform it unless he himself knows of the defect.

D This statement is, I think, supported by the judgment of this court in *Cole* v. *De Trafford* (*No. 2*) (14). It is also clearly supported by the well-known passage in Lord Cairns's judgment in *Wilson* v. *Merry* (1). In that case in a coal mine with a proper system of ventilation a scaffold was erected which was so improper that it stopped the ventilation of the mine, whereby an explosion of fire-damp occurred and a man was killed. His widow sued the employers. It was not E suggested that the employers themselves took any part in the erection of the platform, nor was any personal fault or negligence of any kind imputed to them. The House of Lords held the employers not liable. Lord Cairns said (L.R. 1 Sc. & Div. at p. 332):

> "The master is not, and cannot be, liable to his servant unless there be F negligence on the part of the master in that in which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business. The result of an obligation on the master personally to execute the work connected with his business, in place of being beneficial, might be disastrous to his servants, for the master might be incompetent personally to perform the work. At all events, a servant may choose for himself between G serving a master who does, and a master who does not, attend in person to his business. But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has, in my opinion, done all that he is bound to do. And if the persons so H selected are guilty of negligence this is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the employment of the master, the master is, in my opinion, not liable, although the two workmen cannot technically be described as fellow-workmen. As was said in *Tarrant* v. *Webb* (15), negligence cannot exist if the master I does his best to employ competent persons; he cannot warrant the competency of his servants."

Again Lord Cairns said (L.R. 1 Sc. & Div. at p. 333):

> "I think the learned judge ought to have told the jury that if they were of opinion that the respondents exercised due care in selecting proper and competent persons for the work and furnished them with suitable means and resources to accomplish the work, the respondents were not liable to the appellant for the consequences of the accident."

It will be noticed that in each passage Lord Cairns uses the phrase "and to furnish them with adequate [suitable] materials [or means] and resources for the work." But, in my opinion, this does not mean that while the master need only use reasonable care to appoint competent servants, he must himself judge of the suitability of the materials used. Lord Cairns has in the previous passage protested against a personal obligation of a master to perform work which he might be incompetent personally to perform; he cannot mean that though this is so the master undertakes himself to select proper materials. I take the passage to mean that he may delegate the work and provision of materials to competent servants, provided he supplies them with the financial means and resources to get the materials for the work and to perform the work. To hold otherwise would be to overrule the series of cases, beginning with *Wigmore* v. *Jay* (7) to which I have referred.

Counsel for the plaintiff strongly relied on the passage in the judgment of Lord Herschell in *Smith* v. *Baker & Sons* (2), where he said ([1891] A.C. at p. 362):

> "It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk. Whatever the dangers of the employment which the employed undertakes, amongst them is certainly not to be numbered the risk of the employer's negligence, and the creation or enhancement of danger thereby engendered."

But it is necessary to appreciate the nature of the action in *Smith* v. *Baker & Sons* (2). It was not an action at common law; it was an action under the Employers' Liability Act, 1880 [repealed by Law Reform (Personal Injuries) Act, 1948], based on defects in the condition of the plant which the court held to include a defective system of working. Two points were decided by the House, first, that as the defence that there was no evidence of negligence of the employer was not taken before the County Court judge it could not be taken on appeal. This at once shut out from consideration of the House any question of what constituted negligence of an employer, and whether, if he appointed competent persons to carry on the work, he was liable for their negligence in the method of carrying out the work by allowing the workman to work with a crane swinging over his head. Therefore, very few of the decisions cited in this judgment as to what may constitute negligence of the employer to prevent the application of the doctrine of common employment were referred to. Two Scottish cases were cited to show that the employer might be liable for a defective system which he was taken to know of, but they were cited in connection with the Employers' Liability Act. The second point was whether under the Employers' Liability Act, 1880, working with knowledge of the risk was a defence against the workman's case, and the House, as I understand, decided by a majority that the maxim was volenti non fit injuria, not scienti non fit injuria, and that to make a defence it must be shown as a fact that the workman was willing and agreed to take the risk, not merely that he knew of it. But in the common law doctrine the implication of taking risk is based, not on an agreement in fact, but on a rule of law arising from the relation of employer and employed. As Collins, M.R., said in *Burr* v. *Theatre Royal, Drury Lane, Ltd.* (16) ([1907] 1 K.B. at p. 555):

> "We are here dealing with a positive rule of law with regard to the relation of employer and employed, which is really based upon considerations incidental to that relation rather than on any actual intention inferred to have existed in the minds of the parties in the particular case. It is a fundamental principle of law, except where the legislature has provided to the contrary, that, wherever the relation of employer and employed exists, there is this limitation of the liability of the employer as regards injury occasioned by the negligence of a fellow-servant."

See, also, SALMOND ON TORTS, 7th Edn., p. 126, where it is said that

> "the reason alleged for this exemption of the employer from liability to his own servants is that a servant impliedly agrees to run the risk naturally incident to the employment undertaken by him, and that one of these risks is that of harm due to the negligence or incompetence of his fellow-servants. 'When several workmen,' says LORD CRANWORTH in *Bartonshill Coal Co.* v. *Reid* (17),
>
> > 'engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.'
>
> The rule, that is to say, is an application of the maxim *volenti non fit injuria.* This presumption that a servant agrees to take upon himself the risk of his fellow-servants' negligence is, however, not a mere presumption of fact, as in other cases in which the maxim is applied; it is a presumption of law, which can be excluded by nothing less than an express agreement between master and men by which the master forgoes the benefit of it."

LORD HERSCHELL and the House of Lords, in *Smith* v. *Baker & Sons* (2), were not considering the limitations of the doctrine of common employment, and their attention was not called to the authorities as to what would constitute a breach of duty by a master if he had appointed with reasonable care competent servants.

The other case relied on by the plaintiff was *Williams* v. *Birmingham Battery and Metal Co.* (18), where in the defendants' factory no ladder was provided for descending from a tramway, but the workman habitually climbed up and down a wall by spikes and bars. The point of the workman's having taken the risk was not raised at the trial, and the numerous cases cited in this judgment were not referred to. The case was dealt with on the lines of *Smith* v. *Baker & Sons* (2), and I think the employer was treated as having with personal knowledge provided a dangerous system. In view of the subsequent decision of the Court of Appeal in *Young's Case* (5), I am not able to treat the decision in *Williams* v. *Birmingham Battery and Metal Co.* (18) as binding me to hold that where the employer has taken reasonable care to appoint competent people to provide plant he is liable if they, without his knowledge, negligently provide dangerous plant. I think the law is accurately stated in SALMOND ON TORTS, 7th Edn., p. 130:

> "A master, although he is not responsible to his servant for the negligence of a fellow-servant, is yet responsible for his own negligence; and for this purpose it is negligence to omit to use reasonable care in choosing competent and careful servants and not dismissing those who prove themselves incompetent and careless. Similarly, the providing of a proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than of his servants. The master cannot relieve himself of responsibility merely by delegating it to a person who is incompetent for the task. But there is no rule of law that an employer, not guilty of any negligence himself, is nevertheless to be held liable because he was bound to supply plant."

Where the master has used reasonable care to delegate, and is not aware of the negligence of the delegate, in my opinion, he is not liable for the consequence of that negligence to the fellow-servant. *Laubach* v. *Co-optimists' Entertainment Syndicate* (19), where a delegate supplied defective plant for use whereby injury was caused to a fellow-servant, and FINLAY, J., held the master not liable, was, in my opinion, correctly decided. In the Privy Council case of *Toronto Power Co., Ltd.* v. *Paskwan* (3), the headnote, in the LAW REPORTS, in my opinion, when compared with the language of SIR ARTHUR CHANNELL, cannot be justified. The earlier cases, such as *Wigmore* v. *Jay* (7) were not cited to the court, and the decision, in my opinion, must be limited to cases where the employer personally and negligently sanctions an improper system.

The present case is to be decided on the footing that the defendant did not know that the execution scene was to be performed, that he had delegated to competent persons the production of plays, that one of them had negligently provided improper plant for a particular scene, but that the defendant did not know of this. On these findings, in my opinion, the doctrine of common employment, as defined in the cases to which I have referred, prevents the employee from recovering against his employer. The appeal must, therefore, be allowed, the judgment for the plaintiff set aside, and judgment entered for the defendant with costs, here and below.

GREER, L.J.—This case raises an important question of principle, that is to say, whether an employer is responsible for the negligence of his foreman or manager in failing to supply safe machinery or plant for the use of his servants, or in failing to see that the machinery or plant, when used, is reasonably safe for use by his employees.

I need not repeat the facts of the case, which are set out in the judgment of Scrutton, L.J. I have come to the same conclusion as the lord justice, that even in cases where the negligence relied on by the plaintiff consists of negligence in the supply or maintenance of plant or machinery, the employer is only liable if personal negligence is proved, and that if the failure to supply or maintain the plant or machinery in a safe condition is due to the negligence of a manager to whom the duty has been entrusted by the employer, the employer is not responsible unless it can be shown that he failed to use reasonable care to select a competent manager, or that he has in some way been guilty of personal negligence in connection with the instalment or maintenance of the machinery or plant or in permitting the continuance of its use after he became aware of its unsafe condition.

The following cases seem to me to prove the above proposition, unless they ought to be disregarded as inconsistent with the decision of the House of Lords in *Smith* v. *Baker & Sons* (2), and the decision of the Privy Council in *Toronto Power Co., Ltd.* v *Paskwan* (3). The cases I refer to are *Wigmore* v. *Jay* (7), *Hedley* v. *Pinkney & Sons Steamship Co., Ltd.* (20), *Coldrick* v. *Partridge, Jones & Co.* (21), *Searle* v. *Lindsay* (22), *Potts* v. *Port Carlisle Dock and Rail. Co.* (10), *Brown* v. *Accrington Cotton Spinning and Manufacturing Co.* (11), *Cole* v. *De Trafford (No. 2)* (14), a decision of the Court of Appeal, *Seymour* v. *Maddox* (9), and *Laubach* v. *Co-optimists' Entertainment Syndicate* (19). The last-named case, a decision of Finlay, J., seems to me to be on all fours with the present case and, if rightly decided, it would determine the present case in the defendant's favour.

I have not been able to find, nor have we been referred to, any reported cases decided by English courts in which it has been expressly held that the doctrine of common employment has no application to claims based on the negligence of a foreman, manager, or other fellow-employee in the provision or maintenance of plant or machinery. I do not think it necessary to do more than refer to the cases cited above by their titles. It seems to me to be beyond question that they do, if rightly decided, establish that the employer is free from liability except for his own personal negligence. It has, of course, to be remembered that in actions against companies a general manager of the business is deemed to be the alter ego of the company, and they would be responsible for his personal negligence. In the present case, however, we have not to deal with a claim against a limited company, but with a claim against an individual employer.

It remains for me to consider whether there is anything in the speeches of the learned Lords in *Smith* v. *Baker & Sons* (2), and the decision of the Privy Council in *Toronto Power Co., Ltd.* v. *Paskwan* (3) that should compel this court to hold that the rule of law applied in this long series of cases is wrong and should not be treated as decisive of the present appeal. The decision of the House of Lords in *Smith* v. *Baker & Sons* (2) was given in a case in which the plaintiff's claim was made under the provisions of the Employers' Liability Act, 1880. That Act was passed in order to extend the liability of employers to make compensation for personal injuries suffered by their workmen. It does not seem probable that that Act, so far as it gave a remedy for defects in the condition of the ways, works, machinery or plant, gave to the workman a remedy limited in amount to his estimated earnings during the three years preceding the injury in respect of a cause of action for which he had a common law right to be compensated without any limit as to the damages he could recover. Section 1 of the Act provides that where after the commencement of the Act personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, a remedy is given to him and his personal representatives, if he has been killed, provided—as stated by s. 2—that he knows that the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the employer or of some person in the service of the employer and entrusted by him with the duty of seeing that the ways, works, machinery or plant were in proper condition. It is obvious that if the employer were responsible at common law for the negligence of the person entrusted by him with the duty mentioned, the Act would have had the effect of giving a limited right to damages to a workman who already had the right without any limit. It seems to me to be implied in the statute that in making the employer responsible in any event, however careful he may have been himself, for the negligence of the person in his service entrusted with the duty of seeing that the ways, works, machinery, or plant were in proper condition, the legislature was giving to the workman remedies which he had not apart from the statute, and imposing upon the employer a liability which was not imposed upon him by the common law. This, of course, is not conclusive, because the legislature may have been either mistaken or doubtful as to what was the state of the existing law. The only questions in *Smith* v. *Baker & Sons* (2) on which the House of Lords gave a decision were two: (i) Whether the fact that the plaintiff had worked with a knowledge of the defects complained of afforded evidence conclusive in law that he voluntarily incurred the risk, and was thereby precluded from succeeding in the action; and (ii) whether the appellant employers, not having taken the point that there was no evidence that the defects complained of were due to any negligence by the employers or the persons entrusted by them with the duty of seeing to the safety of the ways, works, machinery, or plant, could rely in the appeal from the County Court on the absence of negligence. The question whether, on the facts proved in the case and the findings of the jury, the employer would have been liable at common law was not at any time an issue in the case, but several of their Lordships made observations which have sometimes been regarded as authority for the proposition that at common law the employer was responsible for the negligence of the person to whom he entrusted the duty of installing and maintaining the plant. LORD HALSBURY said ([1891] A.C. at p. 339):

> "I think the cases cited at your Lordships' Bar of *Sword* v. *Cameron* (23) and *Bartonshill Coal Co.* v. *McGuire* (24) established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act. In *Sword* v. *Cameron* (23) it could hardly be doubted that the quarryman who was injured by the explosion of the blast in the quarry was perfectly aware of the risk; but nevertheless he was held entitled to recover notwithstanding that knowledge."

LORD WATSON, referring to sub.-s. 3 of s. 2 of the Employers' Liability Act, said ([1891] A.C. at p. 356):

> "I think the object and effect of the enactment is to relieve the employer of liability for injuries occasioned by defects which were neither known to him nor to his delegates down to the time when the injury was done. At common law his ignorance would not have barred the workman's claim, as he [that is, the employer] was bound to see that his machinery and works were free from defects, and so far the provision operates in favour of the employer."

On the other hand, LORD HERSCHELL'S speech is consistent with the law, as it A appears from the many cases referred to above that the employer is only liable for his personal negligence. He, like LORD HALSBURY and LORD WATSON, expresses approval of the Scottish case of *Sword* v. *Cameron* (23), but points out that in *Bartonshill Coal Co.* v. *Reid* (17), LORD CRANWORTH, in approving *Sword* v. *Cameron* (23), pointed out that it was to be inferred from the facts stated that the notices and signals given were those that had been sanctioned by the employer, B and he impliedly states the employer's duty at common law to be to take reasonable care so to carry on his business as not to subject those employed by him to undue risk.

It seems to me that the employer can perform this duty by taking reasonable care to employ competent men to see that safe machinery, plant and appliances are provided and maintained for the use of his workpeople. Of course, if the employer, C instead of appointing competent people to undertake this duty, undertakes it himself, and does it negligently, he would be liable at common law. I do not think that LORD HALSBURY meant to say that *Sword* v. *Cameron* (23) and *Bartonshill Coal Co.* v. *McGuire* (24) established the principle that the employer was liable in every case where it is proved that there was a negligent system or a negligent mode of using perfectly sound machinery. I think the meaning of the D words which I have quoted is that the employer would be liable if he was personally guilty of negligence in knowingly allowing a negligent system of work to be carried out, or in failing to appoint competent people to devise for him a system of work to be carried out in his absence. With regard to the statement I have quoted from LORD WATSON'S speech, I think, if literally interpreted, it does not accurately represent the law on the subject. Too much importance ought not to be attached E to the observations of members of a tribunal on questions that were not involved in the case they had to consider when they did not have before them any citation of the relevant authorities. The decision of the Privy Council in *Toronto Power Co., Ltd.* v. *Paskwan* (3) seems to me inconsistent with the whole trend of the English decisions, and, being a decision on the law of Canada, is not an authority which we are bound to follow. F

In the present case there was no evidence that the defendant had failed to exercise reasonable care in selecting competent persons to acquire and maintain suitable and safe apparatus for the rehearsal and performance by his travelling company of plays in their repertoire. There was no evidence that the accident to the plaintiff was due to the personal negligence of the defendant, but, on the contrary, there was evidence that, if there was any negligence proved to be the G cause of the plaintiff's injuries, such negligence was the negligence of a fellow-servant, in consequence of which, by reason of the long-accepted doctrine of common employment, the plaintiff is disentitled to recover. I agree, therefore, with my Lord that the appeal should be allowed with costs.

SLESSER, L.J.—In this case, sought to be founded upon the alleged negligence H of the defendant, his servants or agents, the jury have answered a number of questions put to them by the learned judge at the trial with a resulting finding of damages against the defendant. In one case an answer was given to an essential question on which to found liability, namely, whether the defendant knew that his property was not safe, which answer, in my opinion, cannot be supported by the evidence adduced. The jury were asked, first: "Was the property as a whole reasonably fit for the purpose for which it was applied?" They replied "No." I This answer was one which they were competent to give. The ninth question was this: "Was the drop scene authorised by the defendant?" The answer "Yes" may doubtfully be defended on the ground that a Mr. Rean, the defendant's producer, stated—in examination in chief—that he had been told that the defendant had authorised the use of the dangerous property, the trap. If such a statement was evidence at all, apparently no objection was taken to it. The second question, however, as I have said, was in the following terms: "If not, did the defendant know it [the property] was not safe?" To which the jury answered "Yes." Assuming that the other answers could properly have been returned by the jury, the answer to question (ii), that the master knew that the property was unsafe, would conclude this appeal in favour of the plaintiff. For his own personal negligence the master is always liable to his workmen: *Thomas* v. *Quartermaine* (25) per Bowen, L.J. (18 Q.B. Div. at p. 691); see also per Lord Herschell in *Smith* v. *Baker & Sons* (2). If the property was not reasonably fit for its purpose and the master had authorised its use (question (ix)) and knew it was not safe (question (ii)), he would have permitted its use after he knew of its unsafe condition, and so might have been found negligent.

The want of evidence to support the finding in question (ii) admits of no doubt. The plaintiff said that he knew that the defendant on previous occasions had objected to the scene being introduced. The defendant said that his instructions were not to have the scene. Mr. Rean, the producer, said that the defendant objected to the hanging scene and would never allow it. The most that can be put against the defendant on this point is that Mr. Rean also said in evidence that a Mr. Starber had told him that the defendant had authorised the use of the trap. Assuming this evidence to be accepted, it does not provide any basis for the finding of the jury that the defendant knew that the trap was not safe or allowed the continuance of its unsafe use. I assume, therefore, as I must, that this question was answered in the negative, as it ought to have been, and proceed to consider what is the legal liability of the defendant, if any, assuming in his favour that he did not know that the trap was not safe. In such circumstances, the injury to the plaintiff must be taken to have been caused by the negligence of some person engaged by the defendant to provide the trap or maintain it in safety. This indeed was the view of the jury because, notwithstanding that they had been asked in the second question whether the defendant knew that the trap was not safe, in answer to the third question, namely: "If not, was or were some person or persons engaged by the defendant to provide the property, guilty of negligence?" they answer "Yes." And I think there was evidence on which they could so answer.

The question, therefore, arises, assuming that the persons engaged by the defendant to provide the trap were negligent, how far, if at all, was the defendant liable as employer for their negligence. The persons who provided the trap, namely, Mr. Rean, the producer, and Mr. Charles Denville, the business manager, were both in common employment with the plaintiff. Though there are cases in which it is difficult to decide whether servants of the same master are fellow-workmen within the meaning of the rule laid down in *Priestley* v. *Fowler* (4), the present case presents no such difficulty. Nor, indeed, was it seriously argued that the producer, the business manager, and the plaintiff were not in the common employment of the defendant in the production of the play. They were engaged in a common undertaking in the service of a common master: *Johnson* v. *Lindsay* (26). The principle to be applied is laid down by Lord Cranworth in *Bartonshill Coal Co.* v. *Reid* (17) as follows (3 Macq. at p. 295):

> "When several workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks."

A servant

> "has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant.":

per Bramwell, L.J., in *Swainson* v. *North Eastern Rail. Co.* (27) (3 Ex.D. at p. 348). For this purpose one servant may be the superior of the other: *Hedley* v. *Pinkney & Sons Steamship Co.* (20). I forbear from quoting the many other cases which have supported this proposition. In my view, in order that the plaintiff may succeed, in the absence of direct evidence that the master has himself been negligent, he must show that the master has not done his best to employ competent persons; "he is not bound to warrant their competency": per JERVIS, C.J., in *Tarrant* v. *Webb* (15) (18 C.B. at p. 804).

This case may be put for the plaintiff either (a) on a failure on the part of the management to caution or instruct the plaintiff; or (b) on the ground of failure to provide proper plant and machinery. Generally the defence of common employment is open to an employer where he has delegated the duty of instructing and cautioning a workman employed on dangerous work if the master has delegated that duty to a competent person who proves in the event to have been negligent in not properly instructing or cautioning the injured workman. So I read the decision of this court in *Young* v. *Hoffman Manufacturing Co., Ltd.* (5); see also *Cribb* v. *Kynoch, Ltd.* (13), a decision of a Divisional Court to the like effect expressly approved by the Court of Appeal in *Young's Case* (5). In *Young's Case* (5) COZENS-HARDY, M.R., said ([1907] 2 K.B. at p. 651):

> "If it is established that a competent foreman was employed by the defendants whose duty it was, either by reason of express directions or by reason of directions implied from the nature of his employment, to give proper instruction, regard being had to the plaintiff's age and other circumstances, the defendants will not be liable for the omission of the foreman to give proper instruction."

In this appeal there is no finding that the manager or producer was not competent, and, therefore, if they were negligent in instructing the plaintiff to jump through the trap or failing to tell him how to jump, the case would fall directly within the decision in *Young* v. *Hoffman Manufacturing Co., Ltd.* (5), and the defendant employer would not be liable. But the case may be put against the defendant in another way on the ground of failure to provide proper plant. It has been said that

> "when a master employs his servant in a work of danger he is bound to exercise due care in order to have his tackle and machinery in a safe and proper condition":

per LORD CRANWORTH in *Bartonshill Coal Co.* v. *Reid* (17) (3 Macq. at p. 288)—and that it may be argued that apart from injury suffered from the negligence of the producer or manager, there was a direct obligation on the master to have the trap and mattress beneath it in a safe and proper condition, which obligation he has failed to satisfy. A master is under a duty of seeing that the condition of the works where he employs his servants is reasonably suitable and safe for the purpose for which the works are used: *Paterson* v. *Wallace* (28). *Wilson* v. *Merry* (1) is the leading authority in this class of case. There, no personal negligence was imputed to the employer. The charge of making arrangements for working a coal mine was given to officials by the employer, who were found to have been selected with care. LORD CAIRNS said (L.R. 1 Sc. & Div. at p. 332):

> "What the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so and to furnish them with adequate materials and resources for the work."

But the materials in that case are stated by LORD CAIRNS to have been furnished for working in the best manner. So that it does not fully decide the problem. What is the position if the failure to furnish proper materials is due to the negligence of a competent manager? This matter was directly considered in *Wigmore* v. *Jay* (7), where a foreman of the employer supplied an unsound scaffold pole which caused the death of a workman. In an action by the widow the employers eventually succeeded. This case was followed in *Cole* v. *De Trafford* (*No. 2*) (14). In that case SCRUTTON, L.J., cited, in addition to *Wigmore* v. *Jay* (7), *Feltham* v. *England* (12), where a similar ruling had been given in the case of defective brickwork. The judgment of the court (COCKBURN, C.J., MELLOR, J., and SHEE, J.) was delivered by MELLOR, J., who said (L.R. 2 Q.B. at p. 36):

A
> "There was nothing in the present case to show that the foreman was an incompetent or improper person to be employed as foreman or manager. We are unable to distinguish the case on this point from that of *Wigmore* v. *Jay* (7), *Gallagher* v. *Piper* (29), and *Skipp* v. *Eastern Counties Railway* (30)."

He concluded:

B
> "With regard to the second ground relied upon on the part of the plaintiff, we can find no evidence of personal negligence to fix the master. There was nothing to show that he had employed unskilful or improper persons to build the piers."

The decision which has given me the greatest difficulty is that of *Smith* v. *Baker* C *& Sons* (2). That was a case where the plaintiff sued under the Employers' Liability Act, 1880. He had been injured by a stone falling from a crane. The jury found that the machinery for lifting the stone was not reasonably fit for the purpose for which it was applied. The case turned largely upon the principle volenti non fit injuria, whether the whole risk was voluntarily incurred by the plaintiff. But LORD HALSBURY said this ([1891] A.C. at p. 339):

D
> "The cases . . . of *Sword* v. *Cameron* (23) and *Bartonshill Coal. Co.* v. *McGuire* (24) established conclusively the point for which they were cited, that a negligent system or a negligent mode of using perfectly sound machinery may make the employer liable quite apart from any of the provisions of the Employers' Liability Act."

E Now, the Employers' Liability Act had for its purpose the exclusion of the defence of common employment, and so the Lord Chancellor appears to say that common employment would not be a defence if the master were shown to have a negligent system or a negligent mode of using perfectly sound machinery. The real issue in *Smith* v. *Baker & Sons* (2) turned on whether it could be said that the plaintiff had agreed to incur the particular danger. LORD WATSON speaks ([1891] A.C. at p. 356) F of work "rendered dangerous by some defect which it was the duty of the master to remedy." But he is there discussing the degree of risk which a workman may be taken to assume, and I am not prepared, having regard to the issues in *Smith* v. *Baker & Sons* (2), to say that the rule laid down in *Wilson* v. *Merry* (1) and *Wigmore* v. *Jay* (7) was intended to have been modified or departed from in *Smith* v. *Baker & Sons* (2). It is significant that *Wigmore's Case* (7) was not G cited to the House of Lords nor referred to in any of the speeches of the learned Lords. As I have said, *Wigmore's Case* (7) has since been followed in this court in *Cole* v. *De Trafford* (*No. 2*) (14), and the same principle has been applied by FINLAY, J., in the recent case of *Laubach* v. *Co-optimists' Entertainment Syndicate* (19).

Toronto Power Co., Ltd. v. *Paskwan* (3) in the Privy Council is not very easy to H reconcile with the decision of this court in *Cole* v. *De Trafford* (*No. 2*) (14). I am certainly of opinion that the headnote to that case that

> "the duty towards an employee to provide proper plant, as distinguished from its subsequent care, falls upon the employer himself, and cannot be delegated to his servants"

I cannot be reconciled with the authorities by which we are bound. Nor can I find in that case any such statement of the law as appears in the headnote. It is stated that the providing proper plant, as distinguished from its subsequent care, is especially within the province of the master rather than his servants. But this statement, which is followed by a statement that the master does not warrant the plant, and that if in the course of working a plant becomes defective and the defect is not brought to the master's knowledge, and could not by reasonable diligence have been discovered by him, the master is not liable, are all indications that the headnote to which I have referred is in no sense an accurate description of what was there decided. However that may be, whatever respect we may pay to this case in the Privy Council, the many authorities, both in the House of Lords and in this court, appear to me to produce the result that in a case like this, where the master has chosen competent servants, and there is no allegation or finding to the contrary, to work with the plaintiff, and the plaintiff has been injured by some error on the part of those servants in not providing proper plant—there being no evidence of a defect in the machinery or plant which the employer knew or ought reasonably to have known—the doctrine of common employment applies and the plaintiff cannot recover. In SALMOND ON TORTS, 7th Edn., p. 130, occurs this passage:

> "The master cannot relieve himself of responsibility [of providing proper plant] merely by delegating it to a person who is incompetent for the task. But there is no rule that an employer, not guilty of any negligence himself, is nevertheless to be held liable because he was bound to supply plant."

This statement appears to me accurately to state the law. For these reasons I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors: *Steadman, Van Praagh & Gaylor*; *Blacket Gill & Co.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THE TORNI

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), November 3, 4, December 11, 1931]

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), April 26, 27, 1932]

[Reported [1932] P. 27; 101 L.J.P. 44; 147 L.T. 208; 48 T.L.R. 195; 41 Ll.L.Rep. 174, P.D.A.; [1932] P. 78; 101 L.J.P. 44; 147 L.T. 208; 48 T.L.R. 471; 18 Asp.M.L.C. 315; 43 Ll.L.Rep. 78, C.A.]

Shipping—Carriage by sea—Bill of lading made in foreign country—Hague Rules not incorporated despite requirements by foreign law—Provision of foreign law that bill of lading deemed to have effect subject to the rules—Bill of lading providing that it "be construed in accordance with English law"—Effect—Government of Palestine Carriage of Goods by Sea Ordinance (*No.* 43 *of* 1926).

The Government of Palestine Carriage of Goods by Sea Ordinance (No. 43 of 1926) incorporated the Hague Rules, with certain modifications, and gave them the force of law. By s. 2 of the Ordinance the Hague Rules "shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Palestine to any other port." By the Carriage of Goods by Sea Act, 1924, the Hague Rules are similarly applied to carriage in ships carrying goods from any port in England. By s. 4 of the Palestine Ordinance "every bill of lading . . . issued in Palestine which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as applies by this Ordinance, and shall be deemed to have effect subject

A thereto, notwithstanding the omission of such express statement." The Hague rules themselves provide, by art. 3 (8), that "any clause, covenant or agreement, in a contract of carriage relieving the carrier or the ship from liability for loss . . . arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect."

B Eleven bills of lading issued in Palestine in respect of the carriage of goods in an Esthonian ship from Jaffa, a port in Palestine, to Hull, did not contain the express statement required by the Ordinance, but did contain a provision that they were "to be construed in accordance with English law." Two of these bills of lading were endorsed to Hull merchants. Delivery of goods under the other nine bills of lading was taken in England by persons who paid C the freight but whose capacity was not made clear. On a preliminary point of law as to whether the Hague Rules applied,

Held: (i) the Hague Rules applied to the contracts between the shipowners and the endorsees of the two bills of lading because

Per SCRUTTON and GREER, L.JJ.: (a) they were applied to the bills of lading by s. 4 of the Palestine Ordinance;

D Per SCRUTTON, L.J.: (b) the provision that the bills should be construed according to English Law did not exclude the Hague Rules, but merely meant that the bills of lading with the rules as incorporated should be construed in accordance with English law.

Re Missouri S.S. Co. (1) (1889), 42 Ch.D. 321, distinguished by SCRUTTON, L.J.

E Per GREER and SLESSER, L.JJ.: (c) if the contract had not been subject to the Hague Rules, the provision that it should not be so subject would have been illegal according to the law of Palestine, and the English courts would recognise that illegality, apply the law of Palestine, and hold the provision void. *Re Missouri S.S. Co.* (1) distinguished by GREER, L.J. Principle there stated by LORD HALSBURY (42 Ch.D. at p. 336), applied by GREER and SLESSER, F L.JJ.

(ii) the court could not decide whether the rules applied to the contracts in respect of the cargo comprised in the other nine bills of lading in the absence of evidence as to the capacity in which the plaintiffs concerned took delivery.

Per SLESSER, L.J.: Where someone is by statute in a public matter required to do a certain act or, if the act were to be done, to do it in a certain way, G failure to obey the statute . . . even though there were no express penalty provided . . . [would] in an appropriate case [be a] misdemeanour.

Per LANGTON, J.: English law comprises the law laid down by Parliament for England, Wales, and for such other possessions, territories and dominions as take their law directly from this source in the same form as that laid down for England. All other law, whether of British origin or not is, for the present H purpose at any rate, foreign law.

Notes. The authority of this decision is now doubtful; it has not been overruled, but both the ratio decidendi and the decision itself were dissented from by the Privy Council in *Vita Food Products, Inc.* v. *Unus Shipping Co., Ltd.*, [1939] 1 All E.R. 513, at pp. 526–528.

I Distinguished: *The St. Joseph*, [1933] All E.R.Rep. 901.

As to the validity of a condition applying English law to a contract of carriage by sea from a foreign port, see 7 HALSBURY'S LAWS (3rd Edn.) 77, para. 144, text and note (k), as to illegality by the lex loci contractus, see ibid. 79, para. 14, as to contracting out of the Hague Rules in a contract of carriage to England, see 30 HALSBURY'S LAWS (2nd Edn.) 608, para. 767, as to application of the Rules to a bill of lading issued to a charterer, see ibid. 610, para. 769, note (t), and for cases as to incorporation of the Hague Rules see 41 DIGEST 381–384, *2269–2290.* As to breaches of statutory commands being indictable misdemeanours, see 31 ibid.

552–553, para. 741. For the Hague Rules see the Carriage of Goods by Sea Act, 1924, Sched., 23 HALSBURY'S STATUTES (2nd Edn.) 884.

Cases referred to:

(1) *Re Missouri S.S. Co.* (1889), 42 Ch.D. 321; 58 L.J.Ch. 721; 37 W.R. 696; sub nom. *Re Missouri S.S. Co., Monroe's Claim*, 61 L.T. 316; 5 T.L.R. 438; 6 Asp.M.L.C. 423, C.A.; 11 Digest (Repl.) 424, *728*.

(2) *The Adriatic*, [1931] P. 241; 100 L.J.P. 138; 145 L.T. 580; 47 T.L.R. 638; 18 Asp.M.L.C. 259; 11 Digest (Repl.) 433, *785*.

(3) *Anselme Dewavrin Fils et Cie.* v. *Wilsons and North Eastern Rail. Shipping Co., Ltd.* (1931), 39 Lloyd, L.R. 289.

(4) *Cox* v. *Bruce* (1886), 18 Q.B.D. 147; 56 L.J.Q.B. 121; 57 L.T. 128; 35 W.R. 207; 3 T.L.R. 167; 6 Asp.M.L.C. 152, C.A.; 41 Digest 379, *2256*.

(5) *Frenkel* v. *MacAndrews & Co., Ltd.*, [1929] A.C. 545; 98 L.J.K.B. 389; 141 L.T. 33; 45 T.L.R. 311; 34 Com. Cas. 241; 17 Asp.M.L.C. 582, H.L.; 41 Digest 486, *3177*.

(6) *Leduc* v. *Ward* (1888), 20 Q.B.D. 475; 57 L.J.Q.B. 379; 58 L.T. 908; 36 W.R. 537; 4 T.L.R. 313, C.A.; 6 Asp.M.L.C. 290; 41 Digest 485, *3172*.

(7) *Dobell & Co.* v. *S.S. Rossmore Co.*, [1895] 2 Q.B. 408; 64 L.J.Q.B. 777; 73 L.T. 74; 44 W.R. 37; 11 T.L.R. 501; 8 Asp.M.L.C. 33; 14 R. 558, C.A.; 41 Digest 429, *2697*.

(8) *Ralli Bros.* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287; 89 L.J.K.B. 999; 123 L.T. 375; 15 Asp.M.L.C. 33; 25 Com. Cas. 227; sub nom. *Sota and Aznar* v. *Ralli Bros.*, 36 T.L.R. 456; 64 Sol. Jo. 462, C.A.; 11 Digest (Repl.) 435, *791*.

(9) *McFadden* v. *Blue Star Line*, [1905] 1 K.B. 697; 74 L.J.K.B. 423; 93 L.T. 52; 53 W.R. 576; 21 T.L.R. 345; 10 Asp.M.L.C. 55; 10 Com. Cas. 123; 41 Digest 445, *2796*.

(10) *Re Mahmoud and Ispahani*, [1921] 2 K.B. 716; 90 L.J.K.B. 821; 125 L.T. 161; sub nom. *Mahmoud* v. *Ispahani*, 37 T.L.R. 489; 26 Com. Cas. 215, C.A.; 12 Digest (Repl.) 303, *2333*.

(11) *Hamlyn & Co.* v. *Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 10 T.L.R. 479; 6 R. 188, H.L.; 11 Digest (Repl.) 423, *724*.

(12) *Brandt* v. *Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.*, [1924] 1 K.B. 575; 93 L.J.K.B. 646; 130 L.T. 392; 16 Asp.M.L.C. 262; 29 Com. Cas. 57, C.A.; 41 Digest 379, *2257*.

(13) *R.* v. *Price* (1840), 11 Ad. & El. 727; 3 Per. & Dav. 421; 9 L.J.M.C. 49; 4 J.P. 58; 4 Jur. 291; 113 E.R. 590; 14 Digest (Repl.) 230, *1920*.

(14) *R.* v. *Hall*, [1891] 1 Q.B. 747; 60 L.J.M.C. 124; 64 L.T. 394; 17 Cox, C.C. 278; 14 Digest (Repl.) 233, *1967*.

Interlocutory appeal from the decision of LANGTON, J., on a preliminary point of law in an action for damage to cargo and short delivery.

The plaintiffs were the owners of the cargo of oranges ex the Esthonian steamship *Torni*. The defendants were the owners of the *Torni*, which at the time of the matters in question was under time charter to a firm of shipbrokers at Swansea. The cargo of oranges was shipped at Jaffa, where the bills of lading were issued.

By their statement of claim the cargo-owners alleged (para. 3) that Messrs. White & Son, Ltd. and Messrs. William Machin & Co., two of the cargo-owners, were respectively the owners of 749 and 340 cases of the said oranges, to whom the property in the oranges passed upon endorsement of the bills of lading relating thereto. It was further alleged (para. 4) that Messrs. I. H. Goodwin, Ltd., White & Son (Hull), Ltd., Humber Fruit Brokers, Ltd., Connolly Shaw, Ltd., T. J. Poupart (Northern), Ltd., William Machin & Co., William N. Gibson & Co. (Leith), Ltd., T. S. Johnson & Co., Andrew S. Clarke & Co. respectively took delivery of various cases of oranges set forth in the statement of claim under bills

A of lading held by them and presented to the shipowners and paid freight due under such bills of lading respectively.

By their defence the shipowners relied on certain exceptions and other provisions contained in the bills of lading. In their reply the cargo-owners alleged that the exceptions and provisions on which the shipowners relied were null and void under Art. III, r. 8, of the Government of Palestine Carriage of Goods by Sea Ordinance B (No. 43 of 1926), which requires rules similar to those scheduled to the Carriage of Goods by Sea Act, 1924, [i.e. the Hague Rules] to be incorporated in all bills of lading issued in Palestine. The shipowners by their rejoinder denied that the bills of lading were subject to the Ordinance, and relied on the following further provision in the bills of lading in question: "This bill of lading wherever signed is to be construed in accordance with English law." They further alleged that the C *Torni* was at all material times under the flag of Esthonia.

The Government of Palestine Carriage of Goods by Sea Ordinance (No. 43 of 1926) provides, so far as material, as follows:

> "An Ordinance to amend the law with respect to the carriage of goods by sea.
>
> "Whereas a Convention for the unification of certain Rules relating to bills of lading was adopted by the International Conference on Maritime Law held D at Brussels in 1922 and 1923;
>
> "And whereas it is expedient that the Rules of the Convention as set out in the schedule to this Ordinance should, subject to the provisions hereof, be given the force of law in Palestine with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;
>
> E "Be it enacted by the High Commissioner for Palestine [Field-Marshal Lord Plumer] with the advice of the Advisory Council thereof: . . .
>
> "2. Subject to the provisions of this Ordinance, the Rules contained in the Schedule hereto shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Palestine to any other port whether in or outside Palestine. . . .
>
> F "4. Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the said Rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

G Schedule [contains rules similar to those scheduled to the Carriage of Goods by Sea Act, 1924.]

The question which the court was asked to determine as a preliminary point was whether the provisions of the Palestine Ordinance applied to the bills of lading in question.

Van den Berg, K.C., and *Cyril Miller* for the cargo-owners.
H *Raeburn, K.C.*, and *Sir Robert Aske* for the shipowners.

The facts and arguments of counsel fully appear from the judgment of LANGTON, J.

Cur. adv. vult.

Dec. 11. **LANGTON, J.**, read the following judgment:

I This case belongs to a class which I have already referred to in a judgment which I delivered last term as a kind of case which generally presents difficulties to me. It is no exception to that rule. Since I have endured in the present case the refined, but well-merited, torture of listening to almost the whole of my somewhat prolix judgment in the previous case (*The Adriatic* (2)), read to me viva voce, I will say at once that I have found very little in that pronouncement which has been of any assistance to me in this case.

Although one of the points to be determined now is the same as in *The Adriatic* (2), namely, which of alternative systems of law applies in interpreting the several contracts between the parties, the facts are wholly dissimilar. In the present case certain parcels of oranges were shipped from Jaffa and carried to Hull on the steamship *Torni.* The vessel is owned by the Reval Shipping Co., Ltd., an Esthonian company, and is an Esthonian ship. At the time in question—January, 1930—she was under time charter to Messrs. Stockwood, Rees, & Co., shipbrokers of Swansea, and was employed by them in a service which they advertised to the world in general and Palestine in particular as the Jaffa Union Line. All the bills of lading concerning these oranges were dated in Jaffa and signed in Jaffa by persons purporting to sign as directors of the Jaffa Union Line, Ltd. It was proved in evidence before me, on testimony which I accept, that the Jaffa Union Line, Ltd., is a corporation under the law of Palestine, which has been formed by certain gentlemen in that country who act as agents for Messrs. Stockwood, Rees, & Co. Some of the preference shares in the Jaffa Union Line, Ltd., are owned by Messrs. Stockwood, Rees, & Co., and the Palestine corporation is paid a loading commission by Messrs. Stockwood, Rees, & Co. on all shipments made at Jaffa on ships which sail in the service known as the Jaffa Union Line. The average number of trips made per season in this service is about sixteen, but in a busy season the number has been as high as twenty-five. There was for a short while some obscurity in my mind as to the precise relationship of the Jaffa Union Line to the corporation known as the Jaffa Union Line, Ltd. This obscurity was quickly and finally dispelled by Mr. Rees, who explained that the Jaffa Union Line was nothing more than a name for the service, used to advertise and designate the service. There was a house-flag flown by the *Torni* to show that she belonged to the service, and the bills of lading are headed by the words "Jaffa Union Line," but there is no existing separate entity which bears this imposing title, and the words are descriptive only of the service of ships provided by Messrs. Stockwood, Rees, & Co.

Upon the pleadings in the case the cargo-owners were divided into two classes. The first and smaller class contained two firms who sued severally as endorsees to whom the property has passed of two separate and comparatively small parcels of oranges. The second and much larger class comprised nine firms suing in respect of individual parcels of greatly varying size. This second class did not, however, purport to sue as endorsees or owners, but only as parties who had presented the bills of lading and paid the freight due thereunder. On this a case was raised of implied contract by the shipowners to deliver the oranges in good order and condition in accordance with the bills of lading. Some of the cargo-owners complained of short delivery and some of damaged goods, and some of both damage and short delivery, and two questions were submitted to me as preliminary points of law. The first of these was as to whether the law of Palestine or the law of England governed the interpretation of the contract, and the second as to whether the bills of lading were or were not subject to what may be called, for brevity's sake, the Hague Rules, under whichever law was found by me to be applicable.

The bills of lading are all identical in form, and contain a large number of provisions protecting the shipowners, some of which are pleaded in the defence. In reply, the cargo-owners set up the Government of Palestine Carriage of Goods by Sea Ordinance (No. 43 of 1926) and claim that under the said Ordinance the provisions of the bills of lading relied upon in the defence are null and void and of no effect. By way of rejoinder the shipowners deny that the bills of lading are subject to the Ordinance, or that the Ordinance formed part of or affected the contract between the cargo-owners and the shipowners. Alternatively they say that the ship was at all material times under the flag of Esthonia, and in the further alternative rely on the latter part of cl. 14 of the bills of lading, which is in these terms: "This bill of lading wherever signed is to be construed in accordance with English law."

There can, of course, be no dispute, and there is no dispute in this case that Palestine is at present mandated territory, and His Majesty the King is the Mandatory for Palestine. In pursuance of the powers under the Foreign Juris-

A diction Act, 1890, His Majesty made and promulgated the Palestine Order in Council 1922, constituting inter alia the office of High Commissioner and defining the powers attaching to this office. In the year 1926, Field Marshal Lord Plumer, as High Commissioner for Palestine, made and published an Ordinance (No. 43 of 1926), entitled the Carriage of Goods by Sea Ordinance, 1926. It was not suggested on the part of the shipowners that this Ordinance was in any way ultra B vires or in excess of the powers conferred upon the High Commissioner. Briefly stated, the effect of this Ordinance was to apply to Palestine with certain named and familiar exceptions, the rules relating to bills of lading adopted by the International Conference on Maritime Law held at Brussels in 1922 and 1923. These rules are, of course, the Hague Rules, which are now incorporated in the British Statute 14 & 15 Geo. 5, c. 22, known as the Carriage of Goods by Sea Act, C 1924. The Ordinance is in fact an obvious adaptation of the statute to conditions in Palestine, and for the present purposes differs from the statute in only one material respect. The difference, which is, in my view, of the greatest importance in this case, lies in a somewhat remarkable addition in the Ordinance to the parallel provision in the statute. Section 3 of the statute is in the following terms:

> D "Every bill of lading or similar document of title issued in Great Britain or Northern Ireland which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act."

Provision 4 of the Ordinance, reads:

> E "Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Ordinance, and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

It is difficult to conceive how a legislative authority could use stronger terms than F those employed in the Ordinance to secure that any and every shipment made in the country under a bill of lading should be made subject to the provisions of the rules enjoined.

In the present case the bills of lading not only contained no express statement as directed by the Ordinance, but included the provision to which I have called attention at the end of cl. 14, that the bill of lading wherever signed was to be G construed in accordance with English law. Since the whole argument for the defendant shipowner turned upon this provision in cl. 14, it is in my view most material to notice at the outset that this clause occurs in a bill of lading issued and signed in Palestine. By way of introduction, I think, rather than positive argument, counsel for the cargo-owners first contended that, since an Ordinance of Palestine had its fount and origin in His Majesty's Order in Council, the law of H Palestine was nearly or practically or almost English law. I think that one might agree that it is British made, or even that, in the jargon of the day, it comes under the heading of an "invisible export"; but counsel for the shipowners made short work of the contention that it is English law or that there is any such thing as "nearly English" or "quasi English" law. Indeed, if the argument were sound, it would not be a little surprising to find, as one does, that the Palestine Order in I Council, 1922, invokes the Foreign Jurisdiction Act, 1890 (53 & 54 Vict., c. 37) as the source of the Royal Authority. The preamble to this statute states that its object is to consolidate the Acts relating to the exercise of jurisdiction out of Her Majesty's dominions. I think the words of this preamble clearly mark the distinction. English law comprises the law laid down by Parliament for England, Wales, and for such other possessions, territories and dominions as take their law directly from this source in the same form as that laid down for England. All other law, whether of British origin or not, is for the present purpose, at any rate, foreign law.

Another aspect of the matter strongly relied upon by the counsel for the cargo-owners was that if the shipowners' contention was sound, it would lead the court to a conclusion so paradoxical as to be manifestly absurd. The Hague Rules are clearly incorporated in the Law of Palestine. They are no less clearly incorporated in the Law of England. But since in each case they apply only to outward shipments they would not, if English law were held to apply, cover a shipment such as this from Palestine. The position, therefore, would be produced in which a shipment from a country governed by the Hague Rules made to a country also governed by the Hague Rules would escape the Hague Rules. I agree that this sounds sufficiently absurd, but I am afraid that it is no part of my duty to strain the law in the laudable desire to produce logical results. In short, this aspect of the matter seems to me to belong to the area of general comment, rather than exact argument.

The strong points for the shipowners were that the bills of lading were in English, that they stated in unequivocal terms that wherever signed they were to be construed in accordance with English law, and they were received by Englishmen in England who might well be totally unaware of any law appertaining to Palestine. As a general principle no one nowadays questions that the test as to what law applies to the construction of a given document or contract is the intention of the parties at the time when the contract was made. Counsel for the shipowners pointed to cl. 14 of the bills of lading. If, he said, the contract deals expressly with the matter, this is the clearest possible evidence of the intention of the parties. As authority for this proposition, if authority were needed, he cited the judgment of ROCHE, J., in *Anselme Dewavrin Fils et Cie.* v. *Wilsons and North Eastern Railway Shipping Co., Ltd.* (3). He urged, too, that there were excellent reasons in this case, from the business standpoint, why English law should have been intended to apply. Apart from the two cases which concern endorsees, the large bulk of the cargo-owners were mere sellers of oranges in Hull. It was to be presumed that the course of business followed in this case was the usual one, and nothing could be more convenient than that receivers of goods of this class should know exactly where they stood when they came forward to pay the freight and take delivery. Doubtless, he said, it was for the express purpose of achieving this desirable end that the express clause as to construction was inserted in the bills of lading. For these reasons, inter alia, he contended strongly that English law, meaning thereby the law of England in England and not any transported or transposed version which might be applied in Palestine, governed the present contract. On the effect as regards the application of the Hague Rules, which I have called the second point here, he argued that if English law applied the Hague Rules were excluded, since they applied to outward shipments only, and from the English standpoint this was an English inward shipment. If, on the other hand, the law of Palestine applied, he did not contend that as regards the small class of endorsees he could exclude himself from the operation of the Hague Rules, since the endorsee could be in no different position from the original shipper of the goods. As regards the second and large class, however, he claimed that, since they were not claiming under the bills of lading at all, but were relying on an implied contract arising from the payment of freight, this class could not claim to apply the Hague Rules to their claims. The contract made by the shippers was not their contract, and they were neither affected by it, nor could they claim any benefit thereunder. These contentions constituted a formidable array. Nevertheless, I do not see this matter altogether in the light in which counsel for the shipowners so powerfully presented it.

I have had to ask myself in the first place: What did the parties to the original contract contained in the bills of lading intend as to the law to be applied? These parties were, nominally, Esthonian shipowners and shippers resident in Palestine. In reality, as we know, the Esthonian shippers were in nowise concerned in the transaction. No one has suggested here that the law of the flag should govern the contract. The real parties then were Messrs. Stockwood, Rees, & Co., Ltd., of

Swansea, and the shippers in Palestine. On this footing there is much to be said for the application of English law, but in my view still more to be said for the application of the law of Palestine. Of the cases in the books the nearest to the present case was by common consent *Re Missouri Co.* (1) and both sides claimed it as a decision in their favour. It is a very familiar and well-tried authority, and concerned the shipment of cattle from Boston, United States of America, to England on a British ship by a British company whose domicil was England. The shipowners claimed the benefit of the negligence clause in the bills of lading, and the shipper replied that it could not avail them because such a clause would be invalid according to the law of the State of Massachusetts, where the bills of lading were signed, given and accepted. A very strong Court of Appeal consisting of Lord Halsbury, Cotton, L.J., and Fry, L.J., affirmed unanimously a judgment of Chitty, J., in favour of the shipowners. But Lord Halsbury, in the course of his judgment (61 L.T. at p. 318), makes the following express saving:

> "I put aside, as Sir Walter Phillimore candidly put aside, questions in which the positive law of the country forbids contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilized country would be called on to enforce it."

Similarly Cotton, L.J. (61 L.T. at p. 319), adopts the same position in the clearest possible terms:

> "As the Lord Chancellor has said, I do not enter into the question what will be the result where parties have made in America a contract which they intend to be governed by English law, when according to the American law such a contract would be in itself illegal."

Fry, L.J., deals with this aspect of the matter in a less precise way, but he, too, draws the clear line between what is merely void and what is actually illegal according to the law of the country where the contract is made.

Re Missouri Co. (1) is, therefore, an authority for the proposition that the English courts will not refuse to uphold a stipulation in a contract merely because that stipulation would have been held to be void in a country where the contract was made. It is, however, no authority at all for the proposition that the English courts will enforce a stipulation which is prohibited by the positive law of the loci contractus, or which would be illegal according to that law. It might perhaps be argued that Lord Halsbury's dictum, which I have cited above, was obiter to the case in hand, but it is at least not lacking in clarity or incisiveness, and whether obiter or not I should be surprised even to hear it challenged.

Now, as I have already pointed out, the legislative authority for Palestine has been at quite extraordinary pains to incorporate the Hague Rules in the positive law of Palestine. Not content with including them in an Ordinance, as they are included in the Carriage of Goods by Sea Act, 1924, the Ordinance goes on to provide that even in the absence of the express statement which the Ordinance expressly enjoins, every bill of lading issued in Palestine shall be deemed to have effect subject to the rules contained in the Ordinance.

The bills of lading in the present case were issued in Palestine. The shippers in practically every case bore names eloquent of eastern origin, and it is not suggested that they were not at least residents if not natives of Palestine. Am I to imagine that in the face of the insistent terms of the Ordinance they nevertheless intended and agreed to contract themselves out of the benefit which that Ordinance was designed to confer upon them? Can I infer that they were entitled to do so? And in the face of Lord Halsbury's plain pronouncement, have I any right to enforce such a provision as that contained in cl. 14 of the bill of lading, which would be a clear infringement of the law of Palestine if it were to be taken to exclude the Hague Rules, which ought to have been expressly included, and are to be deemed to be included, even in the event of actual omission? In my view it would be both contrary to law and contrary to commonsense so to hold. To my mind the terms of the Ordinance are stronger than the parallel and familiar terms in the Harter Act of the United States of America. The Harter Act (Act of Congress 1893, No. 57) declares that words or clauses contrary to its provisions are to be null and void and of no effect, and the Hague Rules themselves, Art. III (8), go just as far in this direction. In a word, the Harter Act says that you must not evade the Act, but the Ordinance seeks to go a step further. It says you cannot evade the Ordinance, however hard you may try. I accordingly decline to believe that these parties in these circumstances either intended to evade or, if they so intended, succeeded in evading, the Ordinance. To put it another way, I am not really sure that in the face of an Ordinance of this kind the familiar question as to the intention of the parties really arises at all. I incline rather strongly to the belief that it is taken out of their hands, and, so far as the Hague Rules are concerned, they have no longer any right to an opinion or intention. But, if I am wrong in this view, I hold that, in view of the facts that these goods were shipped by a regular service from Palestine, bearing a name taken from a Palestine port, that the shippers were presumably residents in Palestine, that the bills of lading were issued in Palestine and the law of Palestine has dealt quite recently and quite concisely with this express point concerning bills of lading, the intention of the parties must be taken to be that they contracted upon the footing that the law of Palestine should apply to the contract.

At this stage it becomes material to consider counsel for the shipowners second point, namely, as to the effect of the decision which I have reached on the second and larger body of cargo-owners. As regards the first body, only two in number, it is clear and, as I understand, conceded, that they can be in no better or worse position than the original shippers. They succeed, therefore, completely on the present issue, once I am satisfied that the law of Palestine applies to the bills of lading.

As to the larger body, I confess that I have had, and still have, some doubt. I dislike intensely the conception of a bill of lading as a chameleon amongst contracts, taking its colour from the country in which it happens to be, meaning one thing in Jaffa, and something very different in Hull. But there is undeniable force in the contention that these cargo-owners are not suing on the bills of lading at all, and that their contract with the shipowner is more naturally and more conveniently to be imagined as governed by the English law which they ought to know rather than by the law of Palestine which they would be most unlikely to know. By way of authority against the shipowners junior counsel for the cargo-owners put forward *Cox* v. *Bruce* (4) and *Frenkel* v. *MacAndrew & Co.* (5). In neither of these cases was the point in issue really comparable to the present case; in fact, junior counsel for the cargo-owners frankly agreed that in *Frenkel's Case* (5) the real question, namely, as to whether the vessel had deviated from the agreed voyage differed toto cælo from anything in issue here. So far as *Frenkel's Case* (5) was concerned he relied on certain isolated passages in the opinions of Lord Buckmaster and Lord Warrington as assisting his argument. The dictum which seemed to come nearest to his proposition was that which he took from the concluding paragraph of Lord Warrington's opinion, in which he refers to the judgment of Fry, L.J., in *Leduc* v. *Ward* (6) (20 Q.B.D. at p. 483) as establishing that bills of lading are to be construed according to ordinary principles of law. When that case is consulted it will be found that there, as also in *Cox* v. *Bruce* (4), the court was dealing with the position of endorsees for value of bills of lading. I cannot feel, therefore, that in either of these cases I have any sound foundation upon which to proceed in dealing with a position which ex concessis is not ruled and regulated, as in that of endorsees to whom the property has passed, by the Bills of Lading Act, 1855.

It seems to me, therefore, that in the absence of any clear authority I must endeavour to deal with this matter upon known facts and ascertained principles.

On the facts and law as I have found them the original contracts were made in Palestine in the form of bills of lading, and it was intended that the law of Palestine should apply to them. It is for the plaintiffs to prove their case. They come into court with a case, which though not actually founded upon the bills of lading, is evidenced by those bills of lading. Moreover, the freight has been paid by them at the rate agreed in those bills of lading. I do not know all the circumstances of their situation. They may be merely agents for the shippers. They may, though it is not pleaded, be persons to whom the property in the goods has passed. If they were merely agents it would be so strange as to seem absurd if it could be held that their contract with the shipowners was a different one, so far as the bills of lading are concerned, from that of their own principals. If, on the other hand, they are persons to whom the property has passed, one may well ask oneself why they should be in a different position to ordinary endorsees to whom the property has passed under the Bills of Lading Act, 1855? In any case, whether agents or property owners, are they not entitled to say: "We hold the bills of lading, we are content to be bound by their terms, and their terms cannot be different for us to the terms originally agreed between the parties"? In other words, when once they present the bills of lading and it has been ascertained what was the original contract between the shipowners and the shippers, it is for the shipowners to show that something has occurred to alter that original contract in the hands of the new holder. In the present state of commerce it is not difficult to conceive a case in which the shipowner could show such circumstances. Having arrived at the port of discharge an insolvent consignee or assignee is unable to pay the freight and take delivery of the goods. A new bargain is thereupon entered into by the shipowners with a person who is neither consignee nor assignee. The contract in the bill of lading might then become of no importance, though the goods had been shipped and carried under the contract contained therein. But in the absence of any evidence of circumstances which would or might change the original terms of the bills of lading, I do not think that on any known principle the shipowner can be heard to say that a contract which meant one thing in its inception meant something else when it had passed into the hands of a fresh holder. It is to be remembered that on the findings I have made the shipowners must be taken to have known all the original terms, so that there can be no business hardship in holding them to their own original terms.

The hesitation which I have felt in this case springs largely from a doubt as to the full extent and the exact meaning of the word "illegal" as used by Lord Justice Cotton in the passage which I have quoted above from his judgment in the *Missouri Case* (1). I have taken it, in conjunction with the words I have cited from Lord Halsbury's judgment in the same case, to mean that, since the law of Palestine at present says positively that you must put the Hague Rules into a bill of lading, you are making a contract contrary to the law of Palestine if you omit them from the bill of lading. Such an omission is accordingly illegal, as I understand the meaning of this term. If I am right in my understanding of this term the contract originally made with the Hague Rules omitted was illegal and wrong in form and the shipowner cannot be heard to take advantage of his own wrong, nor should any court be asked to enforce it in this form. Moreover, the principle applied in *Dobell* v. *Rossmore* (7) ([1895] 2 Q.B. at pp. 412 and 413) applies here with even greater force, and I ought to take these bills of lading as containing the Hague Rules written into them, as the Master of the Rolls, Lord Esher, says that such provisions should be construed when introduced by a clause paramount, and as the law of Palestine says they must be treated even when not so included.

In the result, therefore, my judgment is for both bodies of cargo-owners on both the points submitted to me.

The shipowners appealed.

Raeburn, K.C., and *Sir Robert Aske* for the shipowners.
Van den Berg, K.C., and *Cyril Miller* for the cargo-owners.

A Reference was made by counsel to the following authorities: *Anselme Dewavrin Fils et Cie.* v. *Wilsons and North Eastern Railway Shipping Co.* (3), *Re Missouri Steamship Co.* (1), *Ralli Bros.* v. *Compania Naviera Sota y Aznar* (8), *McFadden* v. *Blue Står Line* (9), *Dobell* v. *Steamship Rossmore Co.* (7), *The Adriatic* (2), *Re Mahmoud and Ispahani* (10), *Hamlyn* v. *Talisker Distillery* (11), *Brandt* v. *Liverpool, Brazil and River Plate Steamer Navigation Co.* (12), and *Frenkel* v. *MacAndrews & Co.* (5). B

SCRUTTON, L.J.—If I were called upon to decide all the questions that have been argued in this case I should certainly desire to hear counsel for the cargo-owners here, and should very likely take time to consider my judgment. In my view, however, the part of this case that I am going to decide can be decided on very short grounds. The owners of a cargo of oranges who, according to the C practice of the Admiralty Court, were not specified in the writ, brought an action against the owners of an Esthonian ship, the *Torni*, for damages to certain oranges alleged to be in breach of the bill of lading. The cargo-owners themselves have alleged that the two cargo-owners whose names are given were owners of oranges to whom the property passed upon the endorsement and certificate on the bill of lading. They had arranged also with the following cargo-owners, nine of whom D took delivery of certain cases of oranges specified under bills of lading held by them—which is a perfectly ambiguous remark to make; there are all sorts of cases held by them—"and presented to the defendants and paid the freight due under such bills of lading respectively." Then follow nine names. The bills of lading themselves are in a most ambiguous and embarrassing form, and are dealt with in a way by which the court cannot tell by looking at them what happened. I take E the first one as a specimen. The form of the bill of lading is "Shipped . . . by"—blank—"and to proceed to the port of Hull and there deliver unto order"—presumably the order of the person whose name is filled in in the "shipped by." The shipper of the first bill of lading I look at is Ebr Charanni. There is no order by Ebr Charanni on the bill of lading. What there is on the bill of lading is the order by Associated Orange Growers, Ltd. who have not hitherto appeared in the F case at all, to deliver to the order of Connolly Shaw, of Liverpool. There is what would be ordinarily an endorsement in blank above that, "Connolly Shaw, Liverpool," and underneath that a stamp: "This bill of lading has to-day been presented by Connolly Shaw"—not as you would have thought, for Associated Orange Growers, Ltd. but "For Sivewright Bacon & Co.," whose name does not appear as plaintiffs at all. No human being by the light of that bill of lading can know G what has happened or decide what the effect is of Connolly Shaw presenting that bill, taking the freight, and taking the goods. And the other bills of lading are equally embarrassing. I have looked through them. Several of them raise entirely different problems, but none of them make clear what is meant by "held by them." Because so far as the bills of lading show, they are held by someone else, and not "by them" at all; and under those circumstances I decline to decide any- H thing as to the position of the people whose names appear as "the following plaintiffs" in para. 4, and I propose only to decide the question which is directly raised by the order that has been made. It is a great pity that the order was ever made, because what may happen in this case is what has happened recently in several other cases: that the parties may go to the Lords, the Lords may decline to decide the question at all, as they did in a recent case; and it will be sent back I for hearing more than two years—three years perhaps—after the cargo arrived, and when everybody has either forgotten about it, or several of the most important witnesses are dead or have disappeared. Preliminary questions of law may be ordered to be stated in a way such as seriously to embarrass the trial of the action. But here is the order, and the judge has dealt with the part of it I am going to read, and so I deal with it; but I regret that the order was ever made.

I am asked whether the bills of lading are, as between the parties to the action, subject to the provisions of the Government of Palestine Carriage of Goods by Sea

A Ordinance. The question begins with a Convention at Brussels, signed by a large number of people with certain reservations which I will refer to. Article 10 of that Convention, which draws up a code of rules to be embodied in bills of lading, is:

> "The provisions of this Convention shall apply to all bills of lading issued in any of the contracting States."

B We go on, because one wants to know who are the contracting States. Article 12:

> "Non-signatory States may accede to the present Convention whether or not they have been represented at the International Conference at Brussels."

Article 13:

> C "The high contracting parties [which includes His Majesty] may at the time of signature, ratification, or accession declare that their acceptance of the present Convention does not include any or all of the self-governing Dominions, or of the Colonies, Overseas Possessions, Protectorates or Territories under their sovereignty or authority";

D and that may raise a very nice question whether a mandated territory is a possession under the authority of the King. I do not know whether the people who framed this question thought that we were going to decide anything about that, or whether they knew anything about it when they settled the provisions. It does not stop there. His Britannic Majesty affixed a reservation to his signature:

> E "I further declare that my signature applies only to Great Britain and Northern Ireland, I reserve the right of each of the British Dominions, Colonies, Overseas Possessions, and Protectorates, and of each of the territories over which His Britannic Majesty exercises a mandate [the people who drew that up did know about Palestine] to accede to this Convention under Art. 13"

F then an Ordinance:

> "Whereas a Convention for the unification of certain Rules relating to bills of lading was adopted by the International Conference on Maritime Law, held at Brussels in 1922 and 1923. And Whereas it is expedient that the Rules of the Convention, as set out in the schedule to this Ordinance, should, subject to the provisions hereof, be given the force of law in Palestine."

G Whether the Government of Palestine sent a notice of that to the Government at Brussels the parties have not troubled to inform us; probably because they had not looked at the Ordinances to see if they might or might not be material. However it is quite clear that the Government of Palestine has intended to accede to the Convention and adopt the rules laid down by the Convention. England has H adopted the rules by the Carriage of Goods by Sea Act, 1924. Palestine, being a mandated territory under the King, has adopted the rules by the Ordinance. Palestine has gone rather further than England. Palestine has inserted this clause:

> "Every bill of lading or similar document of title issued in Palestine [this bill of lading was issued in Palestine] which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to I have effect subject to the provisions of the said rules."

The people who drew up this bill of lading have disobeyed that law, and have not included, as they are told to in the Ordinance, an express statement that it is to have effect subject to the provisions of the said rules. The Government of Palestine have anticipated that people in Palestine might disobey the law, and so they have added the words

> "shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

Palestine, therefore, has endeavoured to carry out and reduce to law the Convention, to which England and Palestine agreed, that all bills of lading wherever signed shall include what used to be known as the Hague Rules, and are now known as the Rules in the Schedule. It has occurred to most of the firms that they might upset the whole apple-cart—if I might use a conventional expression—of the countries who have agreed to it by simply putting in a clause into their bill of lading, as they have done: "This bill of lading wherever signed, is to be construed in accordance with English law." If that has the effect of striking out the whole of the schedule, it will be quite simple for every shipowner to defeat the whole of the Convention and the whole system under it by simply putting in a clause:

> "This bill of lading is to be construed by the law, not of the place where it is made, but by the law of the place to which the ship is going."

It will take very strong evidence to convince me that such a clause has that meaning. I read the effect of the Palestine Ordinance as this: In every bill of lading, whether you state it or not, these terms of the schedule, the Hague Rules, are to be included as part of the terms. Consequently, when I come to construe this bill of lading, I read into it those terms. I give perfectly sufficient effect to the clause about English law, if it has any effect, by saying: Yes, here is the bill of lading with those terms in it. Now construe it according to English law. If English law were faced with the same question on a bill of lading signed in England with a clause: "This bill of lading is to be construed in accordance with Palestine law," I have no doubt that the English courts would hold that they had to construe the bill of lading containing, in compliance with the English statute, the Rules in the schedule, according to Palestine law. I think exactly the same result follows if you turn it round and sign the bill of lading in Palestine, where it has to comply with Palestine law, and construe it according to the law of England.

For these reasons, I think, without going into all the reasons that he gives, that the result at which LANGTON, J., arrived is a correct result. In my view, most of the cases cited have nothing to do with the question. I do not think that any case has raised this sort of point before. Certainly *Re Missouri Steamship Co.* (1) seems to me to have done nothing like raising it. *The Missouri Case* (1) was this: Here is a bill of lading made in Massachusetts, with a clause in it printed which the courts of Massachusetts would declare to be void as contrary to public policy. Inasmuch as public policy differs in all sorts of countries, and the United States think that the negligence clause is contrary to public policy whereas the English courts do not think it is contrary to public policy, the English courts do not regard the view of public policy when they come to interpret that document, and do not strike the clause out of the bill of lading, because their view of public policy differs from the view of public policy taken in the United States courts. But it is quite a different thing when you have a question, not of following a clause in that bill of lading, but a question of trying to strike out the clause which the law of the place says shall be incorporated in every bill of lading made in that country. For those reasons, limiting the answer which I give to the main part of the question, I answer that the bills of lading are subject to the provisions of the Government of Palestine Carriage of Goods by Sea Ordinance, and that the Rules are included in the bill of lading. I decline to go on and answer the question what the effect of that is on the various people mentioned in para. 4, because there are no facts which enable me to decide in what relation those people mentioned there stand to the property and to the conveying; and I decline to answer a question which requires knowledge of facts which the parties have not given me.

For those reasons I think the appeal must be dismissed with costs; and in my view, the sooner the parties go to trial and determine the facts the more likely is justice to be done.

GREER, L.J.—I agree. Though the terms of the Ordinance strictly and literally interpreted seem to apply if the question is asked not only with regard to

A the contracts contained in the bills of lading, of which the parties mentioned in para. 3 of the statement of claim are assignees, and in the same position as the original contractors were to the bill of lading, I think we ought not to decide, notwithstanding the wise words of the Ordinance, what the effect is of the implied contract made with other parties who were not assignees, and do not appear to have been assignees, of the bills of lading and the contract therein contained, but B between whom and the ship the contract has to be implied out of the circumstances under which they came to present the bill of lading and pay the freight. It may be that in some of these instances the persons coming to pay were the agents of the shippers and were therefore, as between them and the ship, people on whom the whole of the contract made by the bill of lading and the other considerations which applied to the contract in Palestine had effect. It may be on the other C hand that different considerations might apply to them if they were mere strangers to the original transaction; and the only materials on which it can be determined what the contract between them and the ship was arise out of the fact that they came with the bill of lading, with a written document, in England, and said to the ship: "Deliver me these goods on the terms of this document." That may prove to be a difficult question which possibly may never arise, and which can only be D determined when the facts of the case are fully proved; it is a question that ought not to be determined as a preliminary point upon these pleadings. I direct my attention solely to the claim in para. 3 of the statement of claim; and the question then is: whether, as against the people to whom the property passed on the bill of lading, the terms of the Palestine Ordinance are to be read into the contract contained in the bill of lading, that is to say, the contract made by the shippers at E the port of shipment.

In 1923, as the result of various conferences between representatives of shipping firms and representatives of merchants, a Convention was arrived at with the laudable object of securing a certain amount of uniformity in the contracts of carriage which were made by bills of lading. That uniformity is desirable was universally admitted, though the result of uniformity and the creation of a F statutory form may be in some respects to restrict the freedom of contract. That is of very little importance compared to the advantages obtained when you get a position created by law in which people can know, without much investigation, what duties are undertaken by a ship with regard to the goods which it carries. So long as there is no dictation as to what the rate of freight is, the freedom of contract remains; because if the shipowner thinks that he is undertaking liabilities G by reason of the statutes passed in the various countries that put a burden upon him which he was not under before, he can rectify that difficulty by a small addition to the freight. The restriction of the freedom of contract is of much less importance now than it was in the old days; because the question which both parties have to face is merely which party, the shipper or the shipowner, is going to pay the premium to insure the goods for the voyage.

H I read the Ordinance as meaning this: Paragraph 4 in my judgment contains an imperative order to those who are making contracts for the shipment of goods from Palestine to this country to insert in a contract made by bill of lading or similar document, an express statement that it is to have effect subject to the provisions of the Rules which are stated in the Ordinance, and that any shipper and any master of a ship who contravenes that order is doing something which by I the law of Palestine is illegal. But in order to prevent that illegality from having the effect of entirely destroying the contract of carriage between the parties, those who drew up this Ordinance wisely added a provision that though there has been disobedience to the first part of para. 4 and the contract has not contained the express statement provided for, the contract shall be deemed, notwithstanding the omission of such express statement, to have effect subject to the rules. I find some difficulty in supposing that under those circumstances the shippers of these goods and those who represented the ship, the agents of the ship, in Palestine, did not make a contract which contained the provisions of the Ordinance. I think it is clearly established that, making their contract as they did subject to the laws which prevailed in the country where they made it, they made it just as much subject to the rules contained in the Ordinance as if they had expressed it so in the document; and if they had expressly stated so in the document the provision in the contract that the contract should be construed in accordance with the laws of this country would not have eliminated those terms from the contract, but would have only directed the parties and the courts in this country to construe the words of the Ordinance according to the rules of construction prevailing in this country.

I agree with my Lord that there are no authorities which prevent this court from coming to the conclusion that they have done. The only case that is anywhere near this is *Re Missouri Steamship Co.* (1), which has been much discussed in the course of the argument. That was a case where an agreement and the terms of a contract of carriage which relieved the carrier from liability for the negligence of his employees was void by the law of Massachusetts. There was nothing in the law of Massachusetts to say that it was illegal, and there was nothing in the law of Massachusetts to say that if it was not put in the contract it should be deemed to be in the contract made within the Massachusetts territory, and there are observations made by LORD HALSBURY and other members of the House of Lords which make it quite clear that in their Lordships' judgment they were not deciding that, if a term in the contract was illegal by the law of the place where it was made, this country would fail to recognise that illegality. On the other hand, I regard the decision of the House of Lords as meaning that if in the country where the contract was made the contract was illegal—not merely void and unenforceable, but illegal—then the courts in this country would recognise the illegality and act in accordance with the law of the country where the contract was made. And that being so, I do not regard that case as any authority with regard to the present case; because in my judgment, apart from the statutory correction of the illegality, the contract, if it did not contain these terms, would have been by the law of Palestine an illegal contract.

For these reasons, without referring at any greater length to the principles of law which have been under discussion, I think the learned judge was right.

We are indebted to Sir Robert Aske (junior counsel for the shipowners) for a clear and unambiguous argument. Where I differ from his argument is in this: his argument treated the Ordinance as if it were a mere statement that the clause in the document would be null and void. I treat it as a statement that it would be illegal not to put it in, and that whether it is put in or not, it is there in the contract. And if that is right, that determines this appeal.

I agree with my Lord that it would be extremely unfortunate if the result of this case were to be, as it would be, to bring to nought the attempt that has been made by means of the Conventions with the various countries, to secure a uniform bill of lading—a more or less uniform bill of lading—to be recognised by one country in regard to the goods shipped from that country, and by the other party to the Convention with regard to the goods shipped from his country. I am not persuaded by the argument that we are bound to bring this Convention to the unfortunate nullity that would come upon it if we decided this case otherwise than in the way we are deciding it.

I agree that this appeal should be dismissed with costs.

SLESSER, L.J.—In this appeal a conflict arises in the following way. In the bills of lading under consideration it is provided that the bill of lading wherever signed is to be construed in accordance with English law. The bill of lading was in fact signed at Jaffa, and therefore, being signed outside the United Kingdom, would not be a bill covered by the Carriage of Goods by Sea Act, 1924. But in Jaffa, which is within the mandated territory of Palestine, there is an Ordinance which substantially applies the provisions of the Carriage of Goods by Sea Act, and substantially carries out the results of the International Conference at Brussels in 1922 in language which was thought appropriate to produce that result in that mandated territory. The question we have to consider and the question which we are asked is this: Whether in the circumstances of the case—if the bill of lading is stated to be construed in accordance with English law, it has to be construed in accordance with that Ordinance or not.

The Ordinance provides in cl. 4 that

> "Every bill of lading or similar document of title issued in Palestine which contains or is evidence of any contract to which the rules apply shall contain an express statement that it is to have effect subject to the provisions of the said rules."

The rules are contained in the schedule to the Ordinance entitled "Rules relating to Bills of Lading." Clause 8 of Art. 3 provides that

> "Any clause, covenant, or agreement, in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this article or lessening such liability otherwise than is provided in these rules, shall be null and void and of no effect."

The first question which I ask myself is this: Whether s. 4 of the Ordinance, which so applies to cl. 8 of the rules, which is the clause here most material, is or is not a provision merely that a contract not containing such provisions shall be void or whether there is there an express prohibition of the making of a bill of lading otherwise than in accordance with cl. 4 and the rules thereby applied. In my opinion it is clear beyond any doubt that the first limb of cl. 4 does contain an express prohibition and an express mandate that the bill of lading shall take a particular form. The language is: "Every bill of lading . . . shall contain an express statement."

Junior counsel for the shipowners has argued that the provision cannot be regarded as a prohibition within the meaning of the observations made by LORD HALSBURY in the *Missouri Case* (1), because there is no penalty attached to the disobedience of the mandatory provision. In my view that is not at all conclusive of the matter. Had this provision been contained in the English statute I entertain no doubt that in the absence of penalty, where someone was in terms by statute in a public matter required to do a certain act, or if the act were to be done, to do it in a certain way, that if that person failed to obey that statute, the act done would be in contempt of the statute, and therefore, though there were no express penalty provided, the ordinary common law rules would apply, and in such case, the matter being one of public obligation and the act done in contempt of the statute, in an appropriate case the remedy would lie for misdemeanour. The matter is so stated in HAWKINS' PLEAS OF THE CROWN, book 2, chap. 25, s. 4, in this matter:

> "It seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable, not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it."

That doctrine has been applied in several cases, two only of which I will cite. The first is *R.* v. *Price* (13), where a person failed, apparently innocently, to inform the registrar of particulars regarding the birth of a child. On being requested to furnish the information he refused, and it was held that he was indictable for a misdemeanour. In that case of course the original innocence ceased to act after the matter had been pointed out to him. The indictment was on the refusal, and there was no penalty attached in express terms. The second case is *R.* v. *Hall* (14) to the like effect, where the passage I have read in HAWKINS' PLEAS OF THE CROWN is cited with approval. I think, therefore, that had the matter fallen for consideration within the realm, the mere absence of a penalty on this matter on which counsel relies would not in itself in any way have militated against the mandatory provision being deemed to be illegal. It is a general rule of law that in the absence of evidence to the contrary one must assume that the foreign law is the same as the English; and indeed it is almost inconceivable that where in any State a statute or an ordinance requires something to be done, the mere absence of an express penalty mentioned would destroy the sanction of the obligation which the sovereign authority sought to impose upon the subject.

Had the matter rested at the end of the first limb of cl. 4 I think it is clear that the obligation is mandatory and express. But the clause goes on to say

> "and shall be deemed to have effect subject thereto, notwithstanding the omission of such express statement."

Those words strengthen the force of the Ordinance in this sense, that if, contrary to the provision of the statute, the bill of lading does not contain the statement, the whole matter might be null and void. This provision of machinery that the terms are in any event to be imported into the bill of lading does not make the obligation under the bill of lading less mandatory. Therefore, to that extent this case does fall directly within the compass of the observations of LORD HALSBURY in *The Missouri* (1), where he says:

> "Where a contract is . . . contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it."

Here we are not concerned with the whole contract, but with the introduction of a particular term; and I would, therefore, add the observation which has been cited to us from SALMOND ON CONTRACTS to the effect that the matter may be regarded as a question of whether the exclusion or insertion of a particular obligation is or is not contrary to the comity of nations. I find it very difficult to think that where you have had an international Convention—and such is the case here—to which various nations have agreed—and, as my Lord has pointed out, Palestine has ultimately agreed to carry out the obligations of that Convention—it would not be contrary to the comity of nations not to give force to those provisions and to allow the particular individuals in a special contract really to make a special provision for themselves out of the universal international obligation and agreement. But, however that may be, and that point may assume greater and greater importance as more and more international Conventions are carried out, I am prepared to found my view on the assumption that this was expressly provided. If that be so—if the bill of lading were drawn otherwise than in accordance with the Ordinance—then, by virtue of cl. 4, s. 8 must be read into this bill of lading. We then apply to that, if it is applicable, that the words shall be construed in accordance with English law. I think the learned judge was right in the answer which he gave to that part of this case. We have only to consider that part, because I agree with my Lord that the question of the respective liabilities of the various cargo-owners cannot here be decided, as not asked in terms, and as we have not the necessary materials on which to decide it, and that therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Botterell & Roche*; *Pritchard & Sons* for *Andrew M. Jackson & Co.*, Hull.

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

THE LALANDIA

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), October 17, 31, 1932]

[Reported [1933] P. 56; 102 L.J.P. 11; 148 L.T. 97; 49 T.L.R. 69;
18 Asp.M.L.C. 351]

Practice—Service on foreign corporation—Foreign shipowners with agents in this country booking freight and selling passenger tickets—Remuneration by commission on bookings—Service on agent—Validity—R.S.C., Order 9, *r.* 8.

A firm of English shipping agents booked freight and sold passenger tickets in England for a foreign corporation on a commission basis, but otherwise had no authority to make any contract on behalf of the foreign corporation, and no authority to vary the terms of such contracts, all of which were fixed by the foreign corporation abroad.

An English writ against the foreign corporation was served on the shipping agents. On motion by the foreign corporation to set aside the writ and its service on the ground that it did not reside or carry on business within the jurisdiction,

Held: the writ and service should be set aside because the shipping agents here merely sold, and did not make, contracts on behalf of the foreign corporation, and so were carrying on their own business here, and not that of the foreign corporation: *The Princesse Clementine* (1), [1897] P. 18, followed; *Thames and Mersey Marine Insurance Co.* v. *Società di Navigazione a Vapore del Lloyd Austriaco* (2) (1914), 111 L.T. 97, explained and distinguished, and test therein stated by BUCKLEY, L.J., at p. 98, applied.

Notes. Section 344 of the Companies Act, 1929, has now been replaced by s. 407 of the Companies Act, 1948.

Followed: *The Holstein*, [1936] 2 All E.R. 1660. Referred to: *Re Tovarishestvo Manufactur Liudvig-Rabenek*, [1944] 2 All E.R. 556.

As to what acts of an agent here will constitute the carrying on of business in England by a foreign corporation, see 9 HALSBURY'S LAWS (3rd Edn.) 94–95, para. 185, text and notes (c)–(f), and ibid., vol. 1, p. 100, para, 228, text and note (c).

Cases referred to:

(1) *The Princesse Clementine*, [1897] P. 18; 66 L.J.P. 23; 75 L.T. 695; 8 Asp.M.L.C. 222; 1 Digest 172, *836*.

(2) *Thames and Mersey Marine Insurance Co.* v. *Società di Navigazione a Vapore del Lloyd Austriaco* (1914), 111 L.T. 97; 30 T.L.R. 475; 12 Asp.M.L.C. 491, C.A.; 13 Digest 430, *1531*.

(3) *La Bourgogne*, [1899] P. 1; 68 L.J.P. 9; 79 L.T. 331; 8 Asp.M.L.C. 462, C.A.; affirmed sub nom. *La Compagnie Générale Transatlantique* v. *Thomas Law & Co., La Bourgogne*, [1899] A.C. 431; 68 L.J.P. 104; 80 L.T. 845; 15 T.L.R. 424; 8 Asp.M.L.C. 550, H.L.; 13 Digest 431, *1540*.

(4) *Saccharin Corpn., Ltd.* v. *Chemische Fabrik Van Heyden Akt.*, [1911] 2 K.B. 516; 80 L.J.K.B. 1117; 104 L.T. 886, C.A.; 13 Digest 430, *1534*.

(5) *Okura & Co., Ltd.* v. *Forsbacka Jernverks Akt.*, [1914] 1 K.B. 715; 83 L.J.K.B. 561; 110 L.T. 464; 30 T.L.R. 242; 58 Sol. Jo. 232, C.A.; 13 Digest 430, *1536*.

(6) *The W.A. Sholten* (*Scholten*) (1887), 13 P.D. 8; 57 L.J.P. 4; 58 L.T. 91; 36 W.R. 559; 6 Asp.M.L.C. 244; 1 Digest 172, *835*.

(7) *Dunlop Pneumatic Tyre Co.* v. *Akt. für Motor und Motorfahrzeugbau vorm. Cudell & Co.*, [1902] 1 K.B. 342; 71 L.J.K.B. 284; 86 L.T. 472; 50 W.R. 226, C.A.; 13 Digest 430, *1532*.

(8) *Walter Nutter & Co.* v. *Messageries Maritimes de France* (1885), 54 L.J.Q.B. 527; 1 T.L.R. 644; 13 Digest 432, *1551*.

Motion to set aside a writ and service.

The plaintiffs, owners of the motor vessel *Henry Stanley*, of London, claimed damages against the East Asiatic Co. in respect of injuries received by their vessel in a collision with the defendants' motor ship *Lalandia*. The collision took place outside the territorial waters.

The defendants were a foreign corporation residing and carrying on business at Copenhagen, with branch offices at Singapore and Bangkok, and agencies at various places, including London. The writ was served on Mr. McGrath, one of the partners in Messrs. Escombe, McGrath & Co., of Fenchurch Avenue, E.C. Messrs. Escombe, McGrath & Co. acted as agents in London for the defendants. The circumstances under which such agency was conducted were fully set out in affidavits sworn by Mr. McGrath and by one of the directors of the defendants. In Mr. McGrath's affidavit he stated the following facts: The defendants were a foreign corporation carrying on business in Copenhagen, and had no residence or place of business in Fenchurch Avenue. The firm of Escombe, McGrath & Co. were ship and insurance brokers and carried on the business of freight and passenger agents at 13, Fenchurch Avenue. In the course of their business the firm had acted for about thirty years as agents for the defendants. They also acted as freight and passenger agents for several other foreign steamship companies. Beyond the ordinary duties of ship brokers, such as the booking of freight and the issue of passenger tickets, the firm transacted no business and had no authority to transact business or enter into any contracts on behalf of the defendant company, or for any of the other companies. The rates of freight and passenger fares were fixed by the defendants. Bills of lading and passenger tickets were supplied to the firm on forms prepared by the defendants and printed in Denmark. Such bills of lading and passenger tickets were invariably signed by the firm as agents only and constituted or evidenced contracts only with the defendants. The terms of the bills of lading provided that questions arising thereunder should be governed by the law of Denmark and decided in Copenhagen. The only name appearing upon the doors of the offices in Fenchurch Avenue was that of Messrs. Escombe, McGrath & Co., and upon the windows of the ground floor their name was exhibited as agents for the defendant company and other foreign companies. Upon a window of the basement the name of the defendant company, of Copenhagen, was exhibited together with a copy of that company's house flag, and upon adjoining windows were the names of other foreign steamship companies for whom Messrs. Escombe, McGrath & Co. acted as agents. The letter paper used by Messrs. Escombe, McGrath & Co. when transacting any agency business stated the names of the various shipping companies for whom they were agents. Apart from these matters Messrs. Escombe, McGrath & Co. had no connection with the defendant company, in the management of which they had no concern, and in which they had no financial interest. The only remuneration received by Messrs. Escombe, McGrath & Co. was the customary agent's remuneration on freights and passage money and brokerage. The defendant company had no interest or concern in the offices at Fenchurch Avenue, the rent of which was paid by Messrs. Escombe, McGrath & Co. All the staff employed at the offices were servants of Messrs. Escombe, McGrath & Co.

In an affidavit by one of the directors of the defendant company it was stated that the defendant company was a corporation registered under the laws of Denmark, with its head office in Copenhagen, and branch offices at Singapore and Bangkok. There were agencies at various places in different parts of the world. The defendant company employed Messrs. Escombe, McGrath & Co. to act as one of its agents in the United Kingdom. The defendant company had no residence, office, or place of business in the United Kingdom. It had no registered address within the United Kingdom such as is provided for by s. 344 of the Companies Act, 1929. There was no head officer or clerk resident or employed at 13, Fenchurch Avenue, or elsewhere in the United Kingdom.

Willmer for the defendant company.—The evidence filed by the defendant company shows that they were not in fact carrying on business in the United Kingdom, and the writ was therefore not properly served on Messrs. Escombe, McGrath & Co. Whether the service was good must depend on whether the defendant company reside or carry on business because they employ agents here; whether Messrs. Escombe, McGrath & Co.'s head office is in fact their office for this purpose; and whether their address is for this purpose the address of the defendant company. It is submitted that these questions should all be answered in the negative. *The Princesse Clementine* (1) shows that a shipping agent, carrying on business normally as such, is not an agent upon whom good service may be made. The evidence shows that this case is entirely different from *La Bourgogne* (3); affirmed sub nom. *La Compagnie Générale Transatlantique* v. *Thomas Law & Co.*

Pilcher for the plaintiffs.—The test is whether the agents had authority to make contracts for the defendant company or whether what they did merely amounted to entering into contracts, all the terms of which were already formulated by the defendant company, without any authority to vary or alter such terms: see *Thames and Mersey Marine Insurance Co.* v. *Società di Navigazione a Vapore del Lloyd Austriaco* (2). In this case it is submitted that Messrs. Escombe, McGrath & Co. were the persons who were really entering into contracts on behalf of the defendants.

Willmer replied.

[Reference was also made to: *Saccharin Corpn.* v. *Chemische Fabrik Van Heyden Akt.* (4), *Okura & Co., Ltd.* v. *Forsbacka Jernverks Akt.* (5), *The W.A. Sholten* (6), *Dunlop Pneumatic Tyre Co., Ltd.* v. *Akt. für Motor und Motorfahrzeugbau vorm. Cudell & Co.* (7), and *Nutter* v. *Messageries Maritimes* (8).]

Cur. adv. vult.

Oct. 31. **LANGTON, J.**—This is a motion to set aside a writ and the service of the writ on the ground that the defendants, the East Asiatic Co., Ltd., are not resident within the jurisdiction, and that the service that has been made upon Messrs. Escombe, McGrath & Co. is therefore not a good service. I have delayed giving my judgment in the case, not because I felt any great doubt about it, but partly on account of the business of the court the week before last, and circumstances over which I had no control last week.

The case belongs to a certain class, but it is not a difficult example of that class. It has been clearly argued on both sides, but the evidence in the case has been from one side only. That does not at all mean to say that the evidence was at all one way. As counsel for the plaintiffs pointed out, there were a good many things which pointed in his favour, and that made one feel that the evidence was all the more candid and all the more reliable for the purpose of this court. The evidence was in two affidavits, the first of which was by Mr. M. V. B. McGrath, a member of the firm of Messrs. Escombe, McGrath & Co., of 13, Fenchurch Avenue, in the City of London. He says that

> "the East Asiatic Co., the defendants in this action, are a foreign corporation carrying on business at Holgersgade 2, Copenhagen. They have no residence, office, or place of business, registered or otherwise, at 13, Fenchurch Avenue. The firm of Escombe, McGrath & Co. are ship and insurance brokers, and carry on the business of freight and passenger agents at 13, Fenchurch Avenue. In the course of this business my firm act, and have acted for about thirty years, as agents for the defendant company. They also act as freight and passenger agents for several other foreign steamship companies. Beyond the ordinary duties of shipbrokers, such as the booking of freight and the issue of passenger tickets, my firm transacts no business and has no authority to transact business or enter into contracts on behalf of the defendant company or of any other company. The rates of freight and the passenger fares are

> fixed by the defendant company. Bills of lading and passenger tickets are supplied to my firm on forms prepared by the defendant company and printed in Denmark. Such bills of lading and passenger tickets are invariably signed by my firm as agents only, and they constitute or evidence contracts only with the defendant company. The terms of the bills of lading specifically provide that questions arising thereunder shall be governed by the law of Denmark, and shall be decided in Copenhagen. . . . The name of my firm is the only name appearing on the doors of the firm's offices at Fenchurch Avenue, but upon the windows of the ground floor the firm's name is exhibited as agents for the defendant company, together with the names of other foreign shipping companies. Upon a window of the basement the name of the defendant company is exhibited, together with a copy of that company's house flag, and upon the adjoining windows are the names of other foreign steamship companies for whom my firm act as agents. The letter paper used by my firm when transacting any agency business states thereon the names of the various shipping companies for whom they are agents. Save as hereinbefore set out, my firm are in no way connected with the defendant company. They have no concern with the management of that company nor any financial interest or share or holding therein. The only remuneration received by my firm from the defendant company is the customary agent's commission on freights and passage money received, and brokerage. The defendant company is in no way concerned in the management of my firm's office. The rent of the office is paid by my firm, and the staff employed in it are all the servants of my firm. On Aug. 30, 1932, I was handed a copy of the writ of summons in this action by a representative of Messrs. Lawrence Jones & Co., the plaintiffs' solicitors, who stated that the writ was served upon me as representing the defendant company. I am advised, and verily believe, that neither I nor my firm is the representative of the defendant company in this country for the purpose of the service of legal process. Neither I nor my firm is the head officer or clerk of the defendant company, nor is any head officer or clerk of that company resident at 13, Fenchurch Avenue. I respectfully submit that the defendant company does not reside or carry on business at 13, Fenchurch Avenue, and that the service of the writ upon me was irregular and should be set aside. I further submit that the writ was in itself bad in that the address of the defendant company was not correctly stated therein. The address stated, namely, 13, Fenchurch Avenue, is not the address of the defendant company but of the firm of Escombe, McGrath & Co."

This affidavit is supplemented by Mr. Christian Frederik Joachim Schmiegelow of Holbergsgade 2, Copenhagen, a managing director of the defendant company, in which he says:

> "The defendant company is a corporation registered under the laws of the Kingdom of Denmark and carries on business as shipowners, being owners of the motor vessel *Lalandia*. Branch offices are maintained by the defendant company at Singapore and Bangkok. At a number of ports and places the defendant company has established its own agencies. At other ports in the world the defendant company does not have an agency of its own, but employs a local firm or company to act as its agents and to transact agency business on its behalf. The defendant company employs the firm of Escombe, McGrath & Co. to act as one of its agents in the United Kingdom. That firm is one of the company's agents for the booking of freight, the issue of passenger tickets, and for the ordinary purposes for which ship's brokers are normally employed. For the services rendered by them the said firm receives from the defendant company only the customary agent's commission and brokerage. Save as aforesaid, the defendant company is in no way connected with the firm, is in no way concerned in its management or in the maintenance of its offices. I have read the affidavit sworn by Mr. McGrath and confirm what is therein

A stated with regard to the relationship between the defendant company and Messrs. Escombe, McGrath & Co. The only business transacted in the United Kingdom on behalf of the defendant company is the agency business transacted as set out in the affidavit. The defendant company has no residence, office, or place of business of its own in the United Kingdom. It has no registered address anywhere within the United Kingdom such as provided for by s. 344 B of the Companies Act, 1929. It has no employees or servants of its own resident anywhere within the United Kingdom. The defendant company has never represented that it resides or carries on business in the United Kingdom or that the office of Messrs. Escombe, McGrath & Co. is its own office. Nor has the defendant company ever held out that Messrs. Escombe, McGrath & Co. are its representatives except for the purposes described in this affidavit. C . . . I submit that the writ in this action is bad, and that the service upon Mr. Myles McGrath was irregular and should be set aside because Mr. McGrath is not the head officer or clerk of the defendant company, and because the defendant company does not reside or carry on business within the United Kingdom."

D It is interesting to note as is shown by the bill of lading exhibited by the defendant company that that company has offices of three kinds. It has its own head offices and branch offices. It has head offices at Copenhagen with branch offices at Singapore and Bangkok, and a second class of agency in various other parts of the world. Then it has a third class of agents, and it is under this third class that Messrs. Escombe, McGrath & Co. rank. They are agents for London, Middlesbrough, and Manchester.

E Now that is the evidence put forward by these two affidavits, and it is on that evidence that this case falls to be decided. It appears from the result of all the cases of this class that each case is a question of fact to be decided upon the evidence. But both counsel at various times when one tried to press the matter reminded me that I cannot speculate in the matter, but must take the facts and F make my decision upon them, and that is what I am endeavouring to do. Now when one comes to look at the various cases quoted for guidance one is a little puzzled because the various authorities to whom one must pay the greatest respect have provided some varied tests. I am not suggesting that those tests are necessarily contradictory, but they are a little puzzling in that they are of a very various nature. There does not appear to be, so to speak, any guiding or acid test of this G particular matter. The last thing I want to do is to endeavour to supply a further test which would necessarily have less authority, and would probably have a great deal less clarity, and, therefore, I have endeavoured to read these authorities and apply them as best I can, and make my finding of fact on such guidance as I can find in the application of various tests.

The cases fall into two classes—cases of ships' agents such as this, and cases H which are not cases of ship's agents. Taking the second class first, personally, I can get very little guidance at all from it. There are two more or less leading cases on the matter: *Saccharin Corpn.* v. *Chemische Fabrik Van Heyden Akt.* (4), and *Okura & Co.* v. *Forsbacka Jernverks Akt.* (5).

I get very little guidance for purposes of this case from those two cases, because it seems to me that each of them falls very clearly and decisively on one side or the I other of the dividing line. In the *Saccharin Corpn. Case* (4) the defendants were carrying on business through an agent at the agent's office, and were resident out of the jurisdiction, but the agent had no other business at all except the agency for this company and one other, and he had very considerable discretion in dealing with contracts for the company for whom he was acting as agent. Therefore, it was not surprising in the circumstances to find that LORD MOULTON and FARWELL, L.J., came to the unhesitating view that the company was resident in this country through the agent. VAUGHAN WILLIAMS, L.J., took a somewhat differing view, but it appears to me as a strong case in favour of the majority decision, though

Vaughan Williams, L.J., did not really differ from the others. But it is a simple case, and does not give me much assistance. In the *Okura Case* (5) the facts were strongly the other way, and, therefore, it is not surprising that the decision went the other way, because in that case the company that was alleged to be acting as agent had no kind of authority to enter into any contract on behalf of the defendant, but were merely a kind of advance agent who obtained orders and submitted them to the defendants for approval.

In the words of Lord Wrenbury, the agents acted only as agents in the manner indicated, and they had no control over the way the defendants did their business and no authority in making contracts, and so it would have been difficult to say that the foreign corporation in that case was either resident, which is the word in the rule, or "here" as is sometimes said in argument as a way of expressing that the company is resident within the rule. Again, to pursue Lord Wrenbury, who made this subject particularly his own, we have to see whether the foreign corporation are doing their business here by a person or through a person, and that is one of the tests that he applies to this class of case—that in order to be resident they should be doing the business by a person and not through a person. Lord Phillimore says that the important distinction between the two cases is that in the *Saccharin Corpn. Case* (4) the agent in London had authority to enter into contracts for the foreign corporation without submitting orders to them for approval, whereas in the *Okura Case* (5) the agents have not that authority, and their duty is simply to submit to the defendants, and until they have signified their approval no contract can be brought into effect at all. There again Lord Phillimore seems to be adopting something of the same test as Lord Wrenbury, and to say that in that particular case the agent was not a company whose work could be said to bring the foreign company within the area of the rule.

Now, passing from this class of case to the shipping agent class, we have first of all *The Princesse Clementine* (1), a case which seems to me to be helpful and authoritative, and upon which I can rely. In that case the agents had offices in Fenchurch Street which they had taken in their own name and paid rent. Lord Gorell in that case says:

> "In a popular sense no doubt the business of the defendant corporation is carried on by the corporation in England, but not in the eye of the law. It seems to me that the business carried on here is that of an agent for the other corporation, and it follows that the person upon whom the service was made was the servant of the agent and not of the corporation."

In that case it appears that the rent of the offices was not charged against the defendants, but the agent received a commission on freights and was paid a fixed annual allowance for doing its business, and if anything it seems to me that the case was a little stronger against the defendants than the case with which I am now dealing. The agents were paid a fixed annual allowance for doing the defendants' business, but that is not the case here. They are only paid the ordinary brokers' commission. However that may be, the case I have mentioned is nearer to this one than any I have been able to find, and Lord Gorell seems to have dealt with the matter with no doubt at all.

The main difficulty of this class of case is to be found in one case much relied on by counsel for the plaintiffs, *Thames and Mersey Marine Insurance Co.* v. *Società di Navigazione a Vapore del Lloyd Austriaco* (2). This case went to the Court of Appeal, and the judgment was given in a written form by Lord Wrenbury, who made some very lucid observations, and made a further attempt to deal with the circumstances from a general point of view, and laid down some guidance for the future. The test, so far as one can find it in his judgment, is given at p. 98 of 111 L.T. He says that the test in each case is to find the answer to the following question:

> "Does the agent in carrying out the foreign corporation's business make a contract for the corporation or does the agent in carrying out his own business

> sell a contract for the foreign corporation. In the former case the foreign corporation is, and in the latter case is not, carrying on business at the agent's premises. Messrs. Marcus Samuel & Co. are an example of the former and Messrs. Thomas Cook of the latter."

He does not endeavour to lay down a test for every kind of foreign corporation and does not attempt to lay down a rule to apply universally. Counsel for the plaintiffs relied on that case: he said that Marcus Samuel & Co. were acting in precisely the same way in that case as Messrs. Escombe, McGrath & Co. were acting here, and there was a good deal to be said for his presentation of the facts. The antithesis noted by LORD WRENBURY is between Messrs. Marcus Samuel & Co. and Messrs. Thomas Cook & Co., and it is based upon these circumstances. Messrs. Marcus Samuel & Co. were the general agents of the company in London, whereas Messrs. Thomas Cook & Co. were only one of several ticket agents who had the right to sell tickets for the shipping line. Therefore, LORD WRENBURY pointed out, you had in one case a corporation that could be called agents, whereas the other was a mere ticket agency. He says, however, that the antithesis is between an agent who makes the contract and an agent who sells a contract. Messrs. Thomas Cook & Co. fell under the latter class, because they only sold tickets or contracts for the foreign company. It is a little difficult to follow what exactly Messrs. Marcus Samuel & Co. did. According to the recital of the facts they issued tickets and made contracts for the carriage of passengers and luggage and goods and booked freight for the goods for the defendants' steamships. So far they did nothing much more than Messrs. Thomas Cook except that they booked freight for goods, whereas there is nothing to show that Messrs. Thomas Cook had any activities in that direction. Then the recital goes on to state that, besides receiving commission for freight and tickets, Messrs. Marcus Samuel & Co. received a small sum for postage and a substantial payment per annum for rent, clerks, and office expenses, and, therefore, it seems to me that they differed largely from the position of Thomas Cook & Co. and also from the position of Messrs. Escombe, McGrath & Co. in the present case.

It may not be an acid test or an actual test that LORD WRENBURY has laid down as to the making and selling of contracts, but it is important that Messrs. Marcus Samuel & Co. receive a salary for rent and clerks and expenses, whereas Messrs. Escombe, McGrath & Co. receive nothing of the kind, and are merely brokers carrying on their own business and receiving a commission for work done from the defendant company and other companies. To pursue the *Thames and Mersey Case* (2), there there were two special desks allotted to the defendants' business, and that is foreign to the present circumstances. The agents there were allotted a limited number of berths on the steamer, but apart from this they could not allot berths and take freights without telegraphing to the defendants. Therefore they are not very different from Messrs. Escombe, McGrath & Co. In the *Thames and Mersey Case* (2) special notepaper and forms were used by the agent when transacting the defendants' business, but I do not find that in this case.

Applying the *Thames and Mersey Case* (2) as best I can to the present circumstances, and agreeing, as I do, that there are many general features of similarity, I think there are many features of differentiation, and when one comes to apply the test of LORD WRENBURY—making or selling contracts—it appears to me that Messrs. Escombe, McGrath & Co. are people who sell and do not make contracts on behalf of this company. It may be, of course, that the recital of facts in the *Thames and Mersey Case* (2) is somewhat short, and that the apparent discrepancy between LORD WRENBURY'S test and the facts upon which he based it may be found in the omissions. I notice, for example, that in his judgment LORD WRENBURY says that the letter of appointment of Oct. 29, 1904, constituted the firm general agents for the company at 5 per cent. commission on tickets sold, and 2 per cent. on tickets sold by other agencies, and that a sum of £480 a year was paid for rent, clerks, and office expenses. Therefore, there was a good deal of evidence in the

Thames and Mersey Case (2) which differed somewhat widely from the evidence in this case.

Now, taking these various tests—the test of making or selling contracts, and the test of LORD WRENBURY in the *Okura Case* (5) of whether they are acting by a person or through a person, and the various values that have to be given to whether the rent is paid by the foreign corporation or whether the agent in this country has the right or not to make any independent contract and has any discretion of his own—applying all these various tests as best I can to the present case, it seems to me that Messrs. Escombe, McGrath & Co. fall upon the side of the line of agents who carry on their own business and not the business of the foreign corporation. I do not pretend that any of the cases are overwhelmingly clear, and one has to do the best one can with the facts as they are, but, so far as I can see the dividing line in cases of this class, I am clear that Messrs. Escombe, McGrath & Co. fall on the side of people who have a wide business of their own and who, in the course of it, transact business as agents for a number of foreign firms of which the defendant company are one. I was informed in the argument that the defendant company provided a large proportion of this agent's foreign steamship business. That may be the case, and I cannot speculate upon a matter upon which I have no evidence on oath. Nor am I certain that it is a circumstance that ought to weigh strongly. I have to make up my mind whether the foreign corporation is really here, in the sense that it has somebody doing its business here who is not doing primarily his own business, and I think Messrs. Escombe, McGrath & Co., on the evidence in the case, and upon the facts, are primarily doing their own business, which was only in a secondary sense the business of the defendant company. Therefore, the motion will succeed, and the writ will be set aside and the service of the writ also, with costs.

Writ and service set aside.

Solicitors: *Lawrence Jones & Co.*; *Thomas Cooper & Co.*

[*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

BAILEY *v.* MARCHIONESS CURZON OF KEDLESTON.
SAME *v.* DUGGAN

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), March 7, 1932]

[Reported [1932] 2 K.B. 392; 101 L.J.K.B. 627; 147 L.T. 269; 48 T.L.R. 283]

Practice—Consolidation of actions—Actions which would not have been consolidated before Nov. 1, 1875*—Separate actions by same plaintiff against different defendants—Common questions of fact—Jurisdiction to consolidate—Principles to be applied—Costs—R.S.C., Ord.* 49, *r.* 8; *Ord.* 16, *r.* 1, *r.* 4.

R.S.C., Ord. 49, r. 8, which empowers the court to consolidate actions "in the manner in use immediately before Nov. 1, 1875, in the Superior Courts of Common Law" must be interpreted with regard to the current rules as to joinder of parties and causes of action. The court can, therefore, now consolidate actions which would not have been consolidated before Nov. 1, 1875. *Horwood* v. *Statesman Publishing Co., Ltd.* (1) (1929), 141 L.T. 54, applied; *Lee* v. *Arthur* (2) (1908), 100 L.T. 61, overruled.

Per Slesser, L.J.: The cases as to when consolidation will be granted or refused seem to disclose no principle, and the decisions depend mainly upon the special circumstances of each case. The court has a discretion to order consolidation even where the facts in the two actions are not precisely similar.

By an agreement made in January, 1929, a mother engaged the plaintiff to act as companion to and conduct the affairs of her twenty-seven-year-old son. In January, 1931, the mother determined the agreement. On June 24, 1931, the plaintiff issued a writ against the mother claiming arrears of the agreed remuneration, and damages for wrongful dismissal and other breaches of the agreement. By her defence the mother disputed the plaintiff's version of the agreement. On June 25, 1931, the plaintiff issued a writ against the son, claiming that since January, 1929, he had incurred liabilities in his own name and made disbursements on behalf of and with the authority of the son, and that after January, 1931, the son had wrongfully revoked this authority, and refused to indemnify the plaintiff for the said disbursements and against the said liabilities. The son in his defence denied that he had given the alleged authority, and said that the acts relied on by the plaintiff were done under the agreement with the mother.

On an application by the plaintiff for consolidation of the two actions,

Held: (i) there was ground common to the actions in the agreement between the mother and the plaintiff and the need to consider the relationship between the mother and the son, and, therefore, the actions should be consolidated;

(ii) both actions should have been joined in one writ, and so the plaintiff should not be allowed his costs of the application and on taxation the cost of only one set of pleadings should be allowed.

Notes. As to consolidation of actions between the same plaintiff and different defendants, see 26 Halsbury's Laws (2nd Edn.) 57–58, para. 94, text and note (b).

Cases referred to:

(1) *Horwood* v. *Statesman Publishing Co., Ltd.* (1929), 98 L.J.K.B. 450, 452, 453; 141 L.T. 54; 45 T.L.R. 237, C.A.; Digest Practice 400, *1019*.

(2) *Lee* v. *Arthur* (1908), 100 L.T. 61, C.A.; Digest Practice 658, *2787*.

(3) *Payne* v. *British Time Recorder Co., Ltd., and Curtis, Ltd.*, [1921] 2 K.B. 1; 90 L.J.K.B. 445; 124 L.T. 719; 37 T.L.R. 295, C.A.; Digest Practice 408, *1084*.

Appeal from an order of Acton, J., reversing an order of Master Jelf, who had ordered that the above actions should be consolidated.

In the first action, the writ in which had been issued on June 24, 1931, Colonel Edward Alec Horsman Bailey, by his statement of claim, alleged that in January, 1929, it was agreed between him and the defendant that the plaintiff should act as companion to the defendant's son by a former marriage, Alfred Leo Duggan, and should exercise a general supervision over him and over his expenditure, and should see that he was maintained in a style of living suitable to his station in life and in accordance with the defendant's directions from time to time, upon the following amongst other terms: (a) That the defendant should pay to the plaintiff the sum of £250 a month on account of expenses for the purpose of maintaining the said A. L. Duggan as aforesaid, and that the plaintiff should use his best endeavours to restrict the annual total of such expenses to a sum not unduly in excess of £3,000; (b) that the plaintiff should be entitled to one month's notice of termination of the agreement; (c) that the plaintiff should be entitled during the period of the agreement to a remuneration of £2 2s. a day, payable monthly on the fifteenth day of each month; (d) that the plaintiff should be entitled during the period of the agreement to free accommodation and to all travelling and living expenses save only personal needs such as clothes. It was further alleged that the defendant knew that it would be necessary for the plaintiff from time to time to incur liabilities in his own name and make payments out of his own money, and agreed to indemnify the plaintiff in respect of such liabilities and payments if the monthly payments of £250 were insufficient to meet them; that subsequently in April, 1930, the one month's notice to terminate the agreement was altered to a six months' notice.

The plaintiff alleged that on Jan. 29, 1931, the defendant purported to terminate the agreement as from May 1, 1931, and from and after April 15, 1931, refused to pay the plaintiff the agreed remuneration or to furnish him with free accommodation or travelling or living expenses, or to pay him £250 a month for covering liabilities incurred and payments made, or to indemnify him for the same. The plaintiff claimed £35 14s. arrears of remuneration, and in addition damages for wrongful dismissal and other breaches of the agreement.

The defendant pleaded that by the agreement made in January, 1929, it was expressly provided that the income allowed should cover all A. L. Duggan's expenses and those of the plaintiff, and that the figure of £3,000 a year was to be kept to as nearly as possible; that £3,000 a year was ample for those expenses, and that the plaintiff had no authority to incur liabilities or make payments out of his own money, but that it was his duty to keep the expenses within £3,000 a year. The defendant denied that any new agreement was made in April, 1930, varying the time within which notice to terminate the agreement might be given, but insisted that it was subject to a month's notice, that she had in fact given three months' notice, as she lawfully might, and that there was no wrongful dismissal. She admitted that £35 14s. was due to the plaintiff in respect of salary from April 15 to May 1, 1931, and brought that sum into court.

The second action, the writ in which was issued on June 25, 1931, was brought by the said Col. E. A. H. Bailey, the plaintiff in the first action, against the said Alfred Leo Duggan, the son of the Marchioness Curzon of Kedleston. The statement of claim alleged that in January, 1929, an agreement had been made between the plaintiff and the defendant that the plaintiff should act as companion to the defendant and should exercise a general supervision over his expenditure and manage his affairs for him; that it was well known to the defendant that it would be necessary for the plaintiff on his behalf to incur liabilities and disburse money, and that it was an implied term of the agreement that the defendant should indemnify the plaintiff in respect of such liabilities and disbursements; that the plaintiff incurred liabilities and made disbursements, and in particular entered into a hire-purchase agreement to acquire a Daimler motor car and allowed the defendant the use of a Buick car, the property of the plaintiff; that, relying on an authority given to him by the defendant to sell certain valuable horses, the plaintiff incurred further liabilities and made further disbursements.

The plaintiff alleged that in February or March, 1931, the defendant wrongfully revoked this authority and had failed to indemnify the plaintiff in respect of liabilities incurred by him on the defendant's behalf or to pay him anything in respect of the user of the Buick car. The plaintiff claimed damages for breach of contract and wrongful revocation of authority.

The defendant pleaded that at all material times the plaintiff was employed under an agreement of Jan. 15, 1929, between the plaintiff and the defendant's mother, whereby the defendant's mother was to pay the plaintiff salary at the rate of £2 2s. a day, together with free accommodation and travelling and living expenses, and the plaintiff was to act as companion to the defendant and administer on his behalf an income of £3,000 a year allowed by the defendant's mother for travelling and all other expenses of the defendant and the plaintiff; that all acts done by the plaintiff for the defendant were done under that agreement and not otherwise; that the defendant never gave the alleged authority to sell the horses or to enter into the hire-purchase agreement for the Daimler car, and that he shared in the use of the Buick car on the invitation and as the guest of the plaintiff.

On Feb. 12, 1932, MASTER JELF made an order, on the application of the plaintiff, that the two actions should be consolidated. That order having been reversed by ACTON, J., who held himself to be bound by the decision of the Court of Appeal in *Lee* v. *Arthur* (2), the plaintiff appealed.

A The Rules of the Supreme Court provide:

> "Order 16, r. 1: All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common B question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the court or a judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment . . ."

> C "Order 49, r. 8: Causes or matters pending in the same division may be consolidated by order of the court or a judge in the manner in use immediately before Nov. 1, 1875, in the Superior Courts of Common Law."

Van Oss for the plaintiff.

Gentle (*Tristram Beresford* with him) for the defendants.

D **SCRUTTON, L.J.**—Two actions have been brought by the plaintiff, Col. Bailey, one against the Marchioness Curzon of Kedleston, and the other against Mr. Duggan, her son by an earlier marriage. Undoubtedly there is a certain amount of matter common to each of the actions. We are told that the defendant son is a man of twenty-seven or twenty-eight years of age, but apparently his financial proceedings render it necessary that, if possible, someone should act for him. E The plaintiff was allowed by both mother and son to act the part of "bear leader," as it used to be called, not always with justice to bears. The two actions with separate writs and separate pleadings proceeded to joinder of issue, and then the plaintiff applied to consolidate them. If tried, they would involve a good deal of discussion as to the relations between the three parties concerned. The master made an order for consolidation of the two actions. ACTON, J., allowed an appeal F from that order, holding himself to be bound by the decision of the Court of Appeal in *Lee* v. *Arthur* (2). The plaintiff appeals.

Within the last twenty years a complete change has taken place in the attitude of the courts towards the joinder of parties and causes of action on the same writ. Accordingly, Order 16, r. 1, which deals with the joinder of plaintiffs was amended, and reads thus:

> G "All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate actions any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, H the court or a judge may order separate trials, or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to without any amendment . . ."

The rule relating to defendants is Order 16, r. 4, which reads thus:

> I "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. . . ."

This rule, it will be noticed, omits the words "arising out of the same transaction or series of transactions," and the words "where . . . any common question of law or fact would arise." The first stage in the change made by the court was to treat r. 4 as covering the same ground as r. 1. The next was to decide that, notwithstanding certain decisions limiting the power of joining matters and parties on one writ, those rules were to be construed liberally and very much enlarged, with the result that many matters, formerly the subject-matter of separate actions, could now be tried in one action. The first case in which that principle was discussed is *Payne* v. *British Time Recorder Co., Ltd., and W. W. Curtis, Ltd.* (3), in which elaborate judgments were delivered by LORD STERNDALE, M.R., and myself, and where I said ([1921] 2 K.B. at p. 16):

> "The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing to strike out one or more of the parties."

That relates to the joinder of parties and causes of action in the same writ. Consolidation affects the litigation at another stage. When several actions have already been brought, raising matters which might have been joined on one writ, what power has the court to order that they shall be tried together? Order 49, which deals with this point, provides by r. 8:

> "Causes or matters pending in the same division may be consolidated by order of the court or a judge in the manner in use immediately before Nov. 1, 1875, in the Superior Courts of Common Law."

Attention should be called to the fact that r. 8 was amended in 1926 by substituting "immediately before Nov. 1, 1875" for "before the commencement of the principal Act." As amended, the rule was obviously meant to go back to 1875. In my opinion, the decision of this court in *Horwood* v. *Statesman Publishing Co., Ltd.* (1) concludes the question of the meaning of this rule in this court. I said (141 L.T. at p. 57):

> "In my view, 'in the manner in use immediately before Nov. 1, 1875,' certainly does not refer to the subject-matter, because the rules have all been altered since Nov. 1, 1875, and matters may now be included in the same writ which could not have been included before Nov. 1, 1875. The rule, so far as it relates to subject-matter, must be interpreted, in my view, in view of the change of rules with regard to parties and causes of action in Order 16."

I proceeded to mention some of the cases which showed the process of the change. SANKEY, L.J., who was the other member of the court, expressed his views in his own words.

The learned judge in chambers has thought that the decision in *Lee* v. *Arthur* (2) prevented him from consolidating these two actions. But since that case was decided a complete change has taken place as to parties and causes of action. Much wider latitude is allowed in making these orders, with the object of avoiding multiplicity of actions and, where various interests in one common subject-matter are involved, all the parties concerned, within reasonable limits, may now be joined as parties so that the court may adjudicate upon their various rights and interests. Evidently the learned judge had not appreciated the change which had taken place. Consequently *Lee* v. *Arthur* (2) has ceased to be a binding authority, together with a number of other cases which decided that certain parties and causes of action could not be joined in the same writ. I think the learned judge was wrong in considering himself bound to follow that case.

One is still left to consider whether, as a matter of discretion, it is better that these two actions should be heard together. Plainly there is common ground between them in the agreement which the defendant mother is said to have made with the plaintiff; and the relation between the plaintiff and her son must be considered in order to arrive at a just conclusion; I have come to the conclusion, as a matter of discretion and in order to avoid expense, that these matters should be dealt with in one action. I wish to add this. I think it is a great mistake that two writs were ever issued. In my opinion, the appeal must be allowed, and the order of the master restored; but, as the expense of two writs and two sets of pleadings ought never to have been incurred, there shall be no costs of the application to consolidate, and on taxation the costs of one set of pleadings only shall be allowed.

A **GREER, L.J.**—I agree. Apart from certain recent decisions I should have thought that there was a good deal to be said for the argument for the defendants on the meaning of Order 49, r. 8, which says:

> "Causes or matters pending in the same Division may be consolidated by order of the court or a judge in the manner in use immediately before Nov. 1, 1875, in the Superior Courts of Common Law."

B It is difficult to suppose that by using the words "in the manner in use immediately before Nov. 1, 1875," the framers of this rule were thinking merely of the way by which consolidation should be effected; because obviously it could only be brought about in one way, namely, by an order of the court, and, but for decisions lately given, I should have read the rule as providing that an order for consolidation may C now be made in the cases in which such an order was made before that date. But I regard *Horwood* v. *Statesman Publishing Co., Ltd.* (1), a decision of this court, as putting a different meaning upon the rule, and therefore I agree with the judgment just delivered by SCRUTTON, L.J.

SLESSER, L.J.—I agree, and would only add that I think the statement as to the practice contained in the ANNUAL PRACTICE for 1932, p. 875, is liable to be D misconstrued. The learned editors say, speaking of Order 49, r. 8:

> "But the rule does not authorise actions commenced by the same plaintiff against different defendants, and pending in the same Division, to be consolidated at the instance of the plaintiff without the consent of all parties, unless the issues to be tried are precisely similar";

E and they cite in support of that statement *Lee* v. *Arthur* (2). As I read the subsequent cases, and particularly *Horwood* v. *Statesman Publishing Co., Ltd.* (1), and the observations of SCRUTTON and SANKEY, L.JJ., in that case, the power to consolidate actions is no longer subject to the limitation imposed by *Lee* v. *Arthur* (2). The practice seems to me to be more accurately stated in the YEARLY PRACTICE OF THE SUPREME COURT 1932, p. 852, as follows:

F

> "The cases as to when consolidation will be granted or refused seem to disclose no principle, and the decisions depend mainly upon the special circumstances of each case. . . . The court has a discretion to order consolidation even where the facts in the two actions are not precisely similar."

Appeal allowed.

G Solicitors: *Baileys, Shaw, & Gillett*; *Withers & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

COUSINS *v.* SUN LIFE ASSURANCE SOCIETY

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 1, 2, 1932]

[Reported [1933] Ch. 126; 102 L.J.Ch. 114; 148 L.T. 101; 49 T.L.R 12]

Husband and Wife—Insurance policy—Expressed to be for benefit of named wife under Married Women's Property Act, 1882*—Subsequent death of wife, husband surviving—Rights of wife's executors under policy—Married Women's Property Act*, 1882 (45 *&* 46 *Vict., c.* 75), *s.* 11.

Policies of insurance on his own life taken out by a husband each contained a declaration that the policy was issued "for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act, 1882," s. 11 of which provided that such a policy should create a trust in favour of the wife and that "the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured." The wife died in 1931, in the lifetime of the husband, leaving a will, and her executors claimed the beneficial interest in the policies.

Held: the wife's executors were entitled to the beneficial interest in the policies because

(i) the trust declared by each policy in favour of the named wife gave her an absolute beneficial interest in the policy and the moneys thereby assured from the time when the policy was effected, and so this trust was not ended by her death

(ii) the moneys were still to be paid under the policy, so an object of the trust remained unperformed, and s. 11, therefore, prevented any interest passing to the husband.

Robb v. *Watson* (1), [1910] 1 I.R. 243, and *Re Collier, Ex parte Collier's Executors* (2), [1930] 2 Ch. 37, stated to be no longer the law. *Prescott* v. *Prescott* (3), [1906] 1 I.R. 155, adopted.

Decision of EVE, J., reversed.

Notes. Considered: *Gunner* v. *Gunner and Stirling*, [1948] 2 All E.R. 771. Distinguished: *Lort-Williams* v. *Lort-Williams*, [1951] 2 All E.R. 241. Referred to: *Re Smith, Bilham* v. *Smith*, [1937] 3 All E.R. 472.

As to policies effected by husband or wife for one another's benefit, see 19 HALSBURY'S LAWS (3rd Edn.) 845, para. 1382, and as to the effect of such policies, see ibid. 846, para. 1383, and for cases on the subject see 27 DIGEST (Repl.) 136–138, *987–996*. For the Married Women's Property Act, 1882, s. 11, see 11 HALSBURY'S STATUTES (2nd Edn.) 801.

Cases referred to:

(1) *Robb* v. *Watson*, [1910] 1 I.R. 243; 27 Digest (Repl.) 138, **498*.

(2) *Re Collier*, [1930] 2 Ch. 37; 143 L.T. 329; sub nom. *Re Collier, Ex parte Collier's Executors*, 99 L.J.Ch. 241; [1929] B. & C.R. 173; 27 Digest (Repl.) 135, *986*.

(3) *Prescott* v. *Prescott*, [1906] 1 I.R. 155; 27 Digest (Repl.) 138, **499*.

(4) *Re Browne's Policy, Browne* v. *Browne*, [1903] 1 Ch. 188; 72 L.J.Ch. 85; 87 L.T. 588; 51 W.R. 364; 19 T.L.R. 98; 27 Digest (Repl.) 137, *993*.

(5) *Re Adam's Policy Trusts* (1883), 23 Ch.D. 525; 52 L.J.Ch. 642; 48 L.T. 727; 31 W.R. 810; 27 Digest (Repl.) 134, *973*.

(6) *Cleaver* v. *Mutual Reserve Fund Life Association*, [1892] 1 Q.B. 147; 61 L.J.Q.B. 128; 66 L.T. 220; 56 J.P. 180; 40 W.R. 230; 8 T.L.R. 139; 36 Sol. Jo. 106, C.A.; 27 Digest (Repl.) 136, *989*.

(7) *Re Fleetwood's Policy*, [1926] Ch. 48; 95 L.J.Ch. 195; 135 L.T. 374; 27 Digest (Repl.) 137, *990*.

Appeal by the insurers and the wife's executors from the decision of EVE, J., that the husband, the plaintiff, was entitled to the sole beneficial interests in the policies of insurance taken out by him for the benefit of his wife, since deceased, under s. 11 of the Married Women's Property Act, 1882. The facts appear in full in the judgment of LORD HANWORTH, M.R.

F. D. Morton, K.C., and *E. J. Macgillivray* for the insurers.
A. P. Vanneck for the wife's executors.
Cleveland Stevens, K.C., and *Gilbert Beyfus* for the husband.

LORD HANWORTH, M.R.—The facts of this case are as follows: On April 13, 1911, a policy was granted by the Sun Life Assurance Society to the husband, Stanley Cousins, for the sum of £15,000 upon premiums to be paid in accordance with the terms set out in the schedule, and on Oct. 15, 1912, another policy for a sum of £3,000 was granted by the insurers to the husband, again upon the same terms. The terms of the policy were these:

> "The society will, on due proof given of the occurrence of the event described in the schedule, of the age of the life assured, and of title, pay the sum assured together with such bonus, if any, as may be due in accordance with the provisions of the Sun Life Assurance Act, 1889, and the laws and regulations made pursuant thereto, and it is hereby declared that this policy is issued for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act, 1882, provided also that this policy is subject to the terms and conditions endorsed hereon."

In the conditions there was a clause relating to the payment of claims which provided that the interest would be allowed from the time when the assured sum and bonuses became payable and also that a surrender value was acquired under the policy as soon as three years' premiums had been paid. On Oct. 3, 1931, the wife, Lilian Cousins, died. On Dec. 5 the will of Lilian Cousins was admitted to probate. The executors of that will are Mr. Walter Henry Court and Mr. Cecil Hales Court. The action was brought by the husband, and he claimed, as the widower, upon the facts which I have stated, a declaration that the sole beneficial interest in the policies which I have referred to vested in the husband, that he was entitled to surrender the same and be paid surrender value out of the funds specified in the policies and retain the same to his use and benefit. The defendants, the insurers, and the two executors of the wife, Walter Henry Court and Cecil Hales Court, have put in separate defences. Substantially the effective point that is raised first by the insurers is this. They contend that the sole beneficial interest in the policies is vested in the defendant executors as the personal representatives of the wife, and that is what the executors assert also in their defence. They contend that that sole beneficial interest passes to and is vested in them as the legal personal representatives of the wife. The point that is thus raised is an important point to a great number of persons who hold policies of the same nature, and an important point to a large number of insurance societies who issue such policies. According to the insurers, their practice has been upon such a policy to treat the benefits of the policy as passing to or being vested in the named wife and passing to her personal representatives. In other words, they say this, which is assented to by the executors, and they have brought it to the attention of the court in their defence, that they are anxious to have the determination of this point and a decision as to whether or not the view they have acted on is correct, but inasmuch as they are more interested than the assured, they have undertaken in this matter to pay all the costs of all the parties concerned in this appeal.

EVE, J., decided by his judgment, which is a short judgment, that the interest of Lilian Cousins was only a contingent one, and in the result he held in favour of the claim of the plaintiff, and from that decision an appeal has been brought before this court. Our attention has been called to a great number of cases usefully, but the point seems to be one which is really plain enough, and there is certainly one decision already which supports the view which this court has come to.

It will be observed that the policy is declared to be for the benefit of a named wife. Two sections in successive Married Women's Property Acts have dealt with the case of an insurance policy taken out by a husband or a wife for the benefit of the other. Section 10 of the Act of 1870 provided that a

> "policy of insurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate."

I think that counsel for the husband was right in saying that the purpose of the section was to enable a trust to be created which should allow of the policy moneys being appropriated to the beneficiary under the trust without going to the trouble of drawing up a trust deed, and so on—a short cut was provided. That section has in it these words, "and shall not so long as any object of the trust remains." In *Robb* v. *Watson* (1) it seems clear that the court (Ross, J.) took the view that the objects there intended were the living objects—the beneficiaries. I cannot otherwise read the passage in his judgment ([1910] 1 I.R. at p. 248), and for the reasons which I gave in the course of the argument I think the sentence, "The objects of the trust may drop off at different times," indicates that his view was that the objects in s. 10 were persons and not merely impersonal. The latter Act of 1882 contained an analogous or a similar section, which is s. 11. The words are very slightly different, but they are definitely different. The section provides that:

> "A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts."

The difference it will be noticed, at once, is in the use of the word "unperformed." It seems difficult to apply that word unless it relates to impersonal objects—that is, not to beneficiaries, but to other purposes of the trust. But it will be observed that each of those sections creates a trust in respect of the policy moneys where it has been expressed in the policy that it is for the benefit of the wife, or the husband, or the children, as the case may be. The result is that when the policy states the purpose for which the policy has been entered into, the Act creates and declares a trust. In the present case we have the terms of the policy, which are quite unqualified, the statement *simpliciter*:

> "This policy is issued for the benefit of Lilian Cousins, the wife of the life assured, under the provisions of the Married Women's Property Act, 1882,"

which thus creates a trust in her favour. It would seem from those words that she took a vested interest in the policy moneys when the policy was created, and I have looked backwards and forwards to see if one can find any contingency which negatives the vested interest which is declared in favour of this named wife, and I cannot find it. Then it is suggested,

> "but there is a provision in the section that in certain events the policy moneys shall revert to and become part of the estate of the insured person."

But when are the policy moneys to become part of the estate of the insured person? It is definitely declared that this policy created a trust, and there is, although the sentence is not very happily worded, a definite direction that

> "The moneys payable under the policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured."

A In the events which have happened, and according to the facts which we have to consider, can it be said that all the objects of the trust have been performed, or do some of the trusts remain unperformed, so that what I may call the resulting trust to the estate of the insured is not effective? On the plain terms, in respect of a vested interest on her death there remains the trust to pay over the moneys due under the policy to the executors of Lilian Cousins, and the trust in her favour B was not ended by her death. There is still a trust which is unperformed, and under those circumstances, the terms of the Act negative any interest passing to the husband in the events which have happened.

I will now say a word or two about the cases. It would seem clear that the decision that we have come to is in accordance with the view held in *Prescott* v. *Prescott* (3). In that case:

> C "A wife effected a policy on her own life in favour of her husband, under the Married Women's Property Act, 1882, for £1,000. By the terms of the policy the insurance company promised to pay £1,000 to the husband or his executors, administrators, or assigns on the death of the wife. The wife paid the premiums on the policy, and the husband predeceased the wife. Held, that the trust created by the policy and the Act in favour of the husband was not D dependent on his surviving his wife, and that the policy belonged to his executors and not to his wife."

The policy was expressed to be in favour of Mr. William Prescott, and the trust that remained was similar to the trust here, a trust to pay over, as and when the moneys should be due, to the personal representatives of Mr. William Prescott.

E It is quite true that in the policy there was a covenant to pay to the named person interested and to his executors and administrators, but, as the Master of the Rolls pointed out, the addition of those words in the covenant to pay do not make any alteration, because the plain meaning of the policy is that it was for the benefit of William Prescott and the other words add nothing and detract nothing. The plain meaning of the policy is to give a vested interest which is not expressed to be F subject to any contingency. A different view has been expressed, and perhaps the shortest way of dealing with it is to refer to *Re Collier, Ex parte Collier's Executors* (2), decided by CLAUSON, J. CLAUSON, J., applies *Re Browne's Policy* (4), and prefers *Robb* v. *Watson* (1) to *Prescott* v. *Prescott* (3). But it should be observed that in *Re Browne's Policy* (4) it was not a policy expressed to be in favour of a named wife, and it was decided upon the construction of that policy that the wife G indicated there was some person who fulfilled the qualification of a wife who did not survive the husband who had taken out the policy. That was *Re Browne's Policy* (4). In *Robb* v. *Watson* (1) again the policy was for the sole benefit of his wife; it was a named wife, but it was held upon the construction of the Act of 1870 that the intention was that she must survive him. I do not desire to say any more, except that in the present case, where there is a *persona designata*, the H wife indicated by name, there was an absolute interest taken by her by virtue of the statute, that a trust was created in her favour, that that trust still remains uncompleted and unperformed until the date shall arrive when she, or, as it is now, her personal representatives, receive the money, and while that state of things continues the Act negatives any interest passing to the husband.

For these reasons I am of opinion that the judgment of EVE, J., should be I reversed and that judgment should be in favour of the defendants [the insurers and the wife's executors] and a declaration made accordingly.

LAWRENCE, L.J.—The policies in this case were effected by the plaintiff for the benefit of his wife, Lilian Cousins, under s. 11 of the Married Women's Property Act, 1882. That section differs somewhat in its language from s. 10 of the Married Women's Property Act, 1870. The latter section, so far as is material, reads as follows:

> "A policy of insurance effected by any married man on his own life, and expressed upon the fact of it to be for the benefit of his wife or of his wife and

> children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate."

Counsel has called our attention to two cases in which it has been decided that a policy effected under that section by a married man on his own life, and expressed upon the face of it to be for the benefit of his wife, does not confer an absolute vested interest on the wife, but only a contingent interest, the contingency being that the wife should survive the husband. The first of those cases in order of date is *Robb* v. *Watson* (1). MR. JUSTICE ROSS in that case seems to have based his decision on the expression:

> "And shall not so long as any object of the trust remains be subject to the control of the husband, or to his creditors, or form part of his estate."

It appears from the judgment that the learned judge construed the expression "so long as any object of the trust remains" as meaning "so long as any beneficiary is in existence," construing the word "object" as an equivalent to "beneficiary," and so construing it he came to the conclusion that the beneficiary in that case having died before the policy had matured, there was no longer any object of the trust remaining, with the result that the policy reverted to and became part of the estate of the husband. It is to be noted that in that case the policy was effected "for the sole benefit of his wife, Elizabeth Watson, for her separate use."

The second of the cases is *Re Collier, Ex parte Collier's Executors* (2). CLAUSON, J., in that case decided that a policy effected for the benefit of a wife under s. 10 of the 1870 Act did not vest in her absolutely, on a wider ground than that taken by Ross, J., in *Robb* v. *Watson* (1). He decided that the object of the Act was to enable a husband to provide for his widow on his death, and that the words "For the benefit of his wife" in the policy meant the benefit of the wife if she should survive him, and become his widow, and expressed the opinion:

> "that the Act is aimed at enabling provision to be made for a widow and is so framed as not to give a husband power to confer the benefit of the policy upon any wife unless she, by surviving her husband, becomes his widow."

Section 11 of the Act of 1882 is worded differently, and reads as follows:

> "A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts."

The words "any object" in the expression in that section: "so long as any object of the trust remains unperformed," cannot mean "any beneficiary"; but necessarily mean "any purpose." Although the wording of the two sections is different I am inclined to think that they are in substance the same, so far as the point that we have to decide is concerned. I think the preferable construction of both sections is to read the word "object" whenever it is used as equivalent to "purpose," and for myself I see no substantial difference between a policy effected for the benefit of a named wife under s. 10 of the 1870 Act, and a similar policy effected under s. 10 of the 1882 Act. If that be the true view, it follows that I am unable to agree with the decisions in *Robb* v. *Watson* (1) and in *Re Collier* (2), but as those cases were both decided under s. 10 of the earlier Act it is unnecessary to come to a final conclusion upon that point. Under the 1882 Act, in my judgment, a policy effected by a man on his own life, and expressed to be for the benefit of a named wife, operates as a valid declaration of trust inter vivos in favour of the wife, giving her a vested, absolute beneficial interest in the policy and the moneys thereby assured from the time when the policy is effected.

In *Re Adam's Policy Trusts* (5), which was a case of a policy effected under the 1870 Act by a married man on his own life for the benefit of his wife and children, Chitty, J., said (23 Ch.D. at p. 527):

> "The view I take of the policy is this: it is a declaration of trust operating inter vivos, and is a good declaration of trust. It appears to me that the effect of the policy and the Act taken together is to constitute a declaration of an executed trust, and that all the court has to do is to express its view of the construction of the two instruments taken together. Now, upon the policy being effected the settlor does not reserve to himself any power of appointment [that is speaking of the policy in that case] therefore this is not an executory trust, but a trust declared on the face of the instrument. The question then is, what is the true construction of the instrument?"

In my opinion the passage which I have quoted applies to a policy effected under the 1882 Act, with the result in the present case that there cannot be any reasonable doubt, as the plaintiff has declared in the policy that it is effected for the benefit of his named wife simpliciter, the policy is that wife's policy. The plaintiff might, no doubt, have effected a policy under s. 11 for the benefit of his wife if she should survive him (as was the case in *Cleaver and others* v. *Mutual Reserve Fund Life Association* (6) and in *Re Fleetwood's Policy* (7)); or he might have taken out a policy for the benefit of any wife who might survive him and become his widow (as was held to have been the case in *Re Browne's Policy* (4)); but that is not what he has done here. He has chosen to effect a policy simply for the benefit of his then living wife, and has thus created a trust, of which it cannot be said that its purpose came to an end, or that, in the words of the section, there was no longer any object of the trust remaining to be performed when his wife died in his lifetime, for, being a vested interest in the wife, it passed on her death to her executors as part of her estate. It is a curious fact, in view of the argument which was presented by counsel for the husband in the present case, that in *Re Fleetwood's Case* (7) it was argued by counsel that the policy was not one under the Act, because the benefit conferred on the wife was expressed to be contingent on her surviving the assured. In answer to that argument Tomlin, J., said:

> "It is true it [that is the policy] is expressed to be for the benefit of his wife in a certain event only, but the fact that the benefit is of a limited or contingent character does not prevent it from being a benefit within the meaning of this Act. I think, therefore, that the policy creates a trust in favour of the wife, but only in the terms of the trust."

For the reasons I have stated I agree that this appeal succeeds, and ought to be allowed.

ROMER, L.J.—I agree. The language of s. 11 of the Married Women's Property Act, 1882, and of the policies that we have to consider in this case are in my opinion much too plain to allow us to give effect to the arguments addressed to us on behalf of the husband. Section 11, which I will only read so far as it is material for the present purpose and so far as it relates to this case, says this:

> "A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife . . . shall create a trust in favour of the objects therein named and the moneys payable under any such policy shall not so long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts."

I make two observations on that section. The first is that you are referred to the policy itself to ascertain the objects of the trust which the Act says is created by the policy, and you must also look at the policy for the purpose of finding the interests which those objects take in the policy money. The other observation that I make is this, that the words "so long as any object of the trust remains unperformed'' clearly mean so long as any object of the trust remains to be performed; in other words, that the policy moneys shall not form part of the estate of the insured or be subject to his or her debts until the trusts have come to an end. I look at the two policies in this case, and I find that they are expressed to be for the benefit of the insured's wife Lilian Cousins. That being so, there is a trust created in favour of Lilian Cousins. I can see nothing in the Act that would warrant us coming to the conclusion that the husband cannot, by means of this section, provide a vested interest for his wife and his children during his own lifetime but can only provide interests for them contingent on them surviving. In the policies themselves I cannot find the remotest indication that the husband intended the wife's interest to be contingent on her surviving. If he had so wished nothing was easier than for him to have said so in the policies themselves. In my opinion, therefore, there was a trust created in favour of the named wife, Lilian Cousins, and that trust did not come to an end on her death, but persists and remains to be performed in favour of her legal personal representatives.

In other words, in my opinion *Prescott* v. *Prescott* (3), which was really indistinguishable from the present case, was rightly decided. I express that view in spite of the fact that CLAUSON, J., had doubts as to its correctness. The only cases which can be relied upon as pointing to the opposite conclusion are the two to which reference has been made by the Master of the Rolls and LAWRENCE, L.J., namely, *Robb* v. *Watson* (1) and *Re Collier* (2), in which CLAUSON, J., expressed his concurrence with the decision of ROSS, J., in *Robb* v. *Watson* (1). In *Robb* v. *Watson* (1) the learned judge had to deal, not with s. 11 of the Act of 1882, but s. 10 of the Act of 1870, and there, as has been pointed out, the words are

> ''so long as any object of the trust remains the policy moneys shall not be subject to the control of the husband or to his creditors or form part of his estate.''

ROSS, J., clearly took the view that those words meant so long as any of the cestuis que trust are living. In the first place it is not customary in this country, when you want to make a statement that a certain person is living, to state that he remains, nor is it customary, when you want to limit a life interest, to direct the income to be paid to the person named so long as he remains, nor, if you want to give an interest contingent upon the beneficiary surviving a certain event, to say if he remains. I decline to attribute to the legislature the intention of using the word ''remains'' in such an extraordinary sense as that attributed to them by ROSS, J. Equally it is to be observed that if the learned judge was right, and the word ''remains'' in that section was equivalent to ''is still living,'' it would not be possible to give even the children of the father who effected the policy anything but a life interest. For these reasons it seems to me that *Robb* v. *Watson* (1) was not correctly decided, but however that may be the words are, of course, different from the words that are used in the section of the Act of 1882 with which we have to deal, and it may be insufficient to say that having regard to the plain words of that section this appeal should in my opinion be allowed.

Morton.—As the result of your Lordships allowing the appeal the action will be dismissed?

LORD HANWORTH, M.R.—I see that the executors contend that the sole beneficial interest in the said policies is vested in them as legal personal representatives of Lilian Cousins.

Morton.—Yes, my Lord. It is true there is not any counter-claim. Your Lordships' order will be in these terms: ''The court being of opinion that the sole beneficial interest in the policy of insurance is vested in the defendants . . .''

LORD HANWORTH, M.R.—We allow the appeal and dismiss the action.

Appeal allowed.

Solicitors: *Linklaters & Paines*; *G. C. T. Money*; *W. H. Court & Son.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

MABRO *v.* EAGLE STAR AND BRITISH DOMINIONS INSURANCE CO., LTD.

[COURT OF APPEAL (Scrutton and Greer, L.JJ.), January 11, 1932]

[Reported [1932] 1 K.B. 485; 101 L.J.K.B. 205; 146 L.T. 433]

Practice—Parties—Adding persons as parties—Addition which would defeat defence under Limitation Act—R.S.C., Ord. 16, *r.* 2.

The court will not allow an amendment joining a new plaintiff to a writ if the effect of so doing would be to deprive the defendants of a defence under the Statute of Limitations.

Hudson v. *Fernyhough* (1) (1889), 61 T.L.R. 722, and the dissenting judgment of GROVE, J., in *Challinor* v. *Roder* (2) (1885), 1 T.L.R. at p. 528, approved; dictum of LORD PARMOOR in *Nocton* v. *Lord Ashburton* (3), [1914] A.C. at p. 977, applied.

Notes. Distinguished: *Hill & Son* v. *Tannerhill*, [1944] K.B. 472. Referred to: *Holman* v. *George Elliot & Co.*, [1944] 1 All E.R. 639; *Ingall* v. *Moran*, [1944] 1 All E.R. 97; *Battersby* v. *Anglo-American Oil Co.*, [1944] 2 All E.R. 387.

As to what amendments of a writ will be refused, see 20 HALSBURY'S LAWS (2nd Edn.) 784, para. 1087; and as to the power of the court to add or substitute a plaintiff where the action has been commenced in the wrong name, see 26 ibid. 20–21, para. 17, text and note (d).

Cases referred to:

(1) *Hudson* v. *Fernyhough* (1889), 61 L.T. 722, D.C.; affirmed on appeal, 34 Sol. Jo. 228, C.A.; Digest Practice 107, *924*.

(2) *Challinor* v. *Roder* (1885), 1 T.L.R. 527, 528, D.C.; Digest Practice 107, *927*.

(3) *Nocton* v. *Lord Ashburton*, [1914] A.C. 932; 83 L.J.Ch. 784; 111 L.T. 641; 30 T.L.R. 602, H.L.; Digest Practice 107, *926*.

(4) *Donald Campbell & Co.* v. *Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; 43 T.L.R. 787, H.L.; Digest Practice 788, *3503*.

Interlocutory appeal from an order of BRANSON, J., at Chambers refusing to add a party as plaintiff.

In January, 1922, an insurance against war risks was effected by two persons named Mabro with the defendants on 3,000 cases of petroleum and carried by the steamship *Berkshire* from Alexandria to Messina. On her voyage the *Berkshire* was seized by Greek warships and taken to the Piræus, where her cargo was condemned as prize upon the ground that it was intended for the use of the forces of Turkey with which country Greece was then at war. A claim on the policy was originally made early in 1923 and the writ in the action was issued on June 5, 1925. In December, 1931, an application was made that a person named Joseph Zok should be added as plaintiff as being the administrator of the estate of his father, Abdul Kader Zok, who had died in March, 1927, and who, it was said, was the person really interested in the insurance, the two Mabros being merely agents for collection.

BRANSON, J., refused to grant the application on the ground that it was barred by the Statute of Limitations.

The plaintiffs appealed.

By Order 16, r. 2, of the Rules of the Supreme Court:

> "Where an action has been commenced in the name of the wrong person, as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in the dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

K. S. Carpmael for the plaintiffs.
Cyril Miller, for the defendants, was not called on.

SCRUTTON, L.J.—Counsel has said everything that can be said in support of this appeal, but in my opinion it fails.

The facts giving rise to the appeal are these: In January, 1922, an insurance against war risks was effected with the defendants on a cargo of petroleum carried by the steamship *Berkshire* from Alexandria to Messina. On her voyage the *Berkshire* was seized by Greek warships, taken to the Piræus, and her cargo condemned as prize in 1923 on the ground that it was intended for the use of the forces of Turkey, with which country Greece was then at war. A claim on the policy was originally made early in 1923, and the writ in the action was issued on June 5, 1925, by two persons named Mabro who, it is now admitted, have no interest in the matter. More than six years after the seizure of the vessel, in December, 1931, an application was made under Order 16, r. 2, that a person named Zok should be added as plaintiff, as being the administrator of his father, who died in March, 1927, that is, two years after the action had been commenced by the Mabros, and who, it is said, was the person interested in the insurance.

Counsel says that we ought to accede to the application, as Order 16, r. 2, provides that

> "where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court or a judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."

In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the statute. It has been suggested that we might allow the joinder without prejudice to any defence against the claim, but I cannot see why, where the defence is clear and arises under the Statute of Limitations, the parties should be put to the expense of allowing an action to proceed which is barred in law. Counsel has contended that the decision of the House of Lords in *Donald Campbell & Co., Ltd.* v. *Pollak* (4) on a matter of costs has in some way enlarged the power of the court, acting under Order 16, r. 2, to the extent of making the matter of joining a person or adding a new cause of action, notwithstanding the Statute of Limitations, a matter of discretion. It is clear that the House of Lords in that case had not the slightest intention of dealing with such a question as this; it was considering merely the powers of the judge as to costs under Order 15. In *Nocton* v. *Lord Ashburton* (3) LORD PARMOOR said, in reference to the case then before the House ([1914] A.C. at p. 977):

> "It is necessary to note that the pleadings could not be amended so as to charge negligence, if amendment was necessary, since at the date of the suggested amendment such a charge would be statute barred."

In *Hudson* v. *Fernyhough* (1) a Divisional Court, consisting of LORD COLERIDGE, C.J.,, and MATHEW, J., took the same view that a party could not be added where the Statute of Limitations had barred the remedy. My recollection is that this rule has been acted on in many cases. The only case where the decision appears to be otherwise is *Challinor* v. *Roder* (2). There an action was brought against three executors, the name of one appearing on the writ as John Hill instead of John Myatt. After the claim would have been barred by the Statute of Limitations as against Myatt, who had acted as an executor in relation to the subject-matter of the action, the plaintiff obtained an order to amend the writ by the substitution of Myatt's name for that of Hill. On appeal the Divisional Court was divided in opinion, DENMAN, J., holding that Myatt had been properly joined, and that the case came within the discretion vested in a judge by Order 16, r. 11, GROVE, J., taking the opposite view. I prefer the view expressed by GROVE, J., that the court could not amend the writ and thus deprive Myatt of the benefit to which he was entitled of right under the Statute of Limitations. For these reasons in this case BRANSON, J., was right in refusing the application to add Zok as plaintiff, and the appeal must therefore be dismissed.

GREER, L.J.—The plaintiffs complain of the decision of BRANSON, J., refusing liberty under Order 16, r. 2, or alternatively under Order 16, r. 11, to join one Zok as plaintiff. The objection to joining him was that if he were joined and treated as a plaintiff as from the time the writ was issued the defendants would be deprived of their rights under the Statute of Limitations. Whether the matter is one of discretion or not, it appears to me inconceivable that we should make an order which would have the effect I have mentioned. It has been the accepted practice for a long time that amendments which would deprive a party of a vested right ought not to be allowed. BRANSON, J., has thought right to adhere to the generally accepted view, and for my part I can see no reasonable ground why we should disturb his order. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Lattey & Dawe*; *W. A. Crump & Son.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

JAMES *v.* COWAN AND OTHERS

[PRIVY COUNCIL (Lord Sankey, L.C., Lord Blanesburgh, Lord Hanworth, M.R., Lord Atkin and Lord Russell), April 25, 26, 28, 29, May 2, 3, 5, June 21, 1932]

[Reported [1932] A.C. 542; 101 L.J.P.C. 149; 147 L.T. 321;
48 T.L.R. 564]

Free Inter-State Trade—Control of dried fruits—Compulsory acquisition to force surplus off Australian market—Order ultra vires Minister—Right of appeal to Privy Council without certificate of High Court—Dried Fruits Act, 1924 *(No.* 1657 *of* 1924; *South Australia), s.* 28*—Commonwealth of Australia Constitution Act* (1900) (63 *&* 64 *Vict., c.* 12), *ss.* 74, 92.

Section 28 of the Dried Fruits Act, 1924, of South Australia **held** not to empower the Minister for Agriculture to make orders for the compulsory seizure of dried fruits so as to force the surplus fruit off the Australian market. The powers given to the Minister were expressly stated as being subject to s. 92 of the Constitution, which provided that trade, commerce, and intercourse among the States should be free.

The decision of the High Court of Australia that the orders were valid was not a decision as to the limits inter se of the Commonwealth and those of any State or States within s. 74 of the Constitution so as to preclude an appeal to His Majesty in Council without a certificate of the High Court.

Notes. Considered: *James* v. *Commonwealth of Australia*, [1936] 2 All E.R. 1449. Applied: *Commonwealth of Australia* v. *Bank of New South Wales*, [1949] 2 All E.R. 755. Considered: *Hughes and Vale Pty., Ltd.* v. *State of New South Wales*, [1954] 3 All E.R. 607. A

As to the powers of the Parliament of the Commonwealth of Australia and those of the State legislatures, see 5 HALSBURY'S LAWS (3rd Edn.) 510 et seq., and for cases see 8 DIGEST (Repl.) 751 et seq. As to appeal to Privy Council, see 5 HALSBURY'S LAWS (3rd Edn.) 690, 691, and for cases see 8 DIGEST (Repl.) 830–833.

B

Cases referred to:

(1) *James* v. *State of South Australia* (1927), 40 C.L.R. 1; 8 Digest (Repl.) 761, **908*.

(2) *State of New South Wales* v. *The Commonwealth* (1915), 20 C.L.R. 54; 8 Digest (Repl.) 754, **796*.

(3) *Jones* v. *Commonwealth Court of Conciliation and Arbitration*, [1917] A.C. 528; 86 L.J.P.C. 145; 117 L.T. 225; 33 T.L.R. 358, P.C.; 8 Digest (Repl.) 831, *837*. C

Appeal by special leave from a judgment of the High Court of Australia dismissing an appeal by the present appellant from a judgment of STARKE, J.

The appellant was a fruit grower and dryer resident and carrying on business in South Australia, and in the course of his business he sold his products in South D Australia, the other States of the Commonwealth, and beyond Australia. The bulk of his sales were made by contracts entered into before the opening of each season with purchasers in the other States of the Commonwealth. The respondent Cowan was at all material times the Minister of Agriculture in South Australia to whom as such Minister the administration of the Dried Fruits Act, 1924, was committed. On various dates in the course of the year 1927 certain stocks of dried fruits, the E property of the appellant, were compulsorily acquired on behalf of His Majesty by the respondent as such Minister as aforesaid in pursuance of the powers conferred upon him by s. 28 of the Act. The appellant, alleging that such sales were illegal and constituted trespasses, brought his action against the respondents in the Supreme Court of South Australia claiming damages. STARKE, J., held that the seizures did not contravene s. 92 of the Commonwealth Constitution and, accord- F ingly, dismissed the appellant's action, but in view of a probable appeal he assessed the damages in the sum of £12,145 4s. 10d. That judgment was, on appeal, affirmed by the High Court of Australia (KNOX, C.J., GAVAN DUFFY and RICH, JJ., ISAACS, J., dissenting). On the appeal a preliminary point was taken that by s. 74 of the Constitution no appeal lay to His Majesty in Council without a certificate of the High Court which had not been asked for. By s. 74 of the Commonwealth G Constitution:

> "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or H more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

W. A. Greene, K.C., and *Wilfrid Barton* for the appellant.

Sir William Jowitt, K.C., and *Fullager* (with them *Harold Murphy*) for the respondents.

I

June 21. **LORD ATKIN.**—This is an appeal from the High Court of Australia in an action in which the plaintiff, a resident in South Australia, claimed damages from the defendants for trespass to his goods. The plaintiff is a producer of dried fruits, currants and raisins. The defendants are the then Minister of Agriculture for South Australia and the members and servants and agents of the Dried Fruits Board set up by the Dried Fruits Act, 1924, of the legislature of South Australia (15 Geo. 5, No. 1657). The defendants justify the alleged trespasses under the Act; the plaintiff denies that the acts done were authorised by the Act, and alleges

A that, if they were, the authority given and the acts done under the authority were invalid by reason of s. 92 of the Constitution of Australia, which provides that trade, commerce, and intercourse among the States shall be absolutely free.

When the case came on before NAPIER, J., in South Australia he took the view that the question raised as to s. 92 was a question "as to the limits inter se of the constitutional powers of the Commonwealth and of the State," and that, therefore, B by s. 40 (a) of the Judiciary Act, 1903, as amended by the Judiciary Act, 1907, the cause was automatically removed from his jurisdiction to that of the High Court. On the case coming on before STARKE, J., on a summons for directions, that learned judge, while agreeing with NAPIER, J., thought it better to make an order removing the cause to the High Court under s. 40 of the Judiciary Act, a power which he undoubtedly possessed, as the case clearly involved the interpretation of the Con- C stitution. At the hearing of the action STARKE, J., gave judgment for the defendants, and this judgment was upheld on appeal by the High Court (KNOX, C.J., GAVAN DUFFY and RICH, JJ.; ISAACS, J., dissenting). On appeal to His Majesty in Council a preliminary objection was made by the respondents that the appeal was incompetent by reason of s. 74 of the Constitution, which provides that no appeal shall be permitted to the Queen in Council upon any question as to the limits D inter se of the constitutional powers of the Commonwealth and those of any State without a certificate of the High Court. No such certificate had been asked for. It will be more convenient to deal with the preliminary point after considering how the constitutional question arises on the facts of this case.

The production of dried fruits, which for all relevant purposes in this case means dried currants, sultanas, and lexias (a species of raisin), is an industry of chief E importance in South Australia, Victoria, and, to a less extent, Western Australia. The fruit having been grown, prepared, dried, pressed, and packed, finds a market in its native State, in the other States of Australia, in New Zealand, and in London. The production is much greater than the consumption in Australia. It appears to be admitted that about 15 per cent. of the total production of Australia and no more can be consumed in Australia; the surplus has to be exported else- F where. It is unnecessary to say that this 15 per cent. is obviously in excess of the possible consumption in any producing State, for it includes the consumption in New South Wales and Queensland, which for producing purposes may be ignored. Unlimited competition, therefore, in Australia would naturally injure the native grower by depriving him of the advantage of a protected market, and leaving him mainly dependent upon obtaining for his exports out of the Commonwealth the G world price. In 1924 the Commonwealth and the producing States concerned had recourse to legislation to deal with the question of marketing dried fruits. The Commonwealth passed the Dried Fruits Export Control Act, 1924, in October, 1924. Under that Act the Minister had power through a system of licensing to control the export of dried fruits from the Commonwealth, and a Dried Fruits Control Board was constituted which had power to control the fruit so brought under H licence. This Act, however, only related to export from the Commonwealth. Dealings with dried fruits in the States were left to the State legislatures. Both Victoria and South Australia passed Dried Fruits Acts in 1924. This appeal is concerned with the South Australian Act, which was assented to on Dec. 24, 1924. It was not to come into force until the governor was satisfied that there was similar legislation in force in Victoria. The Act constituted a Dried Fruits Board I of five members, three of whom were to be appointed by growers, the other two being official members. By s. 19 the board was to have power to make contracts with any person in respect to the purchase or sale of dried fruits produced in Australia, and (6):

> "To enter into contracts with boards appointed under legislation in force in other States with objects similar to those of this Act, for concerted action in the marketing of dried fruits produced in Australia and for purposes incidental thereto, and to carry out such contracts,"

and it had power to open shops, fix maximum prices, and by advertising or other appropriate means encourage the consumption of dried fruits.

Section 20 of the Act provided:

> "(1) The board shall also have power in its absolute discretion from time to time to determine where and in what respective quantities the output of dried fruits produced in any particular year is to be marketed and to take whatever action the board thinks proper for the purpose of enforcing such determination."

Notice of every determination was to be given to the public and to every grower affected. There were provisions for the registration of growers, dealers and packing sheds, with an obligation on the persons registering to give particulars of their past and expected future out-turn. Section 28 of the Act is the section under which the present dispute arises:

> "28.—(1) Subject to s. 92 of the Commonwealth of Australia Constitution Act and for the purposes of this Act or of any contract made by the Board, the Minister may on behalf of His Majesty purchase by agreement or acquire compulsorily any dried fruits in South Australia, grown and dried in Australia, not being dried fruits which are held for export under and in accordance with a valid and existing licence granted under the Dried Fruits Export Control Act, 1924, of the Parliament of the Commonwealth, or of which the board constituted under that Act has accepted the control for the purposes of that Act, or which are included in any contract referred to in s. 18 of that Act: Provided that the Minister under the powers conferred by this Act shall not acquire compulsorily any such dried fruits in any case where the owner or the person having the control thereof has exported or arranged to export such quantity as he is licensed to export under and in accordance with such a licence as aforesaid and such further quantity (if any) as is determined by the Minister and for the export of which a licence can be obtained under the said Commonwealth Act. (2) The Minister may authorise the board to acquire on his behalf any dried fruits which this Act empowers him to acquire. (3) Any dried fruits acquired pursuant to this Act may be sold by the Minister in such manner as he thinks fit."

For any fruit so acquired by the Minister the owner, by s. 29 (2), was to be entitled to receive the export parity price, which by s. 3 meant the selling price in London of the like Australian dried fruits, less freight, insurance, and other charges. Section 30 annulled all existing agreements in writing for the sale of dried fruits to be produced in 1925, with the exception of certain contracts already made by dealers with growers. Power was given to the governor to make regulations dealing with the marketing of dried fruits, inspection and granting of certificates of quality, registration, and other matters, and substantial penalties were enacted for interfering with the board or the Minister and for breach of the regulations.

In 1926, in pursuance of the Act, the Dried Fruits Board made several determinations, notices of which were duly published. The plaintiff was himself a grower of fruits, and a dealer, and owned a registered packing shed, in which he prepared and packed the fruit which he had either grown himself or bought from others. He apparently disputed the validity of the determinations and refused to obey them, and sold his dried fruits to other States in Australia in excess of the proportions fixed in the respective determinations. Proceedings were issued against him by the board for penalties for breach, but they stood adjourned from time to time pending the hearing of an action in the High Court, which the present plaintiff instituted against the State to have the determinations declared invalid. In this action the plaintiff was eventually successful: judgment was given in August, 1927, declaring the determinations invalid. Meantime, on Feb. 26, 1927, the board gave notice of a determination for 1927. It follows the form of the determination of 1926, and it is relevant to notice what it purports to declare:

> "Dried Fruits Acts, 1924–1926.—Notice of Determination made by the Dried Fruits Board.—Notice is hereby given that the Dried Fruits Board has made the following determination under s. 20 of the Dried Fruits Act, 1924, namely: That the proportion of the output of currants, sultanas, and lexias produced in the year 1927 which may be marketed in the Commonwealth of Australia by any of the following persons, that is to say—(a) any grower; (b) any dealer; or (c) any person being the owner or occupier or person in charge of any packing shed—shall not be more than the following: For currants, 15 per cent.; for sultanas, 10 per cent.; for lexias, 10 per cent. This determination shall operate until rescinded or varied by a subsequent determination. Dated the 26th day of February, 1927.—By order of the Board, W. N. TWISS, Secretary."

This determination was arrived at as the result of an inter-State conference, as appears from a minute of a meeting of the board on Feb. 24, 1927. Apparently, the board had not much hope that the appellant, James, would pay any more attention to this determination than he had to those of 1926, and they decided to adopt with regard to him a different procedure, as appears from the following minutes of a meeting of the board on March 4, 1927:

> "The following line of action was agreed to in respect of James, and secretary was instructed accordingly: (i) To ascertain when the Minister would be returning and how long he will remain in the city. (ii) To ascertain if James has any fruit in his shed on the date the Minister is likely to return to the city. (iii) Secretary then to apply to the Minister for order of acquisition. (iv) On receipt of the order from the Minister, Inspector Carne to be despatched immediately to Berri with order of acquisition, with instructions to serve same on James, at the same time Inspector Carne to serve notice on James to supply particulars of all his selling contracts (under s. 7 of the Amending Act). . . . Secretary was directed to communicate immediately with Supervisor Haynes of Berri, instructing him to telephone secretary on Monday afternoon next what fruit, if any, had been delivered to James' shed in order that the above programme may be carried out."

Accordingly, on March 7, 1927, Mr. Butterfield, then Minister of Agriculture, authorised the Dried Fruits Board to acquire on his behalf 77,150 lb. of dried fruits which were on March 5 in the registered packing shed of James. On the same day the board made an order declaring that the said quantity was acquired by His Majesty the King, and on the same day authorised the defendant Carne, an officer of the board, to seize and take possession of the fruit. The order was taken by Carne, who attended at James' packing shed on March 8 with two other officers and seized and marked the packages of fruit. After the first two or three orders the practice was for the Minister himself to declare the acquisition, and the board then gave the necessary authority to seize to their officer. The defendant Mr. Cowan did not become Minister till April, and the first order made by him was on April 13, 1927, and may be set out:

> "Order made under the 'Dried Fruits Acts, 1924 to 1926.'—I, the Honourable John Cowan, M.L.C., the Minister of Agriculture for the State of South Australia, the Minister of the Crown to whom the administration of the Dried Fruits Acts, 1924 to 1926, is for the time being committed by the governor, do hereby, pursuant to the powers conferred on me by s. 29 of the said Act and all other powers me enabling, declare that the dried fruits described in the schedule hereunder are acquired by His Majesty the King. Schedule: The whole of the dried fruit which at the hour of five o'clock in the afternoon of the twelfth day of April, 1927, was in or about the packing shed of Frederick Alexander James at Berri, in the State of South Australia, and which under orders previously served upon the said Frederick Alexander James has not been acquired by His Majesty the King. Dated the 13th day of April, 1927.—**J. COWAN, Minister of Agriculture.**"

Subsequent orders, as, for instance, on April 30, 1927, were made on separate forms, the first defining the fruit as not marked "I.S.C.," or "Required for Inter-State Contracts," the second as marked "I.S.C.," or "Required for Inter-State Contracts." Both alike were to be seized.

The result was that by a series of orders, the last of which was made on Aug. 15, 1927, most of the plaintiff's fruit was seized. There appears to their Lordships to be little doubt that the intention was to seize the whole of the fruit, but, apparently, in the intervals between the different orders James was able to get away a certain quantity of fruit to satisfy his inter-State trade. It is beyond dispute that unless the seizures can be justified under the Act they were legal wrongs for which the plaintiff had a remedy, and the trial judge assessed the damages on that footing at £12,145 4s. 10d., though being of opinion that the defendants could justify under the Act he gave judgment for the defendants.

On Aug. 22, 1927, in the action of *James* v. *State of South Australia* (1), the High Court held that the provisions of s. 20 and the determinations of the board made thereunder were invalid, as offending against s. 92 of the Constitution, which provides that trade, commerce and intercourse among the States shall be absolutely free. It was contended that this decision was wrong. The restriction imposed upon the powers of the State was, it is said, limited to interference with inter-State commerce "as such." Legislation which applied equally to commerce within the State, as well as to inter-State commerce, and was designed for the welfare of the State, was not affected by s. 92. It appears to their Lordships unnecessary to undertake the difficult task of defining the precise boundaries of the absolute freedom granted to inter-State commerce by s. 92. In the present case they are clearly of opinion that s. 20 and the determinations made under it were directed at inter-State commerce as such. They were intended to prevent persons in South Australia from selling more than the fixed quota in any of the Australian States. The quota was fixed by reference to the needs of all the States; and the prohibition of the sale of the surplus was against selling to any of the States. As the determination said: "The proportion which may be marketed in the Commonwealth of Australia shall not be more than" the prescribed proportion. If this leaves inter-State commerce "absolutely free," the constitutional charter might as well be torn up. Their Lordships have no hesitation in agreeing with the decision of the High Court on this point.

Their Lordships have not failed to notice a suggestion made by ISAACS, J., that the fixing and enforcement of a quota was an essential part of the whole Act, and that what is left is so substantially different from the original that the residue could not fairly be said to represent the meaning of the legislature. The learned judge did not, however, proceed to found his judgment on what he calls this annihilating principle, and as it was not pressed upon this board by the appellant, their Lordships also forbear from further discussion of a matter which upon another occasion may require serious consideration.

The conclusion that s. 20 and the determinations made thereunder violate s. 92 of the Constitution has a direct bearing upon the immediate question raised on this appeal, namely, whether the orders for acquisition made by the Minister are valid. The orders were attacked by the plaintiff on two grounds: (i) That they were not made "for the purposes of the Act" within the meaning of these words in s. 28. (ii) That they violated s. 92 of the Constitution.

On the first contention the plaintiff's argument was that the purposes of the Act are to be ascertained by reference to ss. 19 and 20 of the Act. The orders of acquisition were, it is said, certainly not made for any of the purposes named in s. 19, and they were not made for the purpose of supporting the determinations or for maintaining any quota, whether fixed by the board or the Minister, for the fact that the Minister purported to seize all the plaintiff's fruit, and that whether intended for inter-State trade or not, showed that the Minister had no quota in his mind. The plaintiff urged in support of this view the damaging and uncontradicted statements made to a representative of the Press by Mr. Twiss, the secretary of the

Dried Fruits Board, one of the defendants. In view of the finding of the trial judge, their Lordships do not think it would be right to adopt any view of the facts which would appear to suggest bad faith on the part of the Minister or his advisers. Without any suggestion, however, of any indirect motive, they cannot avoid being impressed with the view that the action taken was due to the initiative of the board, that the essence of the matter was that the determinations of the board as to a quota must be observed in order that the Act should operate fairly amongst all producers, and that the method of acquisition was adopted with that object.

The learned trial judge, however, thus stated his view of the facts:

> "But the truth is, I think, that the Minister and the board were doubtful of both the validity and the practical efficacy of the determinations, and resolved to regulate and control the marketing of dried fruits, and particularly the plaintiff's dried fruits, by another method sanctioned by the Act, namely, compulsory acquisition. They did not do it with the object or intention of bolstering up invalid determinations, or of punishing the plaintiff, or of benefiting particularly the members of the Australian Dried Fruits Association, or of obstructing, interfering with or preventing the plaintiff carrying on his business, whether domestic or inter-State, or of deterring or intimidating the plaintiff and others, or of obtaining the approval and support of the members of the Australian Dried Fruits Association, or with any like intent. As the consumption of dried fruits in Australia was not sufficient to absorb the output, the government of the Commonwealth, the fruit-growing States, the Minister, and the board were convinced that the surplus would glut the Australian market and cause a fall in prices, which, it was supposed, would be detrimental to the progress and stability of the dried fruits industry, however beneficial it might be to the consumers of dried fruits. So, in pursuance of the scheme, in which the Commonwealth and the fruit-growing States had joined, the Minister and the board resolved to use the powers apparently conferred upon them by legislation to prevent the evils feared, and to force the surplus fruit off the Australian market. And, if a grower would not fall in voluntarily with the scheme, then he must be compelled to do so, and the marketing and sale of his fruit regulated and controlled by some method allowed by the Act."

In view of this finding, which was accepted on appeal, their Lordships are not disposed to decide the case on the first contention of the plaintiff.

On the second contention, namely, that the orders made by the Minister were invalid because they infringed s. 92, in their Lordships' opinion the plaintiff is entitled to succeed. STARKE, J., appears to have decided this part of the case by reference to the decision of GRIFFITH, C.J., in *New South Wales* v. *The Commonwealth* (2), generally known as the *Wheat Case*. This is based on the view that s. 92 does not affect powers of acquisition, which, it is said, merely change the ownership, and do not regulate the disposition of goods by the owner. In substance it means that the Crown becomes the owner, and the Crown can do what it pleases with its own, dispose of it inter-State or not as it chooses. This doctrine was repudiated by counsel for the defendants.

Their Lordships would not be prepared to assent to it stated in the simple form which commended itself to GRIFFITH, C.J. If the real object of arming the Minister with the power of acquisition is to enable him to place restrictions on inter-State commerce, as opposed to a real object of taking preventive measures against famine or disease and the like, the legislation is as invalid as if the legislature itself had imposed the commercial restrictions. The Constitution is not to be mocked by substituting executive for legislative interference with freedom. But in the present case the courts are not faced with the problem of construing an Act of the legislature which contains no reference to s. 92. In this case the powers given to the Minister are expressly conditioned as subject to the section. Section 28 appears to mean that the Minister may acquire compulsorily so that he does not interfere with the absolute freedom of trade among the States and acquires for the purposes of the Act. Thus the only question in this case appears to be whether the Minister did exercise his powers so as to restrict the absolute freedom of inter-State trade. It may be conceded that even with powers granted in this form, if the Minister exercised them for a primary object which was not directed to trade or commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, he would not be open to attack because incidentally inter-State trade was affected. But in the present case it appears to their Lordships, as it did to ISAACS, J., that the statement of the objects of the Minister and the board, as expressed in the finding of STARKE, J., set out above, makes it plain that the direct object of the exercise of the powers was to interfere with inter-State trade. "To force the surplus fruit off the Australian market" appears necessarily to involve two decisions—first, the fixing of a limited amount for Australian consumption (a necessary element in the conception of a "surplus"); secondly, the prevention of the sale of the balance of the output in Australia. In the result, therefore, one returns to the precise situation created by s. 20 with its determination of where and in what quantities the fruit is to be marketed. Section 20 and the determinations are invalid, and for precisely the same reasons it appears to their Lordships inevitable that the exercise of the powers of the Minister, crediting him with the precise object and intention found by the High Court, were also invalid.

It follows from what has been said that the plaintiff established his cause of action and was entitled to have judgment for the amount of damages found by the trial judge.

It remains, however, to dispose of the preliminary point that the decision of the High Court was a decision upon a question "as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States," and that by s. 74 of the Constitution no appeal lay to His Majesty in Council from such a decision without a certificate of the High Court, which had not been asked for. It has been convenient to reserve discussion of this point until the effect of the legislation could be considered in the merits; but had their Lordships acceded to the objection they would, of course, not have dealt with the substance of the appeal. But, in their Lordships' opinion, the present case does not fall within s. 74. At one time in the argument it was suggested that to determine the point it would be necessary to come to a conclusion on a matter which has been decided differently at different times in the High Court, namely, whether s. 92 applied to the Commonwealth as well as to the individual States. If to both, it was almost conceded that no question of limits inter se would arise. If to the States alone, then the violation of s. 92 would, it is said, amount to an invasion of Commonwealth powers which would involve a question under s. 74. Their Lordships, however, do not find it necessary to decide the question as to the application of s. 92, which will remain for them an open question. If the implied prohibition in s. 92 applies to both Commonwealth and States it would seem reasonably clear that there are no competing powers; the prohibition area is denied to both. But similarly, if the prohibition is addressed to the States alone, no question arises as to limits of powers between State and Commonwealth. The State is forbidden to pass legislation or to grant executive powers of a certain kind (interfering with absolute freedom of inter-State trade, &c.). The only question is whether it has violated the prohibition or not. The Commonwealth powers on this footing are undisputed. There are no boundaries between the one and the other which come into question. Their Lordships see no difference in this respect between the provisions of s. 92 and those of s. 115, which prohibit a State from coining money. The Commonwealth has such a right, but if a State were alleged to be violating s. 115 there would be only a simple question whether the prohibition had been ignored or not. No question of the limits of State and Commonwealth powers inter se would arise. *Jones v. Commonwealth Court of Conciliation and Arbitration and others* (3) appears to be a very different case. There the Commonwealth by its legislation as to industrial disputes had deliberately entered the State territory and automatically restricted the State's powers. There appears to have been a plain question as to the limits inter se of the respective powers. For these reasons their Lordships are of opinion that the appeal was competent.

In the result, their Lordships find themselves in accord with the convincing judgment delivered by ISAACS, J., in the High Court. They are of opinion that the appeal should be allowed, the order of the High Court on appeal dated March 21, 1930, and of STARKE, J., dated Nov. 7, 1929, should be set aside, and judgment should be entered for the plaintiff against the defendants for £12,145 4s. 10d., the plaintiff to have the costs of the action and of the appeal to the High Court, and will humbly advise His Majesty accordingly. The defendants must pay the costs of the appeal to His Majesty in Council.

Appeal allowed.

Solicitors: *Justice & Pattenden*; *Sutton, Ommanney, & Oliver.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

McLEAN *v.* BELL

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Thankerton, Lord Macmillan and Lord Wright), April 19, 21, 22, May 13, 1932]

[Reported 147 L.T. 262; 48 T.L.R. 467; 76 Sol. Jo. 414]

Negligence—Effective cause—Responsibility—"Last opportunity"—Negligence by plaintiff—Subsequent failure by defendant by reasonable care to avoid accident.

In a running-down case, if it is established that, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due, and the plaintiff is entitled to recover. The decision of the case must turn, not simply on causation, but on responsibility.

Per LORD WRIGHT: In such a case the plaintiff's negligence may be what is often called "causa sine qua non," yet, as regards responsibility, it becomes merely evidential or matter of narrative, if the defendant, acting reasonably, could and ought to have avoided the collision. Certainly in some cases there may be still further refinements to be considered. Thus, a plaintiff, notwithstanding the defendants' failure to avoid the collision, might still at the last moment by the exercise of reasonable care have averted the casualty. In some cases the plaintiff might be solely responsible, or might be responsible equally with the defendant. What has been called the "last opportunity" may in such cases need to be determined, and, if that can be attributed solely to the plaintiff, the plaintiff's claim must fail. It must always be a question of fact and degree.

Notes. The common law rule that contributory negligence on the part of the plaintiff was a complete defence in an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945.

Considered: *The Eurymedon*, [1938] 1 All E.R. 122. Referred to: *Chisholm* v. *London Passenger Transport Board*, [1938] 4 All E.R. 850; *Kiley* v. *Garnsey* (1940), 84 Sol. Jo. 274; *Smith* v. *Harris*, [1939] 2 All E.R. 960; *Duncan* v. *Cammell Laird, Ltd.*, *Craven* v. *Cammell Laird, Ltd.*, [1944] 2 All E.R. 159; *Admiralty Comrs.* v. *North of Scotland and Orkney and Shetland Steam Navigation Co.*, [1947] 2 All E.R. 350.

As to the effect of negligence by the plaintiff, see 23 HALSBURY'S LAWS (2nd Edn.) 680, 681, and for cases see 36 DIGEST 170 et seq. A

Cases referred to:

(1) *British Columbia Electric Rail. Co., Ltd.* v. *Loach*, [1916] 1 A.C. 719; 85 L.J.P.C. 23; 113 L.T. 946, P.C.; 36 Digest (Repl.) 182, *981.*

(2) *Swadling* v. *Cooper*, [1931] A.C. 1; 100 L.J.K.B. 97; 46 T.L.R. 597; 74 Sol. Jo. 536; sub nom. *Cooper* v. *Swadling*, 143 L.T. 732, H.L.; 36 Digest (Repl.) 171, *918.* B

(3) *Davies* v. *Mann* (1842), 10 M. & W. 546; 12 L.J.Ex. 10; 7 J.P. 53; 6 Jur. 954; 152 E.R. 588; 36 Digest (Repl.) 177, *945.*

(4) *Radley* v. *London and North-Western Rail. Co.* (1876), 1 App. Cas. 754; 46 L.J.Q.B. 573; 35 L.T. 637; 41 J.P. 484; 25 W.R. 147, H.L.; 36 Digest (Repl.) 170, *915.* C

Appeal from an interlocutor of the Second Division of the Court of Session setting aside the verdict of the jury in favour of the appellant, the plaintiff in the action, as contrary to evidence.

The action was brought by the appellant, Sarah McLean, a girl of seventeen, employed as a shop assistant, with the consent and concurrence of her father, D against the respondent for damages for personal injuries alleged to have been sustained by her in consequence of the fault of the respondent on Feb. 1, 1929. The appellant averred that she alighted from an east-going tramcar in Dumbarton Road, Glasgow, on the north side of the road, at a tramway stopping place near Broomhill Drive. She then proceeded to cross to the south side of the road. Before doing so she looked to see if the road was clear of traffic, and observed none from which E danger might be apprehended. When she had reached the middle of the southernmost tramway rails she was suddenly run into and knocked down by a motor car belonging to the respondent, which was being driven by him in a westerly direction. The appellant averred that the respondent was driving at an excessive speed, that he failed to keep a proper look-out, that he did not give warning of his approach, and that the accident was entirely due to his fault. The respondent pleaded (inter F alia) contributory negligence on the part of the appellant, who, he alleged, suddenly ran out from behind a tramcar across the course of the respondent's car at a time when he was so close to her as to make it impossible for him to avoid her.

In January, 1930, the case was tried before LORD MONCRIEFF and a jury, who returned a unanimous verdict in favour of the appellant, assessing the damages at £850. That verdict was set aside on a bill of exceptions for the respondent and a G new trial was allowed. The second trial took place in December, 1930, before LORD FLEMING and a jury, who, by a majority of seven to five, returned a verdict for the appellant, assessing the damages at £750. That verdict was set aside by the Second Division on the ground that the verdict was contrary to the evidence, and the respondent was assoilzied from the conclusions of the action. It was against that interlocutor that the present appeal was brought. The appellant con- H tended that there was sufficient evidence to justify the decision of the jury that the true or proximate cause of the accident and of the loss, injury and damage sustained by the appellant was negligence on the part of the respondent, and, alternatively, that even on the assumption that she was shown to have been negligent, there was evidence to support the verdict on the ground of subsequent negligence proved on the part of the respondent.

I

A. P. Duffes, K.C., of the Scottish Bar (and also of the English Bar), and *Robert Gibson, K.C.* (of the Scottish Bar), for the appellant.

J. L. Wark, K.C., and *J. R. Wardlaw Burnet* (both of the Scottish Bar) for the respondent.

The House took time for consideration.

May 13. The following opinions were read.

LORD WRIGHT.—This is an appeal against an interlocutor of the Second Division of the Court of Session in Scotland, setting aside the verdict of the jury

A in favour of the appellant, the pursuer in the action, as contrary to evidence, and assoilzieing the respondent, the defender.

The pursuer, Sarah McLean, who was a girl of seventeen, employed as a shop assistant in Glasgow, brought her action claiming damages for personal injuries sustained by her on Feb. 1, 1929, in consequence of her being run into and knocked B down whilst crossing the street by a motor car owned and driven by the defender, James Hunter Bell. By her condescendence the pursuer alleged that the accident was entirely due to the fault of the defender, who in breach of his duty drove the car recklessly and negligently and without warning to the pursuer, at an excessive rate of speed, and not under proper control, and in breach of his duty to avoid pedestrians, like the pursuer, lawfully using the road, and that the accident would C not have happened if the defender had carried out his duty. The defender by his answers denied that he was driving at an excessive speed or that he failed to perform all the duties incumbent on him, and he alleged that the accident was due solely to the fault of the pursuer, who suddenly ran out from behind a tramcar and across the course of the defender's car when the defender was so close to her as to make it impossible for him to avoid her, and he alleged that, but for the pursuer's D own reckless disregard for her own safety, the accident would not have happened. By his pleas in law he claimed to be assoilzied on the ground that the accident had been caused or at least materially contributed to by the fault and negligence of the pursuer.

On Jan. 16 and 17, 1930, the case was tried before LORD MONCRIEFF and a jury, who unanimously delivered a verdict for the pursuer, assessing the damages at E £850. The defender then lodged a notice of motion for a rule to show cause why a new trial should not be granted and also lodged a bill of exceptions. On June 27, 1930, the Second Division allowed the exceptions taken and set aside the verdict of the jury and allowed a new trial. The new trial was held on Dec. 9 and 10, 1930, before LORD FLEMING and a jury. The jury found by a majority of seven to five for the pursuer, assessing the damages at £750. The defender thereupon lodged F a notice of motion for a rule to show cause why the verdict of the jury should not be set aside and a new trial granted. On July 2, 1931, the motion was heard before the judges of the Second Division, sitting with LORD FLEMING, who set aside the verdict of the jury and assoilzied the defender on the ground that the verdict was contrary to the evidence and that they had before them all the evidence that could reasonably be expected to be obtained relevant to the cause. From this inter-G locutor the pursuer has appealed to your Lordships' House.

The accident took place in Dumbarton Road, Glasgow, about 10 a.m. That street runs east and west, the Glasgow direction being to the east. It is 35 ft. 11 in. wide from kerb to kerb, and in it are two sets of tramlines, of 4 ft. 8 in. gauge, and separated by a space of 4 ft. 4 in. From the north kerb to the nearest tramline is 10 ft. 10 in., and from the south kerb to the south line is 11 ft. 5 in. The H accident occurred near a place marked "Car stop if required," which is on the north side. A little further to the east are two wide openings—Broomhill Drive to the north, about thirty-nine feet broad at the mouth, and Sawmill Road to the south, slightly broader. Dumbarton Road is level and is straight for more than two hundred yards to the eastwards of the place of the accident. The pursuer alighted from an east-going tram at the car stop, on the north side of the road, I the car having very nearly, but not quite, stopped. She had to cross to a shop almost opposite on the south side, and was struck down by the defender's car while she was crossing, and about when she had reached the southernmost line of tram rails. The defender's car, after striking her, carried her underneath it about twenty yards before it stopped. Apart from the tramcar and the defender's car, there was no moving traffic in the street, but a little beyond the place of collision there was a van and horses standing on the south side and on the same side a furniture van was standing a little to the west of the mouth of Sawmill Road. On the north of the street and west of the tramcar there were no moving or standing vehicles in sight. The pursuer sustained very serious injuries, from which she has not yet recovered, and may never recover.

There was a conflict of testimony at the trial, the pursuer, supported by seven independent eye-witnesses, giving evidence to establish her case, and the defender, with four independent eye-witnesses, testifying in support of his version of the accident. It is not necessary to examine the conflicting evidence in any detail. The pursuer's evidence was to the effect that when she alighted from the tramcar she went to the north footway, looked to the west, and saw no traffic (to the east was the tram which was just moving away and was then about five yards distant), she then started to cross, and when about the second tram rail looked, saw no traffic and proceeded and was struck down about the southernmost tram rail, that is about six or seven feet or a little more from where she had looked; she was not running or hurrying across; she heard no horn. The eye-witnesses she called deposed that the defender's car was going very fast, at too high a speed (twenty-eight to thirty miles per hour is one estimate), and did not swerve or reduce speed till the car struck the pursuer; they deposed that the defender could have avoided the accident; some say that when they first saw the car there were fifteen or twenty yards between it and the girl, and she had no chance then of getting out of the way. There was evidence that the tram had proceeded some way after the girl alighted before the defender's car passed it. The defender's evidence was that he was passing about half-way along the tramcar (which is thirty feet long) when he caught a glimpse of the girl darting round the rear of the tram, so that, though he applied his brakes and slightly swerved, he had no time to avoid the impact, and that he had sounded his horn, and was going at a moderate speed of twelve miles per hour before he reached the girl. He called eye-witnesses in support of his story. No exception has been taken to the Lord Ordinary's summing-up, which is agreed to have been sufficient and correct in law. The jury, by a majority verdict, found for the pursuer on that conflict of evidence.

On the appeal before the Second Division the leading judgment was given by the Lord Justice-Clerk, with whose judgment LORD FLEMING agreed. He put the question as being not whether the verdict was right, but whether there was evidence on which a reasonable jury could reach the result they did. He was satisfied that there was abundant evidence on which the jury were entitled to hold that the defender was in fault, as to speed, omission to sound his horn, failure to stop or swerve before the accident. But he held that the pursuer could not be acquitted "of negligence materially contributing to the accident." He did so on the ground that, though she said she looked, she gave no explanation of why she did not see the car. That, in the opinion of the learned Lord Justice-Clerk, involved her in a dilemma, because either she crossed without looking or else she saw the danger and nevertheless crossed; he assumed that the car was fifteen or twenty yards away when she looked. A dilemma is, in my judgment, not always a safe method of settling a matter of fact. The jury may have thought that she was not negligent in crossing when she did if she looked, as she said she did, as far as the corner of Sawmill Road and saw no car. In these cases much must depend on the speed of the car, and (as the jury may have thought) it may have reasonably appeared to the girl that her survey had extended as far as was practically necessary, so that any car outside that range did not attract her attention, though she could not give the proper explanation under cross-examination. I should hesitate to hold that if the jury did find the pursuer not negligent at all, their verdict was perverse. But I shall assume that they did think she was negligent in the sense of being careless of her own safety in crossing the street when she did. On that assumption, however, there was a further question still for the jury, namely, whether, assuming her to be negligent in that sense, the defender could yet by the exercise of reasonable care and skill have avoided striking her. That issue was raised on the pleadings and was fully dealt with on the evidence, and there was, A in my judgment, abundant evidence to entitle the jury to find against the defender on that issue. I can see no reason to think that they did not so find, and if they did, that finding justifies, or rather requires, a verdict for the pursuer. With all respect to the learned Lord Justice-Clerk, he seems to ignore this aspect of the case in his judgment, and I think that vitiates his conclusion. The only test which he applied is whether the pursuer materially contributed to the accident. B No doubt in a sense she did, because if she had not come out into what may be called the danger zone, and had not proceeded to cross the street, she would not have been struck by the car. She may have been negligent in so doing, but that does not bar her claim if the defender by the exercise of reasonable care and skill (which does not mean anything superhuman or exceptional, with all allowance for what is C called the agony of the moment) could have avoided the pursuer, even though the effect of the pursuer's negligence, if she was negligent, continued right up to the moment of impact.

I should desire to apply to this case (with a slight alteration) the language of LORD SUMNER in giving the opinion of the Privy Council in *British Columbia Electric Rail. Co., Ltd.* v. *Loach* (1) ([1916] 1 A.C. at p. 728):

> D "Under the proper direction it was for the jury to find the facts and to determine the responsibility, and upon the answer which they returned reasonably construed the responsibility for the accident was on the defender solely, because whether the pursuer got in the way of the car with or without negligence on his part the defender could and ought to have avoided the consequences of that negligence."

E The man in that case who was killed had driven his buggy across a level-crossing without looking out to see that the road was clear. He was struck down by the approaching car. The verdict of the jury was upheld for the reasons I have quoted from LORD SUMNER'S opinion. That opinion does not bind this House, but I think it is consistent with the principles (which are the same in Scottish as in English F law) governing these questions which have recently been discussed in this House in *Swadling* v. *Cooper* (2), a case of collision between a motor car and a motor cycle at crossroads, where neither rider could have seen the other in time to avoid the collision. LORD HAILSHAM, in whose judgment the other noble and learned Lords concurred, stated the law in these collision cases to be as follows:

> G "In order to succeed the plaintiff must establish that the defendant was negligent and that that negligence caused the collision of which he complains. If it is established from his own evidence, and by evidence adduced on behalf of the defendant that the plaintiff could have avoided the accident by the exercise of reasonable care, then the plaintiff fails, because his injury is due to his own negligence in failing to take reasonable care. If, although the plaintiff was H negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due, and the plaintiff is entitled to recover."

What the Lord Justice-Clerk seems, if I may so say with all deference, to have ignored, is the rule embodied in the last sentence I have just quoted. Yet if that rule is borne in mind, in the present case I think the jury, in view of the evidence I before them, were abundantly entitled to find that the case fell within the class illustrated by *British Columbia Electric Rail. Co., Ltd.* v. *Loach* (1) and not within the class illustrated by *Swadling* v. *Cooper* (2), where the jury's verdict for the defendant was upheld on the ground that the evidence was consistent with the conclusion that when the parties became aware of their respective positions there could have been no time for the defendant to avoid the impact, and, therefore, the plaintiff, being also in fault, the negligence of each party contributed to the collision.

No doubt, in these cases some confusion may arise from the use of the word "contributed" with or without such an adverb as "materially." In one sense, but for the negligence of the pursuer (if she was negligent) in attempting to cross the road, she would not have been struck, and as matter simply of causation her acts formed a necessary element in the final result, since without them no accident could have occurred. The decision, however, of the case must turn, not simply on causation, but on responsibility; the plaintiff's negligence may be what is often called "causa sine qua non," yet as regards responsibility it becomes merely evidential or matter of narrative, if the defendant acting reasonably could and ought to have avoided the collision. Certainly in some cases there may be still further refinements to be considered. Thus a pursuer, notwithstanding the defender's failure to avoid the collision, might still at the last moment by the exercise of reasonable care have averted the casualty. In some such cases the pursuer might be solely responsible, or might be responsible equally with the defender. What has been called the "last opportunity" may in such cases need to be determined, and if that can be attributed solely to the pursuer, or to the pursuer as well as the defender, the pursuer's claim must fail. But in the present case there was evidence of eye-witnesses, as I have already stated, that at the critical moment the defender could, while the pursuer could not, have avoided the collision. In these days of rapidly moving traffic it is true that a foot passenger should be circumspect in crossing a road, but it is equally true that the driver of a motor car should be alert in seeing danger and in controlling his speed and course accordingly, and may be in a much better position to avoid a collision than the pedestrian. It must always be a question of fact and degree.

What I have so far said applies, I think, equally to the judgments of the other Lords of the Second Division. LORD ORMIDALE seems to hold that the verdict of the jury must be perverse because

> "it was clearly proved that concurrent negligence on the pursuer's part in failing to take ordinary precautions for her own safety directly contributed to bring about the accident."

If by the word "concurrent" the learned judge is referring to the fact that the pursuer's negligence in crossing the road (if the jury found her to be negligent in so doing) and such consequences persisted up to the moment of the collision, he is, in my judgment, seeking to apply as decisive a matter which was not so treated as long ago as in the classic case of *Davies* v. *Mann* (3), where the unfortunate donkey remained hobbled on the highway till run over by the defendants; in that case, unless the donkey had been left as it was no accident could have happened. The same criticism seems to apply to the judgment of LORD HUNTER, who appears to base his conclusion on the circumstance that without the pursuer's negligence the accident would not have taken place. LORD ANDERSON takes much the same view, but supplements it by observing:

> "It is plain that, inasmuch as the defender had only a few seconds of time in which to act and a very few yards of space in which to manœuvre, the situation was not one to which *Radley* v. *London and North-Western Rail. Co.* (4) could be applied. There was no opportunity for an act of negligence on the part of the defender, subsequent to the negligence of the pursuer, which would have the effect of making the fault of the pursuer non-contemporaneous and not contributory."

But with deference to the learned judge, I think he is there usurping the functions of the jury, who, if they had so found, must have decided for the defender. In fact, their verdict shows that they must have come to a contrary conclusion (if they found the pursuer was negligent), because they found, being properly directed, for the pursuer; in my judgment there was abundant evidence to justify their so finding.

In my judgment, the appeal should be allowed, and the interlocutor of the Second Division should be reversed, and the case should be remitted in order that the verdict may be applied. The appellant should have the costs of this appeal, and her expenses in the court below.

LORD TOMLIN, LORD WARRINGTON, LORD THANKERTON and **LORD MACMILLAN** concurred.

Appeal allowed.

Solicitors: *Horner & Horner*, for *W. G. Leechman & Co.*, Glasgow and Edinburgh; *Stanley & Co.*, for *A. C. Baird, Mackenzie & Co.*, Glasgow, and *J. Miller Thomson & Co.*, W.S., Edinburgh.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LADIES' HOSIERY AND UNDERWEAR, LTD. *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE

[COURT OF APPEAL (Scrutton and Slesser, L.JJ., and Eve, J.), May 27, June 13, 1932]

[Reported [1932] 2 K.B. 679; 101 L.J.K.B. 632; 147 L.T. 390; 96 J.P. 336; 30 L.G.R. 369]

Rates—Assessment—Uniformity—Comparable hereditaments incorrectly assessed at lower figure—Amendment of incorrect, not of correct, value.

It is a vital principle of the law of rating that each hereditament should be independently assessed, and the first vital question on an assessment is the correct valuation according to the relevant statute of the individual hereditament. There is another vital principle, namely, that, as between different classes of hereditaments and as between different hereditaments in the same class, the valuation should be fair and equal. But where the evidence of the correct valuation is clear and uncontradicted evidence that another comparable hereditament has been incorrectly valued is of no weight. The assessing authority should not sacrifice correctness to ensure uniformity, but should, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error.

Where, therefore, the occupiers of a hereditament which had been correctly assessed sought to have the assessment reduced on the ground that comparable hereditaments in the area were assessed on a lower basis,

Held: where the valuation of a hereditament was correct and that of other hereditaments was incorrect the proper course was to correct the incorrect values and not to alter the correct value, and, accordingly, the assessment would not be reduced.

Notes. Applied: *Lilley & Skinner, Ltd.* v. *Essex County Valuation Committee*, [1935] All E.R. Rep. 54. Considered: *R.* v. *Cornwall County Valuation Committee, Ex parte Falmouth Rating Authority*, [1937] 2 All E.R. 266.

As to consideration of assessments of comparable hereditaments, see s. 3 (5) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955 (35 HALSBURY'S STATUTES (2nd Edn.) 384), and as to ascertainment of rateable value, see s. 5 of the Act (ibid. 388). For cases see cases there cited and 38 DIGEST 579 et seq.

Cases referred to:

(1) *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee*, [1922] 1 K.B. 264; 91 L.J.K.B. 258; 126 L.T. 338; 86 J.P. 9; 38 T.L.R. 83; 66 Sol. Jo. 236; 20 L.G.R. 43; 2 B.R.A. 838, D.C.; 38 Digest 581, *1157*.

(2) *Double* v. *Southampton Assessment Committee*, [1922] 2 K.B. 213; 91 L.J.K.B. 803; 126 L.T. 796; 86 J.P. 86; 66 Sol. Jo. 473; 20 L.G.R. 297; 2 B.R.A. 849, D.C.; 38 Digest 579, *1145*.

(3) *Hunter* v. *Swindon and Highworth Assessment Committee*, [1922] 2 K.B. 630; 92 L.J.K.B. 74; 128 L.T. 20; 86 J.P. 174; 67 Sol. Jo. 64; 20 L.G.R. 664; 2 B.R.A. 983, D.C.; 38 Digest 609. *1355*.

(4) *Pointer* v. *Norwich Assessment Committee*, [1922] 2 K.B. 471; 128 L.T. 48; sub nom. *Norwich Assessment Committee* v. *Pointer*, 91 L.J.K.B. 891; 86 J.P. 149; 67 Sol. Jo. 98; 20 L.G.R. 673; 2 B.R.A. 965, C.A.; 38 Digest 582, *1162*.

(5) *Poplar Metropolitan Borough Assessment Committee* v. *Roberts*, [1922] 2 A.C. 93; 91 L.J.K.B. 449; 127 L.T. 99; 86 J.P. 137; 38 T.L.R. 499; 66 Sol. Jo. 386; 20 L.G.R. 317; 2 B.R.A. 858, H.L.; 38 Digest 520, *698*.

(6) *Port of London Authority* v. *Orsett Union Assessment Committee*, [1920] A.C. 273; 89 L.J.K.B. 481; 122 L.T. 722; 84 J.P. 69; 36 T.L.R. 233; 18 L.G.R. 153; 2 B.R.A. 709, H.L.; 38 Digest 563, *1017*.

(7) *Cardiff Archdiocese Trustees* v. *Pontypridd Area Assessment Committee and Mountain Ash Rating Authority* (1930), 144 L.T. 207; 94 J.P. 246; 46 T.L.R. 633; 28 L.G.R. 535; [1926–31] 1 B.R.A. 389, D.C.; Digest Supp.

Appeal from an order of the Divisional Court (Lord Hewart, C.J., Avory and Hawke, JJ.) upon a Case stated by quarter sessions pursuant to s. 31 of the Rating and Valuation Act, 1925.

The ratepayers, Ladies' Hosiery and Underwear, Ltd., were occupiers of newly erected premises comprising the ground floor of No. 5 Church Parade, Ealing, and used as a shop for the sale of ladies' underwear and millinery. Quarter sessions had reversed the decision of the assessment committee which had accepted a proposal of the rating authority, the borough council of Ealing, for the amendment of the current valuation list, by the insertion of the figures £325 and £267 as the gross and rateable values of the hereditament occupied by the ratepayers, and had ordered the valuation list to be amended by the insertion of £225 and £184 as the gross and rateable values of the hereditament, subject to the following Case Stated. The Divisional Court reversed the judgment of quarter sessions and restored the figures arrived at by the assessment committee. The ratepayers appealed.

The Case Stated was as follows. (i) The ratepayers' sole ground of appeal was that their premises were incorrectly and unfairly assessed in comparison with the assessments of other hereditaments of the same class in the same valuation list. They had given notice to the assessment committee prior to the hearing specifying seven hereditaments in the same neighbourhood with the assessments of which they intended to compare their own assessment for the purpose of showing such unfairness. (ii) The ratepayers had given no notice to the occupiers of any of the said seven hereditaments of their intention to compare their premises therewith. (iii) The ratepayers called no evidence before quarter sessions to prove that their assessment was higher than the rent which might be expected to be obtained for their premises, and their only witness agreed that that rent would be at least £325 upon the terms of a letting from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe rent-charge (if any), and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in the state to command that rent. He further admitted that the premises were in fact let on a full-repairing lease at £425 per annum. (iv) On the evidence adduced by the ratepayers, and in the absence of any evidence on the part of the assessment committee, the following facts were established to the satisfaction of the court of quarter sessions: (a) That the said seven other hereditaments were comparable with and formed part of the same class as the premises under appeal; (b) that the premises under appeal were assessed on a comparatively higher basis than the said seven other hereditaments; and (c) that the said seven other hereditaments were assessed at sums below the rents which would be obtained therefor. (v) The ratepayers did not seek to prove or contend that the said seven other hereditaments were under-assessed, but accepted their said assessments as correct.

(vi) The assessment committee called no evidence, but submitted at the close of the ratepayers' case that the evidence adduced by the ratepayers and the grounds of their objection to their assessment disclosed no valid grounds of appeal in law for the following reasons: (a) That, as it was admitted that the premises under appeal would command a rent equal to the amount of the gross assessment as fixed by the assessment committee, it followed from the definition of "gross value" in s. 68 of the Rating and Valuation Act, 1925, that the said assessment was correct according to law and no question of unfairness could arise. (b) That as the seven other hereditaments would admittedly command rents in excess of their assessments they formed no basis for a comparison upon which the court could reduce the assessment of the ratepayers' premises. (c) That the ratepayers' remedy, if any, was to give notice to the occupiers of the said seven other hereditaments objecting to their assessments. (vii) The ratepayers contended as follows: (a) That the necessity for equality and fairness as between different hereditaments in the same valuation list had always been a principle of rating law and was clearly recognised by the Rating and Valuation Act, 1925. (b) That the unfairness referred to in ss. 26 and 37 of the said Act arises where one hereditament is assessed at a gross value comparatively higher than the gross values of other comparable hereditaments within the same class and affords a ground of objection notwithstanding that the gross assessment taken by itself may comply with the definition of gross value in s. 68 of the said Act. (c) That the objection of unfairness by way of comparison with other assessements, the correctness of which is not disputed by the objector, is altogether distinct from the objection that other hereditaments are under-assessed, which is the only case in which notice to the other occupiers is required. (d) That it is the duty of the rating authority and/or the county valuation committee, not of the individual ratepayer, to secure uniformity, and that the assessments of the said seven other hereditaments, not having been the subject of proposals for amendment by the rating authority, must be taken to have been correctly arrived at and conclusively determined, and that the rents which such hereditaments might command was a matter irrelevant to a comparison as between one assessment and another.

(viii) The court of quarter sessions were referred to the following cases: *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (1), *Double* v. *Southampton Assessment Committee* (2), *Hunter* v. *Swindon and Highworth Union Assessment Committee* (3), and *Pointer* v. *Norwich Assessment Committee* (4). Quarter sessions were of opinion that the contentions of the ratepayers were well founded, and in the absence of any evidence to the contrary were satisfied on the facts that the premises under appeal were unfairly assessed. They accordingly allowed the appeal with costs and accepted the ratepayers' figures of £225 and £184 for the gross and rateable values respectively, and ordered the valuation list to be amended accordingly.

The question upon which the opinion of the court was desired was whether upon the above statement of facts quarter sessions came to a correct determination and decision in point of law.

By s. 37 (1) of the Rating and Valuation Act, 1925:

> "Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as 'a proposal'), and where a rating authority in pursuance of the provisions of this Act make any

> amendment in a rate other than the correction of a clerical or arithmetical error, or the correction of an erroneous insertion, omission, or misdescription, the authority shall forthwith make a proposal for any necessary amendment of the list."

F. J. Tucker for the ratepayers.
Comyns Carr, K.C., and *Trustram Eve* for the assessment committee.

Cur. adv. vult.

June 13. The following judgments were read.

SCRUTTON, L.J.—This appeal by ratepayers against a decision of the Divisional Court varying their assessment to their prejudice is said to raise questions of procedure which have been the subject of considerable controversy at assessment committees and quarter sessions. A new building was erected in the borough of Ealing. In accordance with the procedure imposed by the Rating and Valuation Act, 1925, the rating authority made a proposal to the assessment committee to assess the new building at a gross value of £325. Thereupon the occupiers objected to the proposal on the ground that the gross value was too high, and should be £225. They supported their objection by a statement that seven comparable hereditaments in the borough were assessed on a lower basis. They did not object to or seek to alter the valuation of these seven hereditaments, but proposed to use these valuations as evidence that the proposed valuation of their hereditament was "excessive and unfair." The assessment committee decided against their objection, and inserted a gross value of £325 in the valuation list. The ratepayers then appealed to quarter sessions on the ground that the gross value, as fixed by the assessment committee, was "incorrect and unfair in comparison with the assessments of shop property appearing in the list," and they mentioned four specific shops, increased at the hearing to seven shops. Quarter sessions heard evidence for the ratepayers; the assessment committee, in order to raise questions of principle, called no evidence. Quarter sessions allowed the appeal, and reduced the gross value to £225, but stated a Special Case. On the Special Case coming before the Divisional Court they decided in favour of the assessment committee, and restored the gross value of £325. The ratepayers now appeal against this decision, asking to have the decision of quarter sessions restored.

The Rating and Valuation Act, 1925, contains, in ss. 22 and 68, instructions as to how the gross value of a hereditament, from which the rateable value is calculated, is to be ascertained. By s. 68 (1):

> " 'Gross value' means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rent-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent."

An imaginary being, called a "hypothetical tenant," is contemplated, who may be the owner of premises which cannot be legally let, but which nevertheless he is supposed to be contemplating paying rent for as a tenant. He is far removed from reality; if he is dealing with premises the subject of the Rent Restrictions Acts, he knows nothing about the standard rent which alone the landlord can require: *Poplar Metropolitan Borough Assessment Committee* v. *Roberts* (5), though, oddly enough, if he is contemplating occupying a property for the use of which he can only take dues limited by statute, he does base his hypothetical rent on those dues: *Port of London Authority* v. *Orsett Union Assessment Committee* (6). It is, not the actual rent which the actual occupier is paying, but the hypothetical rent which the hypothetical tenant might reasonably be expected to pay, which is the standard of valuation.

Now on this fact, which is made by the statute the vital fact in the case, the evidence was all one way. Only one witness was called, and he said that the rent which might be expected to be paid for the premises on the terms of a letting from year to year if the tenant undertook to pay all usual tenant's rates and taxes and tithe-charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in the state to command that rent, was "at least £325." These terms are those on which the statute says "gross value" is to be calculated.

One would have thought that this evidence destroyed the ratepayer's objection, but he said: "No, I will show you that seven other hereditaments in the borough are assessed at sums lower than the rents which their hypothetical tenant would pay, and I require that I also should be assessed at a sum lower than the hypothetical tenant would pay. I do this because the essence of rating is fairness and uniformity, and I prefer my assessment to be inaccurate but uniform, rather than it should be accurate but out of harmony with my neighbours. It is true that I can, if my facts are right, secure uniformity by correcting the inaccuracy of my neighbours' assessments, on objection to those assessments, and can get those assessments made uniform with my correct assessment. But I do not want this; I want to indulge my passion for uniformity by securing uniform inaccuracy, though that uniformity makes my correct assessment incorrect, but the inaccuracy is to my pecuniary advantage." I think this view is wrong.

It is a vital principal of the law of rating that each hereditament should be independently assessed. When, in *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (1), the assessment committee passed a resolution that all the valuations of certain particular classes of property should be increased by 25 per cent., the list was quashed on the ground that there had been no real valuation of any particular hereditament, but only the insertion of what the present Lord Chancellor called ([1922] 1 K.B. at p. 273) "a fancy figure," "an arbitrary rule of thumb" applied "to every property without considering either the situation of the property, its character or its age." If, then, the assessment committee is to begin with an independent valuation of the particular hereditament, the position of that hereditament in regard to the test of gross value imposed by the statute is the first question to be considered, and if the only evidence before the court, and given by the occupier of the hereditament, is that £325 is the rent which the hypothetical tenant would be expected to pay for a tenancy of that hereditament in statutory terms, there is an end of the case.

But it may be that, regarding the hereditament in question alone, the assessment committee is in doubt as to the hypothetical statutory rent. In such a case it is admissible to tender evidence of the assessment of another hereditament said to be comparable, and to do so without asking, in the alternative, that such second assessment should be varied, and therefore without giving notice to the occupier of the second hereditament: see *Pointer* v. *Norwich Assessment Committee* (4) and *Hunter* v. *Swindon and Highworth Union Assessment Committee* (3). But, while such evidence is admissible in chief, it is generally of very little value. BANKES, L.J., gives the reason in *Pointer* v. *Norwich Assessment Committee* (4) ((1922) 2 K.B. at p. 476). He said:

> "With regard to the first objection, that as to the admissibility of the evidence, SALTER, J., in his judgment in the court below, speaking of rents actually paid for similar premises in the neighbourhood, said:
>
> > 'Certainly it has been the practice both in rating courts and in compensation courts to discourage evidence of this kind where it is tendered in chief,'
>
> and in that respect my experience has agreed with that of the learned judge. But the reason why it has been discouraged is not because it is inadmissible, but because there are so many circumstances to be taken into consideration that comparisons of that kind are practically valueless. And if evidence of the actual rent paid for the premises sought to be compared is valueless, much more so must be evidence as to their rateable value. But although evidence of the rateable value of such other premises is in the majority of cases of but

> little value, I agree with the deputy recorder and the Divisional Court that it cannot as a matter of law be regarded as inadmissible."

While, therefore, the assessment committee and quarter sessions cannot exclude such evidence, it is not of much weight, and especially of practically no weight when they have direct and uncontradicted evidence as to the hypothetical statutory rent of the hereditament to be assessed.

The ratepayers here, however, say that besides the principle of independent valuation there is another vital principle—that as between different classes of hereditaments and as between different hereditaments in the same class the valuation should be fair and equal. I agree, but, in my view, there is a third important qualification, that the assessing authority should not sacrifice correctness to ensure uniformity, but, if possible, obtain uniformity by correcting inaccuracies rather than by making an inaccurate assessment in order to secure uniform error. That a list may be quashed where two different principles have been applied without individual justification, appears from the second point decided in *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (1), where the assessments of certain classes of hereditaments were raised uniformly by 25 per cent. while certain other classes of hereditaments were left untouched, and also from *Double* v. *Southampton Assessment Committee* (2), where a valuation of individual hereditaments of a particular class had been commenced but not completed, and a supplemental list, containing the new completed valuations, was issued, leaving all the hereditaments whose valuations had not been completed at their old valuations. There the court altered the assessment of the objector; they might have quashed the list, for it proceeded on two different principles, and, without differentiating in individual cases on the merits, assessed those hereditaments which had been re-valued on the new valuation, and those which had not been re-valued on the old valuation, there being no distinction between the two classes except time of valuation, which was irrelevant to the real hypothetical gross value.

Quarter sessions in the present case appear to have found that seven hereditaments of the same class were valued at less than the statutory standard of gross value, and that, therefore, an accurate valuation under the statute should be altered to make it conform with inaccurate valuations of the seven under the statute, thus making itself, when altered, inaccurate. Quarter sessions have stated their opinion thus:

> "We are of opinion that the contentions of the ratepayers were well founded, and in the absence of any evidence to the contrary we were satisfied on the facts that the premises under appeal were unfairly assessed, and we accordingly allowed the appeal with costs and accepted the ratepayers' figures of £225 and £184 for the gross and rateable values respectively and ordered the valuation list to be amended accordingly."

I do not understand this. The sessions heard direct and uncontradicted evidence from the ratepayers that the hereditament, the subject of the assessment, was correctly assessed at £325 according to the statute; they had also uncontradicted evidence, and so found that seven other hereditaments had been incorrectly assessed according to the statute at less than the hypothetical and statutory gross value. They could not correct the inaccuracies in the seven assessments and so secure correct uniformity, because the ratepayers had given no notice to the seven occupiers and did not ask that their assessments should be corrected, which would have secured correct uniformity. In these circumstances, in my opinion, quarter sessions were not justified in disregarding the uncontradicted evidence that the assessment was a correct statement of the gross value according to the statutory definition, and altering it to an incorrect statement in order to secure uniformity in error.

It is quite impossible to do as we were requested, and give a code of instructions to assessment committees and quarter sessions which will guide them in all cases which may arise. My imagination is not equal to foreseeing all the combinations of facts which may occur in the whole country. All the help I can give is to point out that the first vital question is the correct valuation according to the statute of the individual hereditament. Where the evidence on this point is clear and uncontradicted, evidence that another hereditament has been incorrectly valued according to the statute is of no weight, unless for the purpose, on proper notice, of correcting that particular inaccuracy. When the evidence as to the proper valuation of the particular hereditament is doubtful, evidence as to the assessment of other hereditaments may be of some weight, though as it will involve another investigation whether the assessment of the other hereditament is correct and whether the two hereditaments are comparable, it is of much less value than the direct evidence as to the hereditament whose assessment is in question. Evidence, however, as to the application of different principles of assessment, as between comparable classes, or different parts of the same classes, may, of course, be of importance on the question whether the valuation list is fair and uniform.

In the present case, however, where the only direct evidence as to the assessment of the premises under dispute was given by the ratepayers to the effect that the assessment was correct under the statute, the figure of gross value of £325 being the correct hypothetical rent under the statute, it appears to me obvious that the decision of quarter sessions altering that assessment was erroneous. The appeal must, therefore, be dismissed with costs.

SLESSER, L.J.—This is a case which arises in connection with the rating of a hereditament which has come into the valuation list since the last quinquennial valuation. In order to assess the hereditament it was necessary to revise the current list by including it in accordance with s. 37 of the Rating and Valuation Act, 1925. The procedure in such a case is that the local authority makes a proposal for any necessary amendment of the list, and a person objecting to such a proposal may give notice in writing of objection thereto. Thereafter, so far as is here material, the matter is considered as if it were a contested matter in the compilation of a valuation list.

The assessment committee for the West Middlesex Assessment Area accepted a proposal of the borough council of Ealing, as the rating authority, dated Sept. 21, 1929, for the amendment of the current valuation list by the insertion of the sum of £325 as a gross valuation of a hereditament forming part of newly erected premises in Ealing. The occupiers appealed to quarter sessions on the ground that their premises were incorrectly and unfairly assessed in comparison with the assessment of other hereditaments of the same class in the same valuation list. Quarter sessions were of opinion that their contentions were well founded and, in the absence of any evidence to the contrary, were satisfied on the facts that the premises under appeal were unfairly assessed, and, accordingly, they allowed the appeal and accepted the ratepayers' figure of £225, instead of £325 fixed by the assessment committee for the gross valuation. It is clear, from the Case Stated, that the ratepayers agree that their hypothetical rent would be at least £325 ascertained upon the terms contained in the definition of "gross value" contained in s. 68 (1) of the Rating and Valuation Act, 1925, and it is clear, apart from all considerations of incorrect and unfair assessment, that the assessment committee were entitled and, indeed, bound, on the admission of the ratepayers as to their gross value, to assess them on the gross value of at least £325 in accordance with s. 22 of the 1925 Act, as applied by the Rating and Valuation Act (Form of Valuation List) Rules, 1926 (Statutory Rules and Orders, 1926, No. 796), and the schedule to those rules, which rules contain, among other matters, in para. 7, this entry: "Gross valuation where required to be entered."

Thus, primâ facie, any gross valuation other than £325 could not be arrived at consistently with the requirements of the statute and the rules, unless there be some overriding provision which entitles the assessment committee, or some other authority to whom appeal is brought, to say, notwithstanding that the gross valuation has been ascertained at £325, it is to be reduced to £225. The ratepayers recognise this difficulty, but seek to overcome it in the following way: A Before quarter sessions they adduced evidence that there were seven other hereditaments found to be comparable with and forming part of the same class as their premises, which were assessed on a lower basis. They argue, therefore, that they suffered from "unfairness" within the meanings of ss. 26 and 37 of the Rating and Valuation Act, 1925, in that they were assessed by the assessment committee on a higher rate than the seven other hereditaments with which they were comparable, B and of which they formed the same class. As to s. 26 (2) it provides that where a rating area has been divided into parts for the purpose of a new valuation list a person shall not be deemed to be aggrieved in respect of the valuation of any hereditament in one of those parts by reason of any disparity between the valuation of that hereditament and the valuation of any hereditament situated in a part of the area the new valuation list for which is to be made in a subsequent year. C The ratepayers argue that this subsection indicates that, apart from the particular matters there provided, a disparity may constitute a grievance under sub-s. (1) of s. 26 as being an incorrectness or unfairness of any matter in the draft list. And as to s. 37 (1), that subsection states that any person who is aggrieved by the incorrectness or unfairness of any matter in the valuation list may make a proposal for the amendment of the list. They argue that, by being assessed at a rate D different from other premises of the same class, they are suffering from incorrectness or unfairness, and support their request to be reduced to £225 for this reason.

I do not think that, in any view, it is possible for the ratepayers to say that they can complain of "incorrectness," for they themselves have admitted the unfairness of their assessment. But with regard to "unfairness" a more difficult question arises. They rely upon *Double* v. *Southampton Assessment Committee* (2). In E that case the assessment committee resolved that a certain class of property, namely, licensed houses, breweries, places of amusement and waterside properties, should be re-assessed. By March 17, 1920, 127 houses had been re-valued and their value increased. The remaining 327 licensed houses had not as yet been re-valued. On that date the assessment committee resolved to include in a supplemental valuation list the houses already assessed, which they confirmed and F on which they passed a poor rate. Thus the 127 houses were, for a time, rated on a higher basis than the 327, and one of the occupiers complained, saying that the rate was unfair, and, in the High Court, succeeded, the decision of the quarter sessions to the same effect being confirmed. It is said that *Double's Case* (2) is an authority for declaring that an inequality of treatment is a ground for the assessment being unfair. LORD TREVETHIN, C.J., stated ([1922] 2 K.B. at p. 224) G that it is a principle of the law of rating that all properties of the same class must be valued by the same method of assessment. In that case, as the revision had only been partial, different methods of assessment had been applied at the time of complaint to the class of 127 as distinguished from the class of 327 houses. To that extent, in so far as *Double's Case* (2) was dealing with general methods of assessment, it was argued that a distinction can be drawn between that case and H the case where an individual occupier is complaining of a difference of treatment of one hereditament from that of several others. In that case, on the old assessment, Double was rightly assessed; the question really turned upon the right time from which the new assessment should operate on a part of the class assessed. It was held that the charge should be made so as to operate over the whole class and not a part. I cannot read *Double's Case* (2) to decide more than this. It does not I decide that an individual may defend a false assessment on the ground of unfairness.

I am inclined, on consideration, to agree that the requirements of the statute do, in their recognition of unfairness, produce the result that an occupier is entitled to require that all other occupiers of the same comparable class shall be assessed upon a similar basis and, in so far as the seven other hereditaments in this case of the same class are differently assessed, I think that the ratepayers here may say that their assessment is unfair. This, however, by no means disposes of the matter. The assessment on this hereditament is correct, and the unfairness, if it exists, is solely due to the under-assessment of the other hereditaments of the same class. The only method by which the apparent unfairness could be corrected would be for the ratepayers to give notice to the seven other hereditaments concerned, and then apply under s. 37 to have these assessments raised up to the level of the ratepayers. This, of course, the ratepayers have not done, and do not seek to do. In the Special Case it is stated that the ratepayers

> "did not seek to prove or contend that the seven other hereditaments were under-assessed, but accepted their assessments as correct."

It is scarcely possible, if the ratepayers' assessment is correct, that the seven other hereditaments can both be in the same class as the ratepayers' hereditament and comparable with it, and at the same time that they should be correct at the present time, although they may have been correct at the time of the last quinquennial valuation.

However that may be, it is clear to my mind that the ratepayers have taken the wrong course in attempting to correct their grievance of unfairness. If the grievance be, as it may well be, that there is economic inequality in requiring competing business to pay less proportionately than the ratepayers, that inequality can only be removed by increasing the assessments of their competitors. But I find it quite impossible to hold that the mandatory requirements of the Rating and Valuation Act, 1925, as to the assessment of "gross value" in a particular case can be avoided or modified by a consideration of unfairness. The decision of the Divisional Court in this case follows in principle the decision in *Cardiff Archdiocese Trustees* v. *Pontypridd Area Assessment Committee* (7), so far as the question of unfairness was there considered, and, in my opinion, as was there pointed out by the Lord Chief Justice (144 L.T. at p. 211), the argument that, because some are unfairly treated the Act must be universally misapplied, may well be rejected in the present appeal as it was in the appeal in that case. I agree that this appeal must be dismissed.

EVE, J. (read by SLESSER, L.J.)—The appellant ratepayers, Ladies' Hosiery and Underwear, Ltd., are the occupiers of the ground floor of No. 5, Church Parade, Ealing, used as a shop, rated as a separate hereditament, and forming part of a newly erected building. On March 10, 1930, the assessment committee accepted a proposal, dated Sept. 21, 1929, of the borough council of Ealing as the rating authority, for the amendment of the current valuation list by the insertion therein of the figure £325 as the gross value of the hereditament occupied by the ratepayers. The ratepayers appealed from such decision to quarter sessions, and on Feb. 16, 1931, quarter sessions allowed the appeal and ordered the valuation list to be amended by the insertion of £225 as the gross value of the said hereditament, subject to a Case Stated under s. 31 of the Rating and Valuation Act, 1925, for the opinion of the court upon the question whether, upon the facts as therein stated, they came to a correct determination and decision in point of law. On April 7, 1932, the Divisional Court reversed the judgment of the court of quarter sessions and directed that court to enter judgment for the assessment committee with costs. Leave to appeal to this court was asked and given, and the question is whether, upon the facts found, the ratepayers are entitled to the relief they claim in these proceedings. Their complaint is that their premises are incorrectly and unfairly assessed in comparison with other hereditaments of the same class in the same valuation list; and they have specified certain hereditaments in the same neighbourhood with the assessments of which they claim to compare their own assessment for the purpose of establishing such incorrectness and unfairness. No notice has been given to the occupier of any of the alleged comparable hereditaments, nor did the ratepayers contend, or seek to prove, that any of them were under-assessed. They accepted the assessment as correct, and themselves called a witness to prove that their own premises were in fact let on a full repairing lease at £425 per annum, and that their gross value was £325 at the least.

Upon these materials the following facts are found in the Case, that the other hereditaments, seven in number, were comparable with, and formed part of the same class as the ratepayers' premises, that these latter were assessed on a comparatively higher basis than the seven other hereditaments, and that the seven other hereditaments were assessed at sums below the rents which could be obtained therefor. Standing by themselves, the findings that the seven other hereditaments were comparable with and formed part of the same class as the premises under appeal, and that the ratepayers' premises were assessed on a comparatively higher basis than the seven other hereditaments may point to either of two alternatives—the one, that the ratepayers' premises are over-assessed, and the other, that the comparable premises are under-assessed; but when they are accompanied by a finding that the comparable hereditaments were assessed at rents below those which could be obtained therefor, and when the ratepayers have themselves proved that the gross assessment of their own hereditament is correct, it is impossible to arrive at any other conclusion than this, that the want of uniformity—if it really exists—cannot be due to over-assessment of the ratepayers' hereditament.

The one concrete fact which emerges is the correctness of the assessment of the ratepayers' premises, and when that is once recognised as established, there is really nothing more to be said. It is quite impossible for the court, in these proceedings, to substitute for the correct figure another figure which the ratepayers, by their own evidence, have proved to be inaccurate. It may be that want of uniformity, and consequent unfairness, can be established, and that it is due to under-assessment of comparable premises and not to other considerations affecting these particular premises, but, if so, this must be established by proper proceedings directed to the raising of the assessments of those other premises, and so framed as to afford the occupiers thereof an opportunity of showing that no such unfairness in fact exists. Upon the materials now before the court it is impossible to arrive at any conclusion beyond this, that the ratepayers have failed altogether to prove that their assessment is otherwise than correct. I think, for the reasons given by my Lord, and the Lord Chief Justice in the Divisional Court, that *Double's Case* (2) has no application to the facts of this case, and accordingly I agree that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Blundell, Baker & Co.*; *H. G. Greenwood.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

MALONEY *v.* ST. HELENS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), November 2, 3, 1932]

[Reported [1933] 1 K.B. 293; 102 L.J.K.B. 85; 148 L.T. 196; 49 T.L.R. 22]

Master and Servant—Wages—Incapacity for work—"Sickness"—Incapacity due to accident.

By his contract of employment with the defendants the plaintiff was entitled to a reduced rate of wages "during periods of sickness." He injured his thumb and was unable to work for some weeks.

Held: "sickness" meant incapacity for work resulting from an accident as well as incapacity resulting from disease, and, therefore, the plaintiff was entitled to wages at the rate specified for the period during which he was unable to work.

Notes. The Workmen's Compensation Act, 1925, has been repealed. See now National Insurance (Industrial Injuries) Act, 1946 (16 HALSBURY'S STATUTES (2nd Edn.) 797).

As to wages during illness, see 22 HALSBURY'S LAWS (2nd Edn.) 134, and for cases see 34 DIGEST 86 et seq.

Cases referred to:

(1) *Cuckson* v. *Stones* (1858), 1 E. & E. 248; 28 L.J.Q.B. 25; 32 L.T.O.S. 242; 5 Jur.N.S. 337; 7 W.R. 134; 120 E.R. 902; 34 Digest 71, *483*.

(2) *Warburton* v. *Co-operative Wholesale Society, Ltd.*, [1917] 1 K.B. 663; 86 L.J.K.B. 529; 116 L.T. 107; 33 T.L.R. 124; 61 Sol. Jo. 145; 10 B.W.C.C. 93, C.A.; 12 Digest (Repl.) 426, *3277*.

Appeal by the defendants from an order of the Divisional Court (SWIFT and MACNAGHTEN, JJ.).

The plaintiff was a grocer's assistant and was employed by the defendants under an oral agreement which, it was admitted, incorporated the terms of an agreement regarding wages made by the Co-operative Union, Ltd., on behalf of the employers, and the trade unions to which their workers, including the plaintiff, belonged. Clause 15 of that agreement provided:

> "Wages during sickness.—Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence: a total of three weeks' full wages and three weeks' half wages in the aggregate in any one year."

On May 18, 1931, the plaintiff crushed his thumb between a chain and a wheel, and was incapacitated for six weeks. His wages were £3 a week, and he claimed under his contract of service with his employers £13 10s. in respect of wages due to him during his sickness and incapacity for work between May 18 and July 6, 1931, namely, three weeks at his full wages of £3 a week, and three weeks at half wages at 30s. a week. The accident having occurred in the course of his employment, a claim could have been made under the Workmen's Compensation Act, 1925, but the respondent made no such claim.

The employers contended that, as the accident was provided for by statute (under which they admitted liability), the claim did not fall under the sickness benefit clause. They further contended that the clause was only meant to cover incapacity arising from sickness caused by disease and not incapacity arising from accident, and they relied on s. 1 (3) of the Workmen's Compensation Act, 1925, which provided that the Act should apply notwithstanding any contract to the contrary. The learned county court judge accepted the view of the employers, and held that the word "sickness" applied to incapacity from disease and not from accident, and, therefore, c. 15 did not apply. He, accordingly, gave judgment for the respondents.

On appeal the Divisional Court held that the county court judge was wrong. The word "sickness" was used to describe any morbid condition without regard to the cause of that condition. It was not clear if the county court judge would have found that the "sickness benefit" clause would have applied if the accident had occurred at the man's home, and he must be taken to have held that the clause did not apply to any condition due to accident. It was difficult to see how, if the accident occurred at home, the injured person would be "sick" and not "sick" if the accident occurred while at work. There was nothing in the "sickness benefit" clause which varied the plaintiff's rights under the Workmen's Compensation Act, 1925, so as to be invalid. The employers appealed.

Stuart Bevan, K.C., *Laski, K.C.*, and *F. Bancroft Turner* for the appellants.

Cave, K.C., and *Gorman, K.C.*, for the respondent, were not called upon to argue.

SCRUTTON, L.J.—Counsel have argued this case with the greatest ability, but it seems to me that if you eliminate the Workmen's Compensation Act from the argument the point raised is quite a short one. It is this: What does the word "sickness" mean in an agreement made between an employer and a workman with reference to wages when the workman is disabled from carrying out his employment? It is assumed that the workman is going to be disabled and thereby prevented from carrying out his employment; and the question is: What is the obligation of the employer in such a case? Under the very elaborate new systems that are growing up now, and which bewilder people like myself who have not known of them, it appears that the chairman of the National Conciliation Board for the Co-operative Service had to deal with a question between the North-Western Sectional Wages Council of the Co-operative Union, Ltd., on the one hand, and the National Union of Distributive and Allied Workers, the National Amalgamated Union of Shop Assistants, Warehousemen and Clerks, and the National Union of Clerks and Administrative Workers, on the other. The chairman has made an award in which he has laid down that wages are to be paid "as below during periods of sickness where absence from duty is properly vouched for by medical evidence." He is obviously dealing with the effect of absence from work from certain causes on the wages of a workman.

The question between the parties here is: What does "sickness" mean in this agreement? One side has said that "sickness" means physical incapacity resulting in disablement from work. The other side says that "sickness" means incapacity for work resulting from disease, but not incapacity for work resulting from accident. In my view, the meaning of English words not special or technical is a matter which people who have the degree of education which His Majesty's judges are supposed to have are quite competent to deal with themselves without any dictionary. Dictionaries are merely useful in giving illustrations or quotations of the way in which words are used. In my view, there are three well-recognised meanings of "sickness" in the English language. There is first of all the somewhat unpleasant meaning that seems to be associated with Channel steamers, and which I see DEAN SWIFT refers to in a quotation in which I was interested—in the NEW ENGLISH DICTIONARY—where he introduces a word that I have not heard since I was at school: "You are sick of the mulligrubs with eating chopt hay." That is a very limited form of sickness, which nobody suggests is the meaning in this case. There is, secondly, the meaning of incapacity through suffering from disease. For instance, when it is said: "Sickness has increased in London during the past month," nobody ever imagines that that means there have been more accidents in the last month. Thirdly, there is a well-recognised meaning of the word in the English language which contrasts sickness with health, and does not trouble about either the cause of the sickness or the nature of the ailment. "Sickness" which prevents you being in perfect health, refers to bodily incapacity as compared with health, which is the body in full capacity. This meaning is to be found in any number of cases. Thus in the marriage service where the expression is "to cherish in sickness and in health." Nobody ever assumes that the parties who use that word add a reservation "but not in the case of accident." You find it when you pray for sick people; you do not put in a reservation "but I am not praying for people who have suffered from accident." I find another quotation going back to Piers the Plowman: "Idel was I neuere in sickenesse ne in helthe." In my view, the ordinary common use of the word "sickness" in the English language is to contrast a body in perfect health with a body in disabled health for some cause or another, whether from disease or accident.

Finally, if I ask myself: What were these people thinking about, and what sort of language were they familiar with when they used these words? I answer that they were settling what was to happen to the wages of a man employed if he were prevented from being employed for some reason. While I agree that this is a satisfactory definition, I am further impressed by the fact that since 1911 to workmen and employers, and particularly to workmen who are out of employment, in connection with State insurance there is the well-recognised phrase "sickness benefit," which covers benefit paid in respect of incapacity to work from disease and bodily or mental disablement. The latter part of the phrase covers all accidents. Using that to enforce my view of one of the common meanings of "sickness" in the English language, I come to the conclusion that when the chairman of the National Conciliation Board for the Co-operative Service used that term "sickness" he was thinking about any circumstances which prevented a man from earning his wages because his body was not in that state of perfect health which would enable him to carry out his service. I am also influenced by the fact that I cannot conceive any reason why an employer should say: "I will pay you wages if you are diseased, but I will not pay you wages if you have an accident." I could understand it if there were some suggestion that some misconduct of the workman had caused the disablement, so that then the employer would not pay him, but there is nothing in this clause about that at all; and so I am invited to believe that employers and workmen have solemnly agreed to a distinction between a man who is not able to go to work because he has got influenza and a man who is not able to go to work because he has fallen off a bicycle and has sustained concussion, and is ordered to stay in bed. That seems to me to be the whole point, and for these reasons I am of opinion that the Divisional Court came to a right conclusion, and the appeal must be dismissed with costs.

GREER, L.J.—I agree, but I cannot say that the question involved in this appeal is a very easy one, because of the ambiguous word which has been used in the award and has been adopted in the co-operative contract of service. The words used in that contract are these:

> "Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence: a total of three weeks' full wages and three weeks' half wages in the aggregate in any one year."

I agree with my Lord that there may be three possible meanings of the word "sickness," one of which I may leave out of account in this case, because no one has contended, or can contend, that the word is used merely to indicate the condition of a man who cannot keep his food in his stomach. That is a very common use of the word "sickness," but it is absolutely outside the purposes of this clause to think that the word can be so confined. The word may mean sickness as distinguished from the results of an accident which do not result in what the average human being would call sickness; or it may mean, as my Lord has said, sickness as opposed to a condition of perfect health. I cannot myself draw any inspiration from the marriage service, because when one agrees to cherish in sickness and in health, he or she is agreeing in regard to every condition into which the other spouse may get; and whether disability from an accident which does not result in the person who has the accident going to bed and being called "sick" is a case of sickness, or whether it is a case of health, it is then the obligation of the one spouse to cherish the other—whether it be a case of sickness or a case of health, or a case in which disability incapacitates from work. But I think there are occasions in which the word "sickness" has been used in contradistinction to a condition of perfect health. Anything happening to a person which causes that person to suffer pain so that it cannot be said that his functions are properly working at the time may be said to be a condition of sickness; and whether the pain results from a blow on the head which necessitates having ice put on his head, or whether the pain is a result of a burst thumb, does not seem to me to create a distinction which ought to be related in any way to the agreement which is involved in this award.

The parties were fixing the wages to be paid while work was being done and they were considering the question whether there should be an extension of the wages to a time when work was not being done, and they have used the words "wages to be paid during periods of sickness." It seems to me obvious that the word includes sickness which is the result of an accident. In the case I put of a man suffering from concussion and being in bed as the result of an accident, nobody would say that that sickness was not the result of an accident; and why the condition of suffering pain as the result of an accident which is short of what ordinarily speaking would be applied to the word "sickness" should be excluded, and pain resulting from what is undoubtedly sickness should be included in the period in respect of which wages have to be paid, I cannot understand. Although I think the word used is a somewhat unfortunate word to use in that regard, I feel sure that the parties intended the result to be that it should be wide enough to include the case of a man who was suffering pain and could not work because of the pain he suffered, and whether that pain was due to disease or to an accident I do not think is material.

SLESSER, L.J.—I agree that this appeal should be dismissed. I begin my judgment with a consideration of the actual language used in this award, which has now become a term of the contract between the plaintiff and the defendant society. Under the heading "Wages during sickness" what is said is this:

> "Wages to be paid as below during periods of sickness where absence from duty is properly vouched for by medical evidence."

The first condition, therefore, is that there shall be an absence from duty. Then it says "during periods of sickness"; therefore, the word "sickness" must be correlated to the word "period," and it is dealing with the duration of the absence from duty. Once that is recognised, it becomes obvious to my mind that, whatever else this may mean, it cannot refer to a period of accident, because an accident is an event which takes place once and for ever, and the period which is limited to a total of three weeks' full wages is the period of sickness. So that, to my mind, the provision contemplates that the sickness is either the beginning of sickness of an idiopathic nature or a sickness following an accident, or it may be some other event. The curious part of this contract seems to be that under the common law so long as the contract is in existence and there has been no frustration of it, the workman is entitled to his wages, notwithstanding the fact that he is not working at all. That has been decided in a number of cases, dating back a considerable period, the leading case being *Cuckson* v. *Stones* (1). There LORD CAMPBELL, C.J., said, a man having been disabled by illness from working for one week (1 E. & E. at p. 257):

> "The contract being in force, we think that here there was no suspension of the weekly payments by reason of the plaintiff's illness and inability to work."

I am by no means sure that this term which has been incorporated into the contract is necessarily in favour of the employee at all; so long as he continued in the occupation, and was not disabled, he would be entitled to payment of his wages indefinitely, unless the contract were put an end to, whereas this agreement seems to limit his right to three weeks' full wages and three weeks' half wages. The importance of this is made clear, because in a recent case it was decided that this right of the workman at common law so to receive wages, although he was not working, but while he was incapacitated, could be applied to a case where the incapacity had originally arisen from an accident. The case to which I refer is

Warburton v. *Co-operative Wholesale Society, Ltd.* (2). There Lord Cozens-Hardy, M.R., says ([1917] 1 K.B. at p. 665):

> "It has been long settled that a contract of service is not terminated by incapacity to work by reason of temporary illness, and that on return to work the man can recover his wages during the period of his absence."

Then he cites *Cuckson* v. *Stones* (1), to which I have referred, and he goes on:

> "I think this principle must apply to a case where a workman is receiving compensation under the Workmen's Compensation Act";

and my Lord ([1917] 1 K.B. at p. 668) also applies the doctrine in *Cuckson* v. *Stones* (1) to a case where the original incapacity arose out of an accident. It seems to me, therefore, on that principle, unless the language here compels us to distinguish it, that there is no difference between the case of sickness causing incapacity to work arising from an accident, and that arising from an original disease.

I only desire to add this. In my opinion, the learned county court judge has misdirected himself in this case by allowing his attention to be called to a consideration of the Workmen's Compensation Act. In the first place, there is no reason to assume that the workman will necessarily come within the limit of £350 annual income, which brings him within the Act. In the course of the argument I called attention to various classes of persons whose incomes depend on the sales which they may make, and whose income may be thereby brought up to the sum of £350. In the second place, there is the very real chance of a person sustaining an accident which does not arise out of and in the course of his employment within the meaning of the Act. In the third place, there is the case of an injury, the effects of which do not last more than four weeks, under s. 9 (1) (a) of the Act, and by reason of that fact the workman will not be able to recover, under s. 1 (1) (a), for the first three days of incapacity. No such limitation appears in the words "wages during sickness." I think, therefore, that it was erroneous and misleading to consider that of necessity the particular case falling under the claim here would be governed or modified or affected by the Workmen's Compensation Act. The mere fact that a person might have a claim under the Workmen's Compensation Act seems to me to be irrelevant. Whatever meaning the word "sickness" has in this agreement cannot depend on the question whether the plaintiff is so successful or competent that he will increase his wages above the amount contemplated by the Act. I agree with the wide interpretation put upon the word "sickness" by my Lord, and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Haslewood, Hare & Co.*, for *Aston, Harwood, Somers, & San Garde*, Manchester; *Church, Adams, Tatham & Co.*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

[*Reported by* E. J. M. Chaplin, Esq., *Barrister-at-Law.*]

HENNELL *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 11, 1932]

[Reported [1933] 1 K.B. 415; 102 L.J.K.B. 69; 148 L.T. 150;
49 T.L.R. 31; 76 Sol. Jo. 849]

Stamp Duty—Instrument securing annuity—Instrument securing sum at stated periods—Covenant to pay monthly sum—Stamp Act, 1891 (54 *&* 55 *Vict., c.* 39), *Sched. I.*

By a deed of covenant one B.H. covenanted with his son to pay to the son during the joint lives of the parties "the sum of £21 13s. 4d. (thereinafter referred to as 'the monthly sum') on the first day of every calendar month." On the question at what rate the deed was chargeable under the Stamp Act, 1891, Sched. 1,

Held: the expressions "instrument securing an annuity" and "instrument securing a sum or sums of money at stated periods" in Sched. 1 to the Stamp Act, 1891, were mutually exclusive and a sharp distinction was to be drawn between them; the contrast between an annuity and a sum payable at stated periods was that the one was a yearly amount, though it might be payable quarterly or half-yearly, while the other was payable at specified periods irrespective of a year; the payments provided for by the deed in question might come to an end by the death of either of the parties within a year and there was no indication in the deed of any intention by the parties to secure an annual amount; and, therefore, the deed was an instrument securing a sum or sums of money at stated periods and not an instrument securing an annuity, and fell to be stamped accordingly.

Statute—Construction—Taxing Act—Ambiguity—Construction more favourable to subject—Choice of Crown to tax under one provision or another.

Where there is a clear alternative given to the Crown to tax under one head or another, the right of choice belongs to the Crown, but where there is a charging enactment the meaning of which is in doubt, it ought to be construed in favour of the subject.

Notes. Considered and referred to: *Commercial Union Assurance Co.* v. *I.R. Comrs.*, [1937] 4 All E.R. 159.

As to stamp duties on instruments, see 28 HALSBURY'S LAWS (2nd Edn.) 439 et seq., and as to the construction of revenue statutes, see ibid., vol. 31, 540–543, and for cases see 39 DIGEST 252 et seq. and 42 DIGEST 734–738. For Stamp Act, 1891, see 21 HALSBURY'S STATUTES (2nd Edn.) 610.

Cases referred to:

(1) *Clifford* v. *I.R. Comrs.*, [1896] 2 Q.B. 187; 65 L.J.Q.B. 582; 74 L.T. 699; 45 W.R. 14; 12 T.L.R. 439, D.C.; 39 Digest 252, *372*.

(2) *Jackson* v. *I.R. Comrs.* (1902), 87 L.T. 269; 66 J.P. 630; 50 W.R. 666; 18 T.L.R. 678; 46 Sol. Jo. 725; 39 Digest 113, *58*.

(3) *Gurr* v. *Scudds* (1855), 11 Exch. 190; 25 L.T.O.S. 130; 3 W.R. 457; 156 E.R. 795; 39 Digest 273, *591*.

(4) *Martin* v. *Lowry, Martin* v. *I.R. Comrs.*, [1927] A.C. 312; 96 L.J.K.B. 379; 136 L.T. 580; 11 Tax Cas. 297; 71 Sol. Jo. 18, H.L.

(5) *Lewis* v. *I.R. Comrs.*, [1898] 2 Q.B. 290; 67 L.J.Q.B. 694; 78 L.T. 745; 39 Digest 113, *57*.

(6) *Underground Electric Rails. Co. of London, Ltd., and Glyn, Mills, Currie & Co.* v. *I.R. Comrs.*, [1916] 1 K.B. 306; 85 L.J.K.B. 356; 114 L.T. 111, C.A.; 39 Digest 277, *614*.

Appeal by the Crown from an order of ROWLATT, J.

The facts and arguments appear in the judgments.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *J. H. Stamp* for the Crown.
Cleveland-Stevens, K.C., and *Milner Holland* for the respondent.

LORD HANWORTH, M.R.—This appeal raises a short, but interesting and somewhat difficult, point. The facts are that a father, minded to pay money to his son, entered into a deed of covenant, dated March 31, 1931, which recites that he was desirous of making provision for his son during the joint lives of the parties. It provides that in pursuance of the agreement made between them, and in consideration of natural love and affection, the father undertakes to pay

> "the sum of £21 13s. 4d. (hereinafter referred to as 'the monthly sum') on the first day of every calendar month commencing on the first day of April, 1931."

Then there is a provision for the protection of that payment, which is not uncommon. I express no opinion whether it is effective or not, but that provision for protection is that, if the son should charge it in favour of any other person, payment of the monthly sum should cease, and it should be paid over to a trustee to be nominated by the father, for him to apply the sum entirely in his discretion as he should think fit for the benefit of the son. That deed having been entered into, it had to be stamped, and those who presented the deed for stamping contended that it should be charged at the rate applicable to an instrument which provides for the payment of a sum or sums of money at stated periods. The Crown contended that it ought to be stamped on a different basis, namely, on the basis that it was an instrument or covenant which was a security for an annuity. The Inland Revenue Commissioners, who have to determine these questions under the Stamp Act, decided that it ought to be stamped at the higher figure, i.e., on the basis that it was a security for an annuity. From that decision of the commissioners an appeal was taken to ROWLATT, J., and he decided, in accordance with the authority of two cases, *Clifford* v. *I.R. Comrs.* (1) and *Jackson* v. *I.R. Comrs.* (2), that the decision of the commissioners was wrong. He allowed the appeal, and it is from his decision determining that the deed was to be stamped at the lower rate that the Crown have appealed.

I ought to say at once that in this particular case the amount involved as against the subject charged is small. It is obvious, however, that the decision may be of great importance, and may involve a considerable amount of revenue. The Crown, therefore, were fully justified in taking the opinion of the higher court, more particularly as ROWLATT, J., seemed to be uneasy in following the decision in *Clifford's Case* (1); but, in order that no harm may be done to the subject, the Crown have undertaken to pay the full costs of all parties.

The point that has to be decided depends upon the true and proper reading of a passage in Sched. 1 to the Stamp Act, 1891. That schedule gives in alphabetical order a number of items relating to documents which are to suffer stamp duty. The particular item which refers to this document is as follows:

> "Bond, covenant, or instrument of any kind whatsoever. (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity) or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack."

It may be explained that the exceptions referred to in each limb of the sentence are taken out of the operative part because, whether it is superannuation, annuity, or rent reserved by a lease or tack, it will be found that those items fall to be charged under separate items contained in the schedule. We have, therefore, the simple words as follows: "Primary security for any annuity or for any sum or sums of money at stated periods." It is quite obvious that those words are not easy to construe, because an annuity which is to be paid, be it once a year, or twice a year, or four times a year, is a sum of money which is to be paid at a stated period, and it is difficult to find a direct and clear antithesis between the two limbs of the provision which are separated by the alternative word "or." As Romer, L.J., has pointed out, there must be some words introduced into the second part of the limb, such as "or for any other sum" or the words "or for any sum or sums of money at stated periods other than an annuity."

Junior counsel for the Crown called our attention to a passage in a speech of Lord Loreburn in the House of Lords which showed that, where there is a clear alternative given to the Crown to tax under one head or another, the right of choice would belong to the Crown; but it has been for a number of years an unbroken rule of the courts that, where there is a charging section or charging Act, the meaning of which is in doubt, it ought to be construed in favour of the subject. Pollock, C.B., in *Gurr* v. *Scudds* (3) said (11 Exch. at p. 191):

> "If there is any doubt as to the meaning of the Stamp Act it ought to be construed in favour of the subject, because a tax cannot be imposed without clear and express words for that purpose."

In *Clifford* v. *I.R. Comrs.* (1) the King's Bench Division followed that rule, which was once more stated, that when the true construction is open to two views, the one more favourable to the Crown and the other to the subject, then the latter construction should be adopted. We, therefore, in considering this passage in Sched. 1 to the Stamp Act have to bear in mind that it is a doubtful passage, and if there is a doubt it ought to be resolved in favour of the subject. *Clifford's Case* (1) was decided in 1896, and, so far as one can see, it has not been doubted, still less overruled. It has been followed in one case by Phillimore, J., *Jackson* v. *I.R. Comrs.* (2). The facts of *Clifford's Case* (1) were that there was a manager put in to carry on a business, and, during the time fixed for the duration of the agreement (which could be determined by notice) it was provided that a weekly sum should be paid to the owner. The court decided that in the case of such a sum there was no necessity, and, indeed, no right, to compute what was the annual return based upon the total of the sums which would be received in the course of the fifty-two weeks of the year.

I come, therefore, to consider, first of all, the word "annuity." If one were considering the Income Tax Acts, that word would connote a sum which was paid in the year—something which is paid for the year. It is not for the purposes of those Acts required that there should be a payment over a series of years to induce the tax upon an annuity. That was decided by this court, and, I think, upheld in the House of Lords in *Martin* v. *Lowry* (4). The Income Tax Act, shortly put, looked to what is paid in the year, and the words "yearly," "annual," and the like, ought to be focused upon what is done in the course of the twelve months which are the year of assessment. The construction of those words does not afford any assistance to us in the construction of these particular words in this Stamp Act.

I have already referred to the cases of *Clifford* (1) and *Jackson* (2). In *Lewis* v. *I.R. Comrs.* (5) it was decided that the deed there was security for an annuity and not for a sum payable at stated periods only. *Clifford's Case* (1) was distinguished. It is, however, to be noted that the deed then under construction contained words providing for the payment of a sum every three months by quarterly payments on the usual quarter days in every year, the first of such quarterly payments to be paid in advance on Michaelmas Day. In other words, there were definitely in that case words which indicated a reference to a year—quarterly payments. A quarter of what? The quarter is obviously something less than the whole, and one asks what is the whole. Intrinsically, therefore, in the deed there was a reference to the larger unit, the year.

In *Underground Electric Rails. Co.* v. *I.R. Comrs.* (6) a similar decision was reached, Scrutton, J., holding that the sum secured was a yearly sum. That judgment was accepted by the Court of Appeal. Bankes, L.J., said:

> "It is plainly there stated that the sum secured is the dividend at the rate of 4 per cent. per annum for the time being on the whole of the guaranteed stock, and if that is the right construction of the deed it is quite immaterial

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> that the guarantee is expressed to be a guarantee in respect of each half-yearly payment. The sum secured is the yearly sum."

Those cases—*Clifford* (1), *Jackson* (2), *Lewis* (5), and *Underground Electric Rails. Co.* (6)—appear to indicate that it is not merely in a case where you have a provision for the payment of an annuity that the larger stamp duty falls to be paid, but also where you can find that there is a right to a multiple of the sums that are B to be paid—where there is a right to aggregate the periodical payments, and to ascertain that a year is connoted, as in *Lewis's Case* (5), where the quarterly payments indicated the year as the unit, or in the case of *Underground Electric Rails. Co.* (6), where a half-yearly payment also indicated the totality of one year. But it appears to me that we have got to take the two limbs of this passage in the schedule as alternative, and to differentiate the cases where you can determine C that a yearly sum is to be paid and those in which a sum is paid at stated periods without any right to apply to them a system of aggregation or to apply a multiple. If in the terms of the deed it is indicated that the stated payments are necessarily a portion of a larger aggregate, then I think the annuity portion would apply, but where you have payments at stated intervals without any such right to aggregate, or to apply a multiple, there I think you must leave the payments as they are D expressed to be made at stated periods, and without bringing them within the earlier portion of the paragraph.

I apply that rule to this present case, for each case, of course, must depend on the actual terms of the instruments which are to be construed, and I seek to find whether or not there is in the terms of the deed, or by inference in the deed, or by necessary implication, any right to apply a multiple or to aggregate the pay- E ments at the stated times. The deed provides that the payments are to be made only during the joint lives of the father and the son. They might come to an end by the death of either of them in a span less than a year. There is no reference to such words as "quarterly" or "half-yearly," or the like, and I find this case to fall within the test laid down by BRUCE, J., where he says in *Clifford's Case* (1):

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> "I see no reasonable ground for the contention that the aggregate of the periodical payments for a whole year is to be taken as the amount upon which the duty is to be assessed."

For these reasons I am of opinion that the appeal fails.

LAWRENCE, L.J.—I agree. This appeal raises a question of some difficulty. G The point is whether the deed of covenant in question is an instrument securing an annuity or an instrument securing a sum or sums of money at stated periods within the meaning of the relevant portions of Sched. 1 to the Stamp Act, 1891. Looking at the relevant words, in my judgment, a sharp distinction is drawn between an instrument securing an annuity and an instrument securing a sum or sums at stated periods. They are taxed at different amounts, which seems to me H sufficient to show that the legislature intended to differentiate between the two. Counsel for the Crown have argued that the two duties overlap, and that the Crown is justified in selecting which of the two to exact. In my judgment, that is not the right view. I cannot conceive that the legislature would in the same sentence impose two duties on the same instrument, with a power of selection in the Crown as to which duty to charge. In my opinion, the two expressions are mutually I exclusive, and one has to gather as best one can the distinction between an annuity and a sum at stated periods. It is not an easy task because there is no definition contained in the Act, and, if taken literally, every annuity is a sum or sums at stated periods. Both counsel for the Crown have asked us to construe the word "annuity" in the popular sense, regardless of the fact that it is contrasted in this enactment with "sums at stated periods," and to say that if the present instrument is looked at it would in the popular sense undoubtedly be called an instrument securing an annuity. I cannot accede to that argument. For some purposes no doubt this deed could be said to be an instrument securing an annuity; but when you have to distinguish between a deed securing an annuity and a deed securing a sum or sums at stated periods, I think it is necessary to probe further and not merely ascertain whether a fixed sum is convenanted to be paid at stated periods during life or other indefinite period, which in general is a sufficient definition of an annuity, but to see whether there is something in the deed which shows that it was intended to secure an annual amount.

The contrast between an annuity and sums payable at stated periods must, I think, be that the one is a yearly amount though it may be made payable quarterly or half-yearly, and the other is an amount payable at specified periods irrespective of a year. The latter may last less than a year or it may last more than a year, and the Act contemplates that it may be expressed to be payable for life or any other indefinite period. That that is the true construction of the relevant words of the Act I think is shown by *Clifford* v. *I.R. Comrs.* (1), which was decided so long ago as 1896, and has never been questioned. That case has been distinguished in cases which are also distinguishable from the present case, and, although it has been commented upon in the Court of Appeal, no doubt as to its having been correctly decided has been expressed or suggested by that court, nor did the Solicitor-General contend that the decision in that case on the facts there was otherwise than correct. In my opinion, that case is indistinguishable from and entirely covers the present case. It is true that there the sums secured were weekly sums, and that in this case we are dealing with monthly sums, but the same reasoning upon which POLLOCK, B., and BRUCE, J., founded their judgments applies to the present case, and, in my opinion, both the judgments in that case lay down the true distinction which has to be drawn between annuities and sums at stated periods in view of the wording of this particular enactment. On the other hand, I think there is a clear distinction between the present case and the cases which were decided the other way. In each of those cases the court came to the conclusion on the wording of the particular instrument that what was secured was an annuity. This conclusion was only reached because from the wording of the particular instrument the court was able to deduce that what the parties intended to secure was an annual sum, bringing it within the definition of "annuity" contained in COKE UPON LITTLETON, namely, "a yearly payment of a certain sum of money," and not within the wider definition which is to be found in LUMLEY, which would comprise all periodical payments at specified times during life or any other indefinite period. Without saying that this latter definition is wrong, it does not apply to a case such as we have to consider. Neither the learned textbook writer in question nor the court in the cases upon the construction of wills and other instruments in the cases to which the Solicitor-General has referred lent himself or itself to the task of distinguishing between an annuity and a sum payable at stated periods.

In my judgment, the decision in the case turns entirely upon the true construction of the deed of covenant in question. Upon that I entertain very little doubt. The deed is concisely and clearly expressed; it plainly secures the payment of a sum of £21 13s. 4d. on the first day of every calendar month. There is nothing in the deed to suggest that the covenantor intended to secure an annual amount. For these reasons, I think that this appeal fails and ought to be dismissed.

ROMER, L.J.—During the argument of this case I have felt, and I still feel, considerable doubt, but upon the whole I have come to the conclusion that this appeal should be dismissed. The appeal, of course, turns upon the proper construction to be placed upon the words which appear in the first schedule to the Stamp Act, 1891, under the title "Bond, covenant or instrument of any kind whatsoever."

We were invited, on behalf of the Crown, to treat the two branches of those words—that is to say, the branch that refers to annuities and the branch that refers to any sum or sums of money at stated periods—as overlapping. I am not prepared to do that. I do not think it would be right to treat the legislature as having

A deliberately intended in the same breath, so to speak, to charge at different rates
the same instrument. That being so, we must, in my opinion, put such a meaning
upon each of the two branches as to prevent them overlapping. As has been
pointed out by the Master of the Rolls, every annuity in the ordinary sense provides for the payment of a sum of money at stated periods. In order, therefore,
to prevent the two branches overlapping we must do one of three things, as it seems
B to me: The first and very obvious thing to do would be to insert the word "other"
after the words "or for any," so that the section would read, "security for any
annuity or for any other sum or sums of money at stated periods." Another way
of arriving at a similar result—that is to say, avoiding an overlapping—would be
to read the second branch as follows, "or for any sum or sums of money at stated
periods other than annual periods," realising that, in the words of POLLOCK, B., in
C *Clifford* v. *I.R. Comrs.* (1), "an annuity ex vi termini means an annual payment."
I think we are prohibited by a decision of this court from adopting that particular
way out of the difficulty because in *Underground Electric Rails. Co. of London* v.
I.R. Comrs. (6) this court treated as being taxable as an annuity under this
section, even if it was not an annuity properly so called, an annual sum which was
not paid annually, but which was payable half-yearly. That course being excluded,
D we are thrown back upon the only alternative to the first suggestion that I have
mentioned, and that is to read the second branch as follows: "or for any sum or
sums of money at stated periods, not being an annual sum or sums." So reading
the second branch, it would clearly exclude the case of an annual sum covenanted
to be paid as an annual sum, but expressed to be payable at stated periods. That
would bring within the branch such cases as the *Underground Case* (6) and possibly
E such a case as *Lewis* v. *I.R. Comrs.* (5). But if it brings within the first branch of
the case such a sum as the court had to deal with in *Lewis's Case* (5) the subject is
getting on very dangerous ground, because in that case the sum payable at stated
periods was treated as an annuity by reason of the fact that the sums were expressed to be paid quarterly. In the present case we have a covenant to pay a sum
of so much a month, and it is said that that is in effect a covenant to pay an annual
F sum because you have merely to multiply the sum by twelve and you arrive at a
particular sum for the year, just as in *Lewis's Case* (5) they multiplied the sum by
four because the covenant was to pay a sum on certain days during the year,
quarterly. I think, however, the true solution is that which has been indicated by
the Master of the Rolls, and that every case will have to depend upon the construction of the particular deed in question, and that what will have to be
G ascertained is whether in truth and in fact the deed is intended to secure an annual
sum, although it is payable at periods less than periods of a year, or whether in
truth and in fact it provides for other than an annual sum.

In my opinion, according to the true construction of this deed, it does in truth
and in fact provide for the payment, not of an annual sum, but of a monthly sum.
H Therefore, adopting the third course that I have mentioned, it seems to me that
this case falls within the second branch, and not within the first branch of the
words in question. But that, of course, does not dispose of the question whether
we ought not to adopt the first alternative that I have mentioned. I think, however, that we should not, and for this reason, that, as was stated by POLLOCK, B.,
in the *Clifford Case* (1) and as has been stated by the Master of the Rolls just now,
I if a statute is

> "so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, the one more favourable to the Crown and the other to the subject, then the latter construction should be adopted."

In the present case I think obviously it would be for the benefit of the subject that we should not adopt the first alternative which I have mentioned, but the third one. Apart altogether from that, it seems to me that this case is really indistinguishable from *Clifford's Case* (1). *Clifford's Case* (1) was decided in the year

1896, and has never been overruled, or, so far as I know, questioned. It must have been acted upon over and over again. In those circumstances I do not think it would be right for us to overrule it. For these reasons, I have come to the conclusion that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *J. C. Fox, Gamble, & Son.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

BRITISH THOMSON-HOUSTON CO., LTD. *v.* FEDERATED EUROPEAN BANK, LTD.

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), January 26, 1932]

[Reported [1932] 2 K.B. 176; 101 L.J.K.B. 690; 147 L.T. 345]

Company—Director—Authority—Ostensible authority—Director held out as having authority—Matter in which director would normally have power to act.

By a guarantee signed: "The F.E. Bank, Ltd.—N.P.," N.P. being, to the knowledge of the plaintiffs, the chairman of the company, the company guaranteed the payment of the plaintiffs' account with the H.W. company. In an action on the guarantee,

Held: the company were responsible for those acts of their chairman which they had held him out as having authority to perform; the matter was one in which normally a director would have power to act; and, therefore, the company were liable on the guarantee.

Notes. This decision was criticised by SLADE, J., sitting at nisi prius, in *Rama Corpn., Ltd.* v. *Proved Tin and General Investments, Ltd.*, [1952] 1 All E.R. 554, as being irreconcilable with the decisions of the Court of Appeal in *Houghton & Co.* v. *Nothard, Lowe and Wills* (1), [1927] 1 K.B. 246, and *Kreditbank Cassel* v. *Schenkers* (2), [1927] 1 K.B. 826.

Referred to: *Clay Hill Brick and Tile Co.* v. *Rawlings*, [1938] 4 All E.R. 100.

As to contracts by companies, see 6 HALSBURY'S LAWS (3rd Edn.) 430–432, and for cases see 9 DIGEST (Repl.) 674 et seq.

Cases referred to:

(1) *Houghton & Co.* v. *Nothard, Lowe and Wills*, [1927] 1 K.B. 246; 96 L.J.K.B. 25; 136 L.T. 140, C.A.; affirmed, [1928] A.C. 1; 97 L.J.K.B. 76; 138 L.T. 210; 44 T.L.R. 76, H.L.; Digest Supp.

(2) *Kreditbank Cassel G.m.b.H.* v. *Schenkers*, [1927] 1 K.B. 826; 96 L.J.K.B. 501; 136 L.T. 716; 43 T.L.R. 237; 71 Sol. Jo. 141; 32 Com. Cas. 197, C.A.; Digest Supp.

(3) *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; 33 L.T. 383, H.L.; 9 Digest (Repl.) 687, *4529*.

(4) *Royal British Bank* v. *Turquand* (1855), 5 E. & B. 248; 24 L.J.Q.B. 327; affirmed (1856), 6 E. & B. 327; 25 L.J.Q.B. 317; 2 Jur.N.S. 663; 119 E.R. 886, Ex. Ch.; 9 Digest (Repl.) 96, *428*.

Appeal from an order of MACNAGHTEN, J., in an action tried by him without a jury.

The plaintiffs claimed £80 upon the following guarantee:

"The Federated European Bank, Ltd., 21, Soho Square, London, W.1.—June 11, 1931.—To the British Thomson-Houston Co., Ltd., Rugby.—In consideration of your supplying or continuing to supply goods to Harris Williams (Servis), Ltd., of Albion Road, Stoke Newington, London, N.16, we hereby guarantee the payment of your account with them up to the sum of £200 (two hundred pounds) for three months from the date hereof, and you are at liberty to give any time or indulgence to the said Harris Williams (Servis), Ltd., for the whole or any part of your account without discharging us.—The Federated European Bank, Ltd. (Signed) N. Pal."

The defendant company had four directors: one Englishman, two Italians, and one Nichola Pal, a Hungarian, who was the chairman of the board of directors. The plaintiffs' writ was specially endorsed under Order 3, r. 6, and they applied by summons under Order 14, r. 1, for liberty to enter final judgment against the defendants. On this summons the manager of the defendant company filed an affidavit in which he swore that the defendants had not executed the guarantee, as any guarantee executed by them had to be executed by two directors, and this guarantee was only executed by one. The Master gave leave to defend the action.

At the trial evidence was given that on June 6, 1931, Nichola Pal had offered the plaintiffs a similar guarantee, but signed by himself for and on behalf of the defendant company as chairman of the board of directors. This, the plaintiffs refused to accept, and the guarantee of June 11, 1931, signed "Federated European Bank, Ltd.—N. Pal," was then sent to the plaintiffs and accepted by them. At the trial neither party put in the articles of association of the defendant company. Macnaghten, J., found that as chairman of the board of directors of the defendant company Nichola Pal was acting in a matter in which normally a director would have power to act for this company, and he gave judgment for the plaintiffs. The defendants appealed.

Turrell for the defendants.

F. T. Atkins for the plaintiffs.

During the course of the argument, Scrutton, L.J., sent for the articles of association of the defendant company. From the articles it appeared that two directors formed a quorum of the board. By art. 106:

> "The directors shall have power . . . (3) To delegate to any managing director, local board, committees, or agents, or to any one or more of their own body, or to any manager or other officer such of the powers and authorities hereby conferred on the directors (other than the powers to borrow and make calls, but including power to sub-delegate) as they may consider requisite for carrying on the business of the company or any portion thereof and from time to time revoke all or any of the powers so delegated. . . . (8) To determine who shall be entitled to sign on the company's behalf bills, notes, receipts, acceptances, endorsements, cheques, releases, contracts, and documents."

SCRUTTON, L.J.—The point raised on appeal appears to be technical and without any merits. It was argued on behalf of the defendant company that they did not execute this guarantee, because by their articles of association any guarantee by the company is required to be executed by two directors. At the trial neither party put in the articles of association, but counsel took the point that one director had no authority to pledge the credit of the company. Having regard to the decision of *Mahony* v. *East Holyford Mining Co.* (3) in the House of Lords that those who have dealings with a company are affected with notice of all that is contained in its memorandum and articles of association, we asked to see the defendant company's articles of association. They confer upon the directors two powers: (i) To delegate to one or more of their number any of the powers of the board of directors, and (ii) to decide who shall sign contracts and other documents on the company's behalf. There is the authority of *Royal British Bank* v. *Turquand* (4) and of *Mahony's Case* (3) that where the articles of association of a company give a power, persons dealing with the company, though they are deemed to have notice of the extent of the power, are not bound to inquire into what has been called the "indoor management" of the company to see whether the power has been properly and regularly exercised with all the prescribed formalities, and that where they find an officer of the company openly exercising an authority which the directors have power to confer upon him, they are relieved from the duty of further inquiry and are entitled to assume that the power has been regularly and duly conferred.

The defendants rely upon the judgment of SARGANT, L.J., in *Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.* (1). From the facts in that case it appeared that one director of a company purported to pledge certain future profits of the company by a contract which, it was alleged, was beyond his powers. One question involved was whether the act of the director was or was not within the powers conferred by an article of association of the company. In the Court of Appeal, SARGANT, L.J., held (and ATKIN, L.J., concurred in his judgment) that, assuming that the article of association enabled the directors to delegate to the particular director who had purported to pledge the profits of the company power to perform the act, it was not enough for the pledgees to rely upon their constructive knowledge of the effect of the articles where the power of delegation had not in fact been exercised and where the pledgees had no actual knowledge that the power existed and did not rely upon its existence. This was considered in *Kreditbank Cassel* v. *Schenkers, Ltd.* (2). In that case a branch manager of the defendant company, without having any authority from the defendants and acting in fraud of them, drew seven bills of exchange purporting to do so on the defendant company's behalf. In an action by holders in due course against the defendants, the plaintiffs were held disentitled to recover on the grounds (i) that they were seeking a remedy against the drawers of a bill whose names had been forged; (ii) that the person who was vouched as having authority to sign the name of the drawers was one whose position should have raised doubts whether such authority would ever have been reposed in him, and that accordingly the plaintiffs were put on inquiry before they discounted the bill; and (iii) that the court was bound to follow the decision in *Houghton's Case* (1). But ATKIN, L.J., in that case said that in certain circumstances the inquiry by persons doing business with a company, whether directors have in fact nominated one of their number to do the act relied on, need not be made. He said ([1927] 1 K.B. at p. 844):

> "There are cases where that inquiry need not be made. When, for example, you find power given to do a certain thing, and the act can be done by the company in board meeting, and there purports to be a resolution authorising it, you are not obliged to inquire whether or not the forms of the company required by the articles as to the constitution of the board, the quorum, and so forth, have been actually complied with."

Then he continued, and this is the material passage of the judgment upon this point:

> "If you are dealing with a director in a matter in which normally a director would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. Those are matters of internal management which an outsider is not obliged to investigate."

Assuming that statement of the law to be correct in the case now before the court, it appears that Nichola Pal in signing this guarantee acted in a matter in which normally a director would have power to act for the company. MACNAGHTEN, J., has held that as chairman of this board of four directors of the defendant company, a title he was permitted to assume, Nichola Pal in so acting was acting in a matter in which normally a director would have power to act for the company. In my opinion, in this, he came to the right conclusion. Accordingly the plaintiffs were entitled to assume that Nichola Pal was duly authorised to act for the defendant company and this appeal must be dismissed.

GREER, L.J.—I am of the same opinion. Had it been necessary for the decision of this case to apply the first ruling in *Houghton & Co.* v. *Nothard, Lowe and Wills* (1) in the Court of Appeal as it is stated in the headnote to the report in the Law Reports, I should have found myself to be in some difficulty. That ruling is expressed thus:

> "Although a person who contracts with an individual director or servant of a company, knowing that the board of directors has power to delegate its authority to such an individual, may under certain circumstances assume that that power of delegation has been exercised and that he may safely deal with the individual in question as representing the company, he cannot rely on the supposed exercise of such power if he did not know of the existence of the power at the time that he made the contract."

If I rightly understand the decision in *Houghton's Case* (1) it is based upon that proposition being an accurate statement of the law. But it is unnecessary for me to inquire further whether this proposition is an essential element in the ratio decidendi, because there are in the case now before the court adequate grounds upon which we can rest our decision—quite apart from *Houghton's Case* (1).

This guarantee was signed by a person who was in fact the chairman of the board of directors of the defendant company. Someone must represent a limited liability company for the purpose of conducting correspondence—it may be the secretary, the managing director, or some other official; and this person must have authority to bind the company by letters written on its behalf. The person chosen for this purpose by the defendant company was the chairman of the board, and the defendants have represented by their chairman that the plaintiffs could rely on the guarantee of the defendants as the act of the defendants and are responsible for those acts which they have held him out as having authority to perform. On that ground I base my decision in this case. I reserve for further consideration the question of how the first ruling of the Court of Appeal in *Houghton & Co.* v. *Nothard, Lowe and Wills, Ltd.* (1), to which I have referred, is to be reconciled with the decision of the House of Lords in *Mahony* v. *East Holyford Mining Co.* (3).

SLESSER, L.J.—I agree. ATKIN, L.J., in *Kreditbank Cassel* v. *Schenkers, Ltd.* (2), speaking generally of the articles of association and of the powers of the defendant company and of their branch managers, said ([1927] 1 K.B. at p. 844):

> "The person [who relies on the articles] is to be in the same position as if he had read them, and if he had, all that he would see would be that the directors had power to nominate the particular individual who could sign bills of exchange. In such a case a person reading the articles would be in no better a position unless he went further and inquired whether or not the directors had in fact nominated that particular individual to sign the bills."

But the lord justice continues:

> "There are cases where that inquiry need not be made. . . . If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. These are matters of internal management which an outsider is not obliged to investigate."

In the present case we are dealing with a company with four directors, of whom one, Nichola Pal, describes himself as the chairman, and there was in evidence a document which he had signed as "N. Pal, chairman." I think the plaintiffs were dealing with N. Pal in a matter in which normally a director would have power to act. The difficulty, therefore, which arises from the decision in *Houghton* v.

Nothard, Lowe and Wills, Ltd. (1) does not press in this case, where in these circumstances it seems to me that the plaintiffs were entitled to assume that they were dealing with a person who had the authority of the defendant company to execute the contract sued upon. A

Appeal dismissed.

Solicitors: *S. Fraulo; Cochrane & Cripwell.* B

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

C

Re JAMES. GRENFELL *v.* HAMILTON

[CHANCERY DIVISION (Farwell, J.), February 16, 17, 1932]

[Reported [1932] 2 Ch. 25; 101 L.J.Ch. 265; 146 L.T. 528; D
48 T.L.R. 250; 76 Sol. Jo. 146]

Charity—Relief of poverty—Home of rest—Inmates engaged on charitable work.

A testatrix devised a freehold house to her trustees in trust to establish a home of rest for the sisters of a community, for the clergy of the diocese, and for such persons as the Mother Superior of the community should nominate and appoint. She also bequeathed a sum of £6,000, the interest therefrom to be applied to repair the house and maintain and support the inmates. The sisters of the community were engaged on charitable work and those who had any income placed it in the fund for the common good. E

Held: although it might be possible that to provide a home of rest for a class of persons who could not in any sense be described as being in need of such a home would not be charitable, primâ facie the words "home of rest" indicated something in the nature of a hospital; in the present case each sister of the community was without means and was engaged in charitable work, the clergy were clearly carrying on such work, and on the true construction of the will the duty of the Mother Superior was to nominate only such persons as were properly suitable to a home of rest as a charity; and, therefore, the gift in the will was a charitable gift. F G

Notes. The form of inquiry directed in this case was criticised and not adopted in *Re White's Will Trusts*, [1954] 2 All E.R. 620.

Followed: *Re Chaplin, Neame* v. *A.-G.* (1933), 76 Sol. Jo. 576. Referred to: *Lord Nuffield* v. *I.R. Comrs.*, *Goodenough* v. *I.R. Comrs.* (1946), 175 L.T. 465. H

As to charitable purposes, see 4 HALSBURY'S LAWS (3rd Edn.) 213 et seq., and for cases see 7 DIGEST (Repl.) 312 et seq.

Cases referred to:

(1) *Wallis* v. *S.-G. for New Zealand*, [1903] A.C. 173; 72 L.J.P.C. 37; 88 L.T. 65; 19 T.L.R. 230, P.C.; 8 Digest (Repl.) 334, *151*.

(2) *Re Estlin, Prichard* v. *Thomas* (1903), 72 L.J.Ch. 687; 89 L.T. 88; 47 Sol. Jo. 691; 8 Digest (Repl.) 323, *77*. I

(3) *Re Rees, Jones* v. *Evans*, [1920] 2 Ch. 59; 89 L.J.Ch. 382; 123 L.T. 567; 8 Digest (Repl.) 389, *830*.

(4) *Dunne* v. *Byrne*, [1912] A.C. 407; 81 L.J.P.C. 202; 106 L.T. 394; 28 T.L.R. 257; 56 Sol. Jo. 324, P.C.; 8 Digest (Repl.) 392, *858*.

(5) *Re Stratton, Knapman* v. *A.-G.*, [1931] 1 Ch. 197; 100 L.J.Ch. 62; 144 L.T. 169; 47 T.L.R. 32; sub nom. *Re Stratton, Knapman* v. *Stratton*, 74 Sol. Jo. 787, C.A.; 8 Digest (Repl.) 392, *850*.

(6) *Hunter* v. *A.-G.*, [1899] A.C. 309; 68 L.J.Ch. 449; 80 L.T. 732; 47 W.R. 673; 15 T.L.R. 384; 43 Sol. Jo. 530, H.L.; 8 Digest (Repl.) 340, *227*.

(7) *Sinnett* v. *Herbert* (1872), 7 Ch. App. 232; 41 L.J.Ch. 388; 26 L.T. 7; 36 J.P. 516; 20 W.R. 270, L.C.; 8 Digest (Repl.) 372, *583*.

(8) *Re Douglas, Obert* v. *Barrow* (1887), 35 Ch.D. 472; 56 L.J.Ch. 913; 56 L.T. 786; 35 W.R. 740; 3 T.L.R. 589, C.A.; 8 Digest (Repl.) 348, *290*.

Adjourned Summons.

By her will, dated Aug. 30, 1928, the testatrix, Isabel Joanna James, after making certain specific and pecuniary bequests, devised and bequeathed her freehold house, known as Glan Mor, in the city of Truro, together with the furniture and effects therein, and the sum of £6,000 to her trustees

> "in trust that my trustees shall establish a home of rest for the sisters of the Home of the Community of the Epiphany at Truro, the clergy of the diocese of Truro, and such persons as the Mother Superior for the time being of the said Home of the Community of the Epiphany at Truro shall from time to time nominate and appoint, in manner following (that is to say) in the first place that my trustees shall with the sanction of the High Court or a judge thereof or of the Charity Commissioners under s. 8 of the Mortmain and Charitable Uses Act, 1888, retain the whole of the said premises as a home of rest to be called St. John's Home of Rest."

After directing that a certain inscription should be placed above the front door, the will continued,

> "and shall invest the said sum of £6,000 in any investment authorised for charitable trust funds with power to vary the investments thereof from time to time, and shall out of the income arising from such investments keep the said home of rest in proper repair and insured against fire, and shall apply the surplus of the said income towards the maintenance and support of the inmates thereof."

The testatrix devised and bequeathed all the residue of her real and personal estate to her nephew, John Panayoty Ballachey. The testatrix died on Oct. 16, 1930. Her estate was amply sufficient to provide the legacy of £6,000. Glan Mor was a large house within the city of Truro, with gardens and lands adjoining containing 3·1 acres or thereabouts. The Community of the Epiphany at Truro was a religious order, of which the members were women belonging to the Church of England, and the home of the community was within the city of Truro. The work done by the community was mainly charitable—among other objects, they carried on a laundry with a home, a convalescent home for working men, a mission house, and a branch house at Penzance. The members also took charge of an industrial school in Truro, and of St. Saviour's Hospital, Regent's Park, London, and the community also had branch houses at Tokio and Kobe in Japan. The sisters had a common fund, in which those of them who had any private income pooled it for the common good. The Bishop of Truro was the Visitor of the community. The testatrix had assisted the community in many ways and had taken much interest in their work. The Mother Superior and the Bishop of Truro were informed of the devise and bequest by the executors, and on consideration they came to the conclusion that it would not be possible for the community to accept and carry out the devise and bequest, as they considered that the interest upon the £6,000 would be insufficient to repair and pay the rates on Glan Mor and maintain the home of rest if it were established. They had no other funds available for the purpose. They considered that a sum of at least £600 a year would be required for the maintenance of Glan Mor and of the proposed inmates. One of the executors, therefore, issued this summons asking for the decision of the court whether the devise and bequest created a valid and effective trust, and whether, if such a trust were created, but could not be carried out, the house and legacy formed part of the residuary estate, or whether the trust should be carried out cy-près, and that if necessary a scheme for the administration of the trust should be directed. The defendants to the summons were the Mother Superior and the Bishop of Truro, the residuary legatee, and the Attorney-General.

Russell Gilbert for the plaintiff.

Wilfrid Hunt for the Mother Superior and the Bishop of Truro.

Stafford Crossman, for the Attorney-General, referred to *Wallis* v. *S.-G. for New Zealand* (1).

G. D. Johnston (*Gover, K.C.*, with him), for the residuary legatee, referred to *Re Estlin* (2), *Re Rees* (3), *Dunne* v. *Byrne* (4), and *Re Stratton* (5).

FARWELL, J. [after reading the devise and bequest in the will, continued:] The question is a familiar one, whether the gift is a charitable gift or not. There is another question which will arise if this be a good charitable gift, namely, whether the purpose is one to which effect can be given. If it turns out that effect cannot be given to the purpose for which this property and this fund were given, then either the gift fails, or it must be applied cy-près, and that is a question which, if the gift be a charitable one, I do not think it would be right to determine at the present time. I will say a word about that later on.

The first question to be determined is whether this is a good charitable gift. In my judgment, the words which control the whole meaning of the clause are the three words "home of rest." Primâ facie, at any rate, I think that a gift for the purpose of founding and endowing a home of rest is a charitable object. I think that that was the view which was taken by Kekewich, J., in the case to which reference was made—*Re Estlin* (2). In that case it was a home of rest for lady teachers, and it was held to be a good charitable bequest. Counsel for the residuary legatee, who argued on his behalf with great ability, sought to import into Kekewich, J.'s decision that he had determined the question on the sole ground that the home of rest was a home for teachers, and that persons in the position of teachers, persons who were endeavouring to promote education, were themselves objects of charity, and that consequently a home of rest for teachers, which might enable them more adequately to fulfil their duties, would be a charitable gift. I think that the position of life of teachers, as teachers, had some influence on Kekewich, J.'s mind from the way in which his judgment is expressed; but, as I read the first part of his judgment, his view was that to provide a home of rest is in itself primâ facie charitable. He says:

> "To provide a home for those who need a home is at any rate charity in the broad sense of the word, whether it is within the statute of Elizabeth or not. One must not forget the distinction between the two; but still there is, to my mind, a distinct charity in providing a home for anyone who needs a home."

Then he proceeds to deal with the lady teachers who need rest.

As I read the judgment, it is that to provide a home of rest is primâ facie a charitable object. In my judgment, that is so, and I think that it comes within the words of the statute of Elizabeth. It may be that to provide a home of rest for a particular class of persons who could not be in any sense described as in need of such a home would not be charitable; but, in my judgment, primâ facie the words "home of rest" themselves indicate something in the nature of a hospital, although not strictly a hospital—that is to say, a home which is to provide relief for those who are in need of it, not by means of medicine or medical attendance, but by providing them with the means and possibility of rest. That, in my view, is in a true sense providing for the impotent, and accordingly to provide a home of rest is primâ facie a good charitable object. If that be so, if the provision of a home of rest be primâ facie a good charitable object, then it does not necessarily follow that the gift will fail because some of the uses to which the home may be put might, upon a right construction of the words of the will, be uses that would not be strictly charitable.

A To express what I mean in very much better language than mine own, I will refer to what LORD DAVEY said in *Hunter* v. *A.-G.* (6). He says ([1899] A.C. at p. 324):

> "A third class of cases was relied on by the Attorney-General of which *Sinnett* v. *Herbert* (7) and *Re Douglas, Obert* v. *Barrow* (8) are examples, in which there is a general overriding trust for charitable purposes, but some of the B particular purposes to which the fund may be applied are not strictly charitable, or one of two alternative modes of application is invalid in law. In such cases the trust is good, and the court will give effect to the general charitable trust, but the trustees are restricted from applying the fund to the purposes or in the manner which are objectionable."

C In the present case, looking at the terms of this will, the object is to establish a home of rest, and the persons for whose benefit that home of rest is to be provided are, first, the sisters of the Home of the Epiphany at Truro. That is an association of ladies for the purpose of doing charitable work. I do not think that it is necessary for me to consider exactly what is the position of these ladies except to say that from the evidence it appears that, under the rules, the ladies who enter D the community give up their private means, and are themselves, therefore, without means. The lady who desired to found this home of rest was anxious that among the persons who might benefit from such a home should be these ladies who carry on what is, I think, clearly a charitable work. Then there are the clergy who are to have the advantages of the home. The clergy of the diocese are clearly persons who are carrying on charitable work. But, when one comes to the words

> E "such persons as the Mother Superior for the time being of the said Home of the Community of the Epiphany at Truro shall from time to time nominate and appoint,"

they would indicate that the Mother Superior, who is not a trustee, would have the widest discretion to appoint anybody she pleased, irrespective of their means, or anything at all. I think that the words bear that meaning, but, in my judg- F ment, when one reads the clause as a whole the duty of the Mother Superior—not because she is the Mother Superior of this particular home, or in any way owing to her position in the home, but owing to the fact that the object of the trust is charitable—is to nominate only such persons as are properly suitable to a home of rest as a charity, and if she were to nominate persons who were unsuitable for such a purpose, it would, in my judgment, be the duty of the trustees to refuse G such nomination. It is for the trustees to see that the home of rest is used and carried on as a charity, and, in my judgment, the power of the Mother Superior to nominate persons must be limited to that overriding purpose, and only such persons as are suitable to the home can be properly nominated and appointed by her. The fact that the words of the sentence in the will are wide enough in themselves to enable her to appoint other persons does not, in my judgment, prevent H the whole gift from being charitable. I do not mean to suggest that the Mother Superior is in any way limited as to the persons to be appointed to the sisters of the community, or of a similar community, or to persons who are employed in some form of charitable work; she has an absolute discretion whom she will nominate, subject only to this, that the persons who can properly be nominated and admitted to the home are persons who are suitable for the main object of the I trust, which is charity—that is, persons who are truly in need of a home of rest. If that be so, then there can be no objection to this gift on the ground that it is not a charity.

It appears from the evidence that there is some doubt whether such a home of rest can be established and maintained, having regard to the existing circumstances. I am by no means satisfied that it is not possible to establish and maintain such a home, but I cannot determine that point now. In my judgment, the right course will be this, that the matter be referred to chambers for an inquiry whether it is possible to establish such a home as the testatrix intended to be established. If, as the result of that inquiry, it is found to be possible to establish such a home, then a further reference to chambers will be necessary to settle a scheme. If, on the other hand, it is found that the establishment of a home is not practicable, then a further question will arise whether the gift fails, or whether the bequest can be used cy-près. That is a question which may or may not arise, according to the result of the first inquiry. I have thought it right not to determine that question now, but to leave that for consideration hereafter, if it becomes necessary to consider it. I propose to make a declaration that this is a charitable gift, and to refer the matter to chambers to inquire whether it is, or will be at any future time, practicable to establish such a home as this.

[His Lordship made an order pursuant to s. 8 of the Mortmain Act, 1888, that the trustees might retain the house unsold.]

Solicitors: *Sydney James*, for *J. Messer Bennetts*, Truro; *Gregory, Rowcliffe, & Co.*, for *Sitwell & Harvey*, Truro; *Solicitor to the Treasury*; *Perowne & Co.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

Re ARGONAUT MARINE INSURANCE CO., LTD.

[Chancery Division (Eve, J.), March 8, 1932]

[Reported [1932] 2 Ch. 34; 101 L.J.Ch. 217; 147 L.T. 350; 48 T.L.R. 331; 18 Asp.M.L.C. 306]

Insurance—Fire—Policy in form transit policy—Negligible transit risk—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 1 (*b*), *s.* 28 (3).

By a policy of insurance an insurance company insured a consignment of wool belonging to the assured against loss or damage while in transit from quay to warehouse in the same neighbourhood and while in storage in the warehouse. By a typed endorsement on the policy the wool was insured against loss or damage by fire or explosion while in transit or in storage. On two occasions after the conclusion of the transit, while the wool was in the warehouse, the policy was renewed at the same premium as had first been charged. During the last period the wool was damaged by fire. By the memorandum of association of the insurance company the company was authorised to carry on "every kind of insurance . . . business . . . except . . . fire insurance business." On a claim under the policy by the assured,

Held: although the policy was in form a transit policy, the transit risk was of an almost negligible nature, and when, after the transit was ended, the policy was renewed the same premium was charged; on these facts and on the true construction of the policy, the policy was a fire policy within s. 1 (b) of the Assurance Companies Act, 1909, and did not fall within the exception in s. 28 (3) of the Act (which provides that a policy shall not be deemed to be a fire policy by reason only that loss by fire is one of the various risks covered by the policy); and, therefore, in view of the terms of the company's memorandum of association, the assured were not entitled to succeed.

Notes. As to fire insurance generally, see 22 Halsbury's Laws (3rd Edn.) 303 et seq., and as to insurance against general loss or damage, see ibid. 330, 331. For cases see 29 Digest 305 et seq. and 419–422, and for Assurance Companies Act, 1909, see 3 Halsbury's Statutes (2nd Edn.) 372.

Cases referred to:

(1) *Royal Exchange Assurance* v. *Hope*, [1928] Ch. 179; 97 L.J.Ch. 153; 138 L.T. 446; 44 T.L.R. 160; 72 Sol. Jo. 68, C.A.; Digest Supp.

(2) *Re United London and Scottish Insurance Co., Newport Navigation Co.'s Claim*, [1915] 2 Ch. 12; 84 L.J.Ch. 544; 113 L.T. 400; 31 T.L.R. 424; 59 Sol. Jo. 529; 13 Asp.M.L.C. 170; 20 Com. Cas. 296, C.A.; 10 Digest (Repl.) 1171, *8152*.

(3) *Simon, Israel & Co.* v. *Sedgwick*, [1893] 1 Q.B. 303; 62 L.J.Q.B. 163; 67 L.T. 785; 41 W.R. 163; 9 T.L.R. 104; 7 Asp.M.L.C. 245; 4 R. 128, C.A.; 29 Digest 145, *971*.

Summons in the winding-up of the Argonaut Marine Insurance Co., Ltd., by the applicants, who claimed to be creditors of the company, asking that the decision of the liquidator not to admit their proof should be reviewed and the proof admitted.

On June 9, 1928, this company and four German insurance companies, by their agents in Hamburg, insured the applicants in the sum of $150,000 with $30 premium in respect of a consignment of raw wool for transit in Harburg-Wilhelmsburg from quay to warehouse for one month, including any stay there, and by a typed endorsement risks of fire and explosion on the general insurance conditions of the companies were included. By art. 1 of these conditions especially were included partial or complete destruction, risk of fire, theft, and pilferage. The policy was renewed for two more months at the like premium. In August the wool was damaged by fire to the amount of $384,000. It was then sold by the companies for $133,047, and this was remitted to the applicants, who subsequently received an amount equal to all their loss except the share of the Argonaut company—$9,424.21, with interest. The applicants took proceedings to recover this in the court at Hamburg, and, although the company had before contended that their agents had exceeded their authority in entering into such a contract, judgment was given by default for the applicants for that sum. The amount not being paid, judgment was obtained in the King's Bench for the amount under R.S.C., Ord. 14. The company then went into liquidation. The applicants put in a proof for the amount, but this was rejected by the liquidator on the ground that the transaction was ultra vires the company. Clause 8 of its memorandum of association was

> "to carry on . . . every kind of transit, insurance business, and generally every kind of insurance and marine insurance business, whether of the like or a different kind . . . except life assurance business, fire insurance business, or accident insurance business within the meaning of the Assurance Companies Act, 1909."

Lindon for the applicants.—Fire insurance is defined in s. 1 (b) of the Act, but this case comes within the qualification in s. 28 (3), namely, that a policy is not to be deemed one of fire insurance by reason only that loss by fire is one of the various risks covered. The endorsement of the policy did not alter its nature: *Royal Exchange Assurance* v. *Hope* (1).

G. O. Slade for the liquidator.—The policy was one of fire insurance within s. 1 (3) of the Act. Its form is immaterial. The transit risk was negligible. Fire was the principal risk: *Re United London and Scottish Insurance Co.* (2). It is not within the saving of s. 28 (3).

Lindon, in reply, referred to *Simon Israel & Co.* v. *Sedgwick* (3).

EVE, J.—This is an application on the part of a German firm to review the action of the liquidator in rejecting the proof they have lodged in the winding-up for damages caused by fire to a consignment of raw wool. The claim is based on a policy of insurance dated June 9, 1928, and the liquidator justifies the course he has taken by asserting that the policy, although purporting to be a transit policy, was in substance a fire insurance policy and one into which the company had no power to enter. He relies on cl. 8 of the company's memorandum of association as establishing that this class of insurance business is outside the company's powers. The company is thereby empowered to carry on every kind of transit insurance, and generally every kind of insurance business, except life assurance business, fire insurance business, accident insurance business, or employer's A liability insurance business within the meaning of the Assurance Companies Act, 1909.

What I have to decide, therefore, is whether this is a fire insurance policy or a marine policy, and in considering that question, s. 28 (3) of the Act, whereby it is provided that the policy shall not be deemed to be a policy of fire insurance by reason only that loss by fire is one of the various risks covered by the policy, must B be borne in mind. If the policy is a marine policy, then, although fire was one, and only one, of the risks insured against, it would not be within sub-s. (b) of s. 1 of the Act, but if, according to its true construction, it is a policy insuring against loss by or incidental to fire, then it is fire insurance business under the Act, and business which the company had no power to undertake. In the former case the claim of the applicants would be provable in the winding-up; in the latter case C their right of proof is limited to the unexpired portion of the premium.

I have come to the conclusion that the liquidator's contention is right. The policy is in form a transit one, but it was altered by endorsement so as to cover the wool while in transit or in storage against risk of fire or explosion. The transit part of the risk was of an almost negligible nature, involving only the transit of the wool from the quay to a shed or warehouse in the same place, and when, after D the transit was over, the policy was renewed on two occasions, the same premium was charged as had been charged for the first period, which included transit, a clear indication that what was really being insured against were the warehouse risks and not the transit. Moreover, the wording of the policy specially including in the insurance the risk of partial or complete destruction by fire discloses the real nature of the contract, and I feel bound to hold that this was the real risk E insured against. I must, therefore, dismiss this summons, with costs.

Solicitors: *Stokes & Stokes*; *Stafford Clark & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

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THOMAS *v.* OCEAN COAL CO., LTD. G

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Blanesburgh, Lord Russell and Lord Wright), October 18, 20, November 15, 1932]

[Reported [1933] A.C. 100; 102 L.J.K.B. 142; 148 L.T. 219; 49 T.L.R. 57; 76 Sol. Jo. 849; 25 B.W.C.C. 436] H

Workmen's Compensation—Accident—"In course of employment"—Act done "for purposes of employer's business"—Breach of regulation by workman—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 1 (2).

The workman was a hitcher in a coal mine, his duties being, inter alia, to help in getting full trams into and empty trams out of the cages. His proper place of work was on the loading, or full tram, side of the pit bottom, but he I was expected to help, in cases of emergency, in dealing with empty trams on the other side of the pit. On April 17, 1931, he crossed the pit bottom to see to the working of empty trams and then ran back across the shaft bottom towards his proper working side to be ready to receive a cage when it landed. So to cross the shaft bottom was expressly prohibited by a regulation made under the Coal Mines Act, 1911. Before the workman could get fully across the shaft bottom the descending cage struck and killed him. On a claim for compensation by his widow,

Held: in considering whether the case came within s. 1 (2) of the Workmen's Compensation Act, 1925, it must first be ascertained, disregarding the prohibition contained in the regulation, whether the workman's death was due to an accident arising out of and in the course of his employment; if it did, the effect of the prohibition in removing the accident from that category could be annulled if the later condition in the subsection as to the act being "done by the workman for the purposes of and in connection with his employer's trade or business" were fulfilled; in the present case the accident certainly arose out of the workman's employment and it also arose in the course of that employment since he had been engaged to work on both sides of the pit and desired to expedite that work; his contravention of the regulation did not put him outside the sphere of the employment, and so his act was done for the purposes of and in connection with the employers' business; and, therefore, his widow was entitled to compensation.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

Considered: *Talbot* v. *Ackers, Whitley and Abram-Coal Co.* (1934), 150 L.T. 444; *Bullers* v. *Altus Shoemakers, Ltd.* (1934), 27 B.W.C.C. 132; *Privett* v. *Darracq Motor Engineering Co.* (1934), 151 L.T. 211; *Tucknott* v. *East Sussex County Council* (1935), 28 B.W.C.C. 42; *Victoria Spinning Co.* (*Rochdale*), *Ltd.* v. *Matthews*, [1936] 2 All E.R. 1359; *Harris* v. *Associated Portland Cement Manufacturers, Ltd.*, [1938] 4 All E.R. 831; *Noble* v. *Southern Rail. Co.*, [1939] 2 All E.R. 817; [1942] 2 All E.R. 383; *Seviour* v. *Somerset Collieries, Ltd.*, [1940] 1 All E.R. 649. Referred to: *Collins* v. *British Timkin, Ltd.* (1934), 27 B.W.C.C. 74; *Knowles* v. *Southern Rail Co.*, [1936] 2 All E.R. 682; *Evans* v. *Powell Duffryn Associated Collieries, Ltd.* (1938), 82 Sol. Jo. 565; *Parmley* v. *Enfield Rolling Mills, Ltd.* (1938), 31 B.W.C.C. 187; *Connelly* v. *Moss Lane Spinning Co.* (1941), 34 B.W.C.C. 216; *Doncaster* v. *Tinsley Park Colliery Co.* (1943), 36 B.W.C.C. 10; *Slavin* v. *Carmichael & Co.*, [1945] 1 All E.R. 292; *Garner* v. *Harland and Wolff, Ltd.* (1946), 175 L.T. 281; *Campbell* v. *Proud's Engineering Co.*, [1947] 2 All E.R. 97.

As to "accidents" within the Workmen's Compensation Acts, see 34 Halsbury's Laws (2nd Edn.) 816 et seq., and for cases see 34 Digest 301 et seq. For Workmen's Compensation Act, 1925, see 16 Halsbury's Statutes (2nd Edn.) 202, and for National Insurance (Industrial Injuries) Act, 1946, see ibid. 797.

Cases referred to:

(1) *Garrallan Coal Co.* v. *Anderson* (*or Devlin*), [1927] A.C. 59; 19 B.W.C.C. 356; 136 L.T. 66; sub nom. *Garallan Coal Co., Ltd.* v. *Anderson* (*or Devlin*), 42 T.L.R. 747, H.L.; 34 Digest 304, *2511*.

(2) *Wilsons and Clyde Coal Co.* v. *M'Ferrin, Kerr* (*or M'Aulay*) v. *James Dunlop & Co.*, [1926] A.C. 377; 95 L.J.P.C. 130; 135 L.T. 164; 42 T.L.R. 397; 19 B.W.C.C. 1, H.L.; 34 Digest 301, *2499*.

(3) *Stephen* v. *Cooper*, [1929] A.C. 570; 98 L.J.P.C. 97; 141 L.T. 300; 45 T.L.R. 413; 73 Sol. Jo. 268; 22 B.W.C.C. 339, H.L.; Digest Supp.

(4) *Plumb* v. *Cobden Flour Mills Co., Ltd.*, [1914] A.C. 62; 83 L.J.K.B. 197; 109 L.T. 759; 30 T.L.R. 174; 58 Sol. Jo. 184; 7 B.W.C.C. 1, H.L.; 34 Digest 288, *2415*.

(5) *Lancashire and Yorkshire Rail. Co.* v. *Highley*, [1917] A.C. 352; 86 L.J.K.B. 715; 116 L.T. 767; 33 T.L.R. 286; 61 Sol. Jo. 397; 10 B.W.C.C. 241; 34 Digest 290, *2425*.

(6) *Barnes* v. *Nunnery Colliery Co., Ltd.*, [1912] A.C. 44; 81 L.J.K.B. 213; 105 L.T. 961; 28 T.L.R. 135; 56 Sol. Jo. 159; 5 B.W.C.C. 195, H.L.; 34 Digest 299, *2489.*

(7) *A. G. Moore & Co.* v. *Donnelly, Fife Coal Co.* v. *Sharp* (*or Greenwood, or Colville*), *Fife Coal Co.* v. *Fyfe*, [1921] 1 A.C. 329; 90 L.J.P.C. 49; 124 L.T. 578; 37 T.L.R. 198; 65 Sol. Jo. 219, 239; 13 B.W.C.C. 458, H.L.; 34 Digest 302, *2501.*

(8) *Hannaby* v. *Llay Main Collieries, Ltd.*, [1931] 1 K.B. 602; 100 L.J.K.B. 353; 144 L.T. 490; 23 B.W.C.C. 403, C.A.; Digest Supp.

(9) *Guest* v. *Gaston & Co.*, [1927] 1 K.B. 1; 95 L.J.K.B. 759; 135 L.T. 400; 42 T.L.R. 547; 70 Sol. Jo. 667; 19 B.W.C.C. 237, C.A.; 34 Digest 292, *2437.*

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.), affirming an award made by HIS HONOUR JUDGE ROWLAND ROWLANDS sitting as an arbitrator under the Workmen's Compensation Act, 1925, in the county court of Glamorganshire at Bridgend, in favour of the respondents, the employers, from whom the appellant claimed £300 compensation in respect of the death of her husband, who died from injuries caused by an accident on April 17, 1931, at the Ocean Colliery, Blaengarw, which belonged to the respondents.

W. H. Upjohn, K.C., *S. Kirkhouse, K.C.*, and *Joshua Davies* for the appellant.
Sir Walter Greaves-Lord, K.C., and *Edgar Dale* for the respondents.

The House took time for consideration.

Nov. 15. The following opinions were read.

LORD BUCKMASTER.—The appellant is the widow of a man who, while in the employment of the respondents, lost his life on April 17, 1931, in the respondents' collieries through being crushed by a descending cage at the bottom of the pit. She claimed £300 as compensation under the Workmen's Compensation Act, but her claim was rejected by the learned county court judge who sat as arbitrator, and his award has been upheld by the Court of Appeal.

The facts relating to the accident have been carefully found by the learned county court judge and are as follows: (i) The deceased man was a hitcher; his work was to be in charge of the pit bottom, attend to the winding signals, close and open the gates, and help so far as necessary in getting full trams and empty trams into and out of the cages; his proper place was on the loading or full tram side of the pit bottom, but he was expected to assist in cases of emergency in dealing with empty trams on the other side of the pit. (ii) On the occasion in question, the deceased workman crossed the pit bottom to see to the proper working of empties towards the main road, and almost at once dashed back to cross under the descending cage towards his proper working side in order to be ready to receive that cage when it landed, but before he could get fully across the pit bottom the descending cage caught him and killed him. (iii) The crossing and re-crossing of the pit bottom were for the purposes of and in connection with the employer's business. So to cross the shaft bottom was expressly prohibited by one of the general regulations made under the Coal Mines Act, 1911, which is in the following terms:

> "No person shall attempt to go on or across the uncovered space of the shaft bottom, except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such place unless the cages are stopped."

The effect of such a regulation is to restrict the operation of s. 1 (1) of the 1925 Act, because the forbidden act is by reason of its prohibition an act that does not arise out of and in the course of the workman's employment. In other words, if without the prohibition an injury might be held to be due to an accident arising out of and in the course of employment, should that accident be due to the forbidden act, it can no longer be so regarded. The effect of this result has been

A modified by s. 1 (2) of the Workmen's Compensation Act, 1925, replacing the 1923 Act, which, omitting words not material to the present purpose, is as follows:

> "Section 1.—Liability of Employers to Workmen for Injuries. (1): If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter
> B mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained. (2): For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment
> C . . . if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

At first sight it would appear that the words of this statute are open to the interpretation that, in case of death or serious and permanent disablement owing to a prohibited act, there is substituted for the inquiry whether the accident arose out of and in the course of the employment another and a different test, namely,
D whether the act causing the injury was done by the workman "for the purposes of and in connection with his employer's trade or business." This interpretation has, however, been rejected by this House in *Garrallan Coal Co., Ltd.* v. *Anderson* (*or Devlin*) (1); and even more expressly in *Wilsons and Clyde Coal Co.* v. *M'Ferrin* (2), where LORD DUNEDIN clearly stated ([1926] A.C. at p. 385) that such an interpretation was obviously untenable, and that the true view of the statute was
E that it must first be ascertained if, disregarding the prohibition, the injury was due to an accident arising out of and in the course of the employment, and then the effect of the prohibition in removing the accident from that category might be annulled if the later condition as to the act being for the purposes of the employer's business were fulfilled. The distinction is critical in the present case. The finding of the county court judge is clear, nor, indeed, could it well have been otherwise,
F that the act of the workman was for the purposes of the employer's business, and we are, therefore, thrown back to the consideration of whether, if the regulations had not existed, the accident arose out of and in the course of employment. This consideration shows that the reliance placed by counsel for the appellant on the case of *M'Ferrin* (2) was mistaken. In that case a man, contrary to regulation, went to inspect a charge shortly after it had been fired, believing it to have been
G discharged. He was mistaken in his belief and was injured by its delayed explosion. That, apart from the prohibition, the injury was due to an accident arising out of and in the course of his employment was plain, and all that was left was to consider if the act was done for the purposes of and in connection with his employer's trade or business, and as this was equally plain the workman's right to compensation was secure, but that does not cover the present case.

H The learned county court judge, whose award was upheld by the Court of Appeal, has rightly proceeded along the lines I have indicated, but it is his final investigation as to whether the accident arose out of and in the course of the employment that has caused me the gravest difficulty. He has not held as a matter of fact that the accident did not so arise, but he has reasoned himself to this conclusion in the belief that he was so constrained by reason of the authority of *Stephen* v.
I *Cooper* (3). The workman there had, without putting the knives out of action, walked along the pole of a mowing machine in order to adjust the harness of one of the horses, which had become detached, and the horses, starting, had thrown him under the knives which had caused him serious injury. The arbitrator had found that the act was not done in connection with the respondent's business, but was an act of bravado, and was not due to an accident arising out of and in the course of his employment. The decision did no more than say that there was evidence on which the arbitrator could so find, but the doctrine of an "added peril" was referred to by LORD HAILSHAM, as appears where he says

> "there was ample evidence to justify the arbitrator in finding that the principle of 'added peril' applies to the present case, and that consequently there was evidence on which he could properly find that the injury was not due to an accident arising out of the employment." A

I agree with the Master of the Rolls in thinking that such a phrase is not a touchstone whereby to determine whether or not the man was acting within his employment, and it would, I think, be unfortunate if this phrase got crystallised into a form of test and an accident should be looked at according to the meaning of these words instead of relying, as reliance must be placed, upon the words of the Act of Parliament. This is clearly expressed by LORD DUNEDIN in *Plumb* v. *Cobden Flour Mills Co., Ltd.* (4) ([1914] A.C. at p. 65), where he said: B

> "It is often useful in striving to test the facts of a particular case to express the test in various phrases. But such phrases are merely aids to solving the original question, and must not be allowed to dislodge the original words. Most of the erroneous arguments which are put before the courts in this branch of the law will be found to depend on disregarding this salutary rule. A test embodied in a certain phrase is put forward, and only put forward, by a judge in considering the facts of the case before him. That phrase is seized on and treated as if it afforded a conclusive test for all circumstances, with the result that a certain conclusion is plausibly represented as resting upon authority, which would have little chance of being accepted if tried by the words of the statute itself." C D

In one sense, every method of performing an operation in the course of a man's employment that is not the safest is an added peril, but the Act contains no provisions that exclude from its benefits an accident that has arisen through a method of work which was not the safest in the circumstances. Conduct can, of course, be so reckless and so unnecessary as to take it outside the meaning of the statute, and this was what happened in *Lancashire and Yorkshire Rail. Co.* v. *Highley* (5); and again, according to the arbitrator, in *Stephen* v. *Cooper* (3). The learned judge here has held that, having regard to what was said in *Stephen* v. *Cooper* (3), he was "bound to hold" that the adding of the peril placed the workman's act outside the scope of his employment. I do not think he was so bound. I think that *Stephen* v. *Cooper* (3) introduced no new law. In my opinion, it merely followed an earlier decision. If this be so, the learned county court judge was not under the constraint by which he thought he was compelled, and the real question, which is a question of fact, remains undecided. In these circumstances it might be possible to remit the case once more to the arbitrator, but as the facts are free from dispute, it seems to me we ought to take upon ourselves the responsibility of deciding whether they take the case outside the statute or no. That is to say, whether, if there never had been a regulation forbidding what the man did, the injury that resulted was due to an accident arising out of and in the course of his employment. I think upon the whole, that it was. It arose out of his employment certainly, and was, in my opinion, in the course of it, seeing that, apart from the prohibition, the action, although hazardous, was due to the man's desire to expedite the process he was engaged to control. I think that *Garrallan Coal Co., Ltd.* v. *Anderson* (*or Devlin*) (1) affords assistance in reaching this conclusion. The circumstances there were identical with those in the present case, with this exception, that there was nothing to show in that case that the workman had any work to do at the pit bottom, and it was because of this that his claim failed. But it is impossible to read the report without realising that the result might, and indeed I think would, have been different had it once been established that the man had been engaged in working at the bottom of the pit. For these reasons I think the judgment of the Court of Appeal should be reversed, and the award of the arbitrator set aside and in lieu thereof the sum of £300, which is the accepted sum, awarded to the appellant. E F G H I

A **LORD BLANESBURGH.**—In my judgment, this appeal should be allowed. The issue, as I see it, with the findings of the learned arbitrator in view, depends upon the true effect of s. 1 (2) of the 1925 Act, read in connection with s. 1 (1) and not ignoring s. 1 (1) (b) of the same Act. The association of the subsection in question with s. 1 (1) is of course complete. Its relation to s. 1 (1) (b), historically and otherwise, will prove, if I am not mistaken, to be illuminating. Merely for B convenience of reference, I once again transcribe these three subsections as they are grouped in the present Act:

> "1. (1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained: Provided that . . . (b) If it is C proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed. (2) For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding D that the workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business."

Of the subsections, s. 1 (1) and s. 1 (1) (b) are to be found in the Workmen's E Compensation Act, 1897, but in that Act s. 1 (1) (b) appeared without the words "unless the injury results in death or serious and permanent disablement." Both as here printed are found in the 1906 Act. As to s. 1 (2), it was first brought into the code as s. 7 of the 1923 Act, and in judgments, even after 1925, it is frequently still so referred to. I will also here, for convenience' sake, sometimes refer to it as s. 7. Its close similarity to s. 1 (1) (b) is immediately obvious, the reason, of F course, being that its enactment in 1923 was designed to bring within the range of compensation certain classes of serious accident which had been excluded therefrom by the judicial interpretation placed upon s. 1 (1) (b). Parliament did not question the correctness of that interpretation and s. 1 (1) (b) remains part of the statute quite unamended. It is merely superseded in its relation to those accidents for which special provision was made by the new section.

G The outstanding judicial decisions referred to were three in number, all of them decisions of this House. Two stressed the point that no relief could be forthcoming under s. 1 (1) (b) unless it still remained true to say of an accident attributable to the serious and wilful misconduct of the workman that it had actually arisen out of and in the course of his employment. The third illustrated the result of that ruling where the relevant disobedience consisted in the breach of a H statutory or other regulation. In *Barnes* v. *Nunnery Colliery Co.* (6) LORD LOREBURN, L.C., said ([1912] A.C. at p. 47):

> "The question whether or not an injury by accident arose out of the employment is quite different from the question whether there has or has not been misconduct,"

I and the true meaning and effect in this respect of the subsection was fully elaborated by LORD DUNEDIN in *Plumb* v. *Cobden Flour Mills Co., Ltd.* (4), where, in a passage which although often cited will bear repetition here, he says ([1914] A.C. at p. 69):

> "You have first to show that the accident arises out of the employment. Then in the older Act (that is the Act of 1897) came the rider that even when that was so the workman still could not recover if the accident was due to the serious and wilful misconduct of the workman himself—a rider limited in the later Act (that is the Act of 1906) to cases where the injury did not result in

> death or serious and permanent disablement. But the very fact that it is a rider postulates that the accident is of the class which arises out of the employment. A man may commit such a piece of serious and wilful misconduct as will make what he has done not within the sphere of his employment. But if death ensues and his dependants fail to get compensation it will not be because he was guilty of serious and wilful misconduct, but because the thing done, irrespective of misconduct, was a thing outside the scope of his employment."

And in the case of an order disobeyed by a workman, such a case as that with which your Lordships are concerned in the present appeal, it was in *Plumb's Case* (4) laid down that the right of the injured man or his dependants to recover, notwithstanding his misconduct, depended upon the question whether the order which he had disobeyed limited the sphere of the employment or whether it amounted merely to a direction not to do certain things or to do them in a certain way within the sphere of the employment. If the order disobeyed were of the first class there could be no compensation.

In LORD SUMNER's words from *Highley's Case* (5) ([1917] A.C. at p. 372), also so frequently quoted, it could be no part of the employment of a workman thus disobedient "to hazard, to suffer, or to do" that which caused his injury. But it was the decision in *A. G. Moore & Co.* v. *Donnelly* (7) which was effective to bring s. 7 on to the statute book. That, in my view, is the most pregnant authority in this case. I am myself satisfied that if its effect had been always appreciated, and if the true meaning of its counterpart, *Wilsons & Clyde Coal Co., Ltd.* v. *M'Ferrin* (2)—a s. 7 case—had always been realised, the order now appealed from could never have been made. The facts in *Donnelly's Case* (7) can be shortly stated. The accident to him arose out of a breach of para. 3 (a) of the Explosives in Coal Mines Order, 1913, which provides that if a shot misses fire the person firing the shot shall not approach the shot hole in the case of a shot fired by a fuse and detonator until an interval has elapsed of not less than an hour. Donnelly in the course of his employment fired a shot by means of a fuse and detonator and retired. But in contravention of para. 3 (a) of the order he returned to the place of the shot in less than an hour, when the shot, which had missed fire, blew off in his face and permanently injured him. It was held that the order was such that his breach of it took him outside the sphere of his employment, so that the risk in which he had involved himself had ceased to be reasonably incidental to that employment. In other words, his accident had not arisen out of and in the course of his employment as required by s. 1 (1), to which, as LORD DUNEDIN had pointed out, s. 1 (1) (b) was merely a rider. From that decision s. 7 very quickly materialised, and as its purpose was, so in the result it was effective to prevent, after it had passed, the refusal of compensation in just such a case as Donnelly's was. It achieved this in *M'Ferrin's Case* (2), which on this point has been, as I see it, completely misunderstood, and, so misunderstood, has been the parent of much of the subsequent confusion. But to this I will return later. Merely asserting, as, on the authority of this House in *M'Ferrin* (2), I do assert, that a man in Donnelly's position is now under s. 7—or s. 1 (2)—entitled to compensation when, under s. 1 (1) (b), he was entitled to none, it is instructive to see how this result has been accomplished by the section. It is not by a statutory statement equivalent to an assertion that such an accident as Donnelly's did in fact arise out of and in the course of his employment. Such a statement would not have been true even in the mouth of the legislature. It has not been made. What the section has said is that such an accident as Donnelly's, with any other accident covered by the terms of the section, shall be deemed to have arisen out of and in the course of the workman's employment whether in fact it did so or not. In other words, differing in this from s. 1 (1) (b), s. 1 (2) does not require that an accident within its scope shall arise out of and in the course of the employment at all. It is enough that the accident is of such a character that complying with the conditions

A of the subsection it may thereunder "be deemed" to have so arisen. And in view of the learned arbitrator's findings in the present case, already detailed by the noble Lord on the Woolsack, and on the plain terms of the subsection itself, I cannot bring myself to doubt that the accident to the appellant's husband is brought within its express terms. For what are the relevant conditions thereby required to be fulfilled? They seem to be two. (i) That the deceased was at the time B when the accident happened to him acting in contravention of a statutory regulation applicable to his employment. To his employment as described by the learned arbitrator the regulation here in question was clearly applicable. And the deceased was contravening it. (ii) That his act was done for the purposes of and in connection with the respondents' trade or business.

The section, it will be noticed, does not require that the act should have been C done for the purposes of or in connection with the workman's employment, although the regulation must have been one applicable to that employment. Here the requirement of the section has in set terms been found by the learned arbitrator. And his finding is without qualification accepted by the respondents. That I should have thought was enough for the appellant to establish. It was then for the respondents to show, if they could, that for some reason entirely unconnected D with the breach of the regulation the accident had not occurred out of and in the course of the deceased's employment so that in relation to his accident s. 1 (1) still remained a bar to relief, quite unaffected by s. 1 (2). But no such case was made by the respondents. The resulting position is clearly put by LORD DUNEDIN in *Garrallan Coal Co., Ltd.* v. *Anderson* (*or Devlin*) (1)—a case on facts substantially identical with those of the present case so far as the employment of the workman E and the regulation and its breach are concerned. There LORD DUNEDIN, having first held ([1927] A.C. at p. 67) that the regulation there and here in question was one of the first class above described—"a prohibition which limited the scope of the employment"—and that [the workman] was going into a territory where he had no business to go except under certain conditions, proceeded :

> F "That being so it is quite clear that if it had not been for the recent Act he could not have recovered, because the accident would not have been arising out of his employment. But then comes the recent Act of 1923, and that Act says, s. 7, that the accident shall be deemed to arise out of the employment 'notwithstanding, &c.' "

The noble Lord quotes the section and proceeds :

> G "There is no question, therefore, that it falls within the Act, only you must prove it was done in contemplation and furtherance of his employer's trade or business. It is clear that there the onus is upon the workman, and the question is : Has he discharged that onus?"

And, on a review of the arbitrator's award there, containing as it did a finding to the contrary, LORD DUNEDIN came to the conclusion, and the other noble Lords H present agreed with him, that the burden had not been discharged. And for that reason, but for that reason only, the decision went against the claim.

It is, I think, indisputable that if the House had before it in *Garrallan* (1) an award containing the finding on the all-important question of the furtherance of the employer's business which we have here, the House not only would but, on the principles laid down by LORD DUNEDIN, must have allowed the claim. So far I as I am concerned that is enough for me. Accepting the principles laid down in *Garrallan* (1), and applying them to the findings in this case, I would, without more, allow the appeal. But this conclusion, although reached under LORD DUNEDIN's own guidance in *Garrallan* (1), is, it is said, suspect in that it does not have due regard to his earlier authoritative exposition of s. 7 which forms the introduction to, and is applied by him in, his judgment in *Wilsons and Clyde Coal Co., Ltd.* v. *M'Ferrin* (2) and *Kerr* (*or M'Aulay*) v. *James Dunlop & Co., Ltd.* (2), heard in this House together. I recognise that that exposition is of final authority. But I am equally satisfied that they misunderstand its meaning and effect who find in the passage already cited from *Garrallan* (1) any inconsistency with it, or A anything other than its inevitable development. Before I go to the exposition itself I would refer to the two judgments to which it was preliminary, and upon which its light was made to fall. *M'Ferrin's Case* (2) was, as has already been said, on all fours with *Donnelly* (7). The regulation broken was the same, and it was a regulation which limited the scope of M'Ferrin's employment. There is no possible doubt on that point. It is the central fact which gives its vital sig- B nificance to the decision, but it is the fact which, unfortunately, in subsequent decisions, has been consistently ignored. LORD DUNEDIN held M'Ferrin to be entitled to compensation under the section on grounds which he thus explained ([1926] A.C. at p. 388):

> "The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in [*Donnelly* (7)], namely, C that the prohibition in the Act of Parliament made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition."

On the other hand, the claim to compensation by M'Aulay's dependants failed. D The short facts of his case are thus stated in the headnote. M'Aulay was a miner engaged with a fireman and another miner in firing by electricity a series of shots in a mine; after one of the shots had exploded he came from his place of safety and coupled the electric cable to the detonator of the next shot. At the time the fireman was moving the handle of his firing battery, which was still attached to the cable, to free some mechanism which had jammed. The shot exploded and E M'Aulay was killed. In coupling the cable to the detonator M'Aulay was in breach of a statutory mining regulation which provided that the person authorised in writing by the manager to fire the shots should himself do the coupling. The reason why, in these circumstances, the claim to compensation failed is thus tersely summarised by LORD DUNEDIN ([1926] A.C. at p. 390):

> "The operation of coupling was the work of a skilled man. The unskilled man F had no right to meddle with it, and if he meddled was doing something which he was not engaged to do, so s. 7 has, for the reasons given above (i.e., in his preliminary exposition), no application."

Now, *M'Ferrin's Case* (2) seems to me to be, in principle, identical with the present. As here, the regulation "applicable to his employment" was one which limited its scope. His case, like this, came within the express terms of s. 7. G There were no other circumstances to take it out of s. 1 (1). There was nothing, therefore, effectively to prevent the accident being deemed to be within that subsection and compensation followed. But in *M'Aulay's Case* (2) there was this vital difference. Apart altogether from the regulation and its breach, M'Aulay was outside of s. 1 (1) because at the time of the accident he was doing something he was not engaged to do at all, and s. 7 was powerless to restore him to grace. H In the light of these two contrasted decisions the only difficulty, I feel, in appreciating fully LORD DUNEDIN's reasoning in *M'Aulay's Case* (2) is that I do not find him attaching any significance to the concluding words of s. 7, already commented on, to which, indeed, he makes no reference. But he must, I think, be taken to have been of opinion that these somewhat vague words did not cover such a usurpation as M'Aulay's amounted to. LORD DUNEDIN's preliminary exposition, I to which I now come, is to my mind, quite clear when it has been illumined by the two decisions of which it was the immediate foundation. I may paraphrase it thus. Section 7 is self-contained in the sense that so soon as its conditions are complied with the workman or his dependants have made a case for compensation. But not an irrebuttable case. It is still open to the employer to show, founding upon the facts proved in support of the claim or adduced in evidence by himself, that apart altogether from the prohibition disobeyed, and made innocuous by virtue of s. 7, the accident for a totally different reason was outside s. 1 (1). It might be shown, A for instance, to take LORD DUNEDIN's own example, that the workman at the time of the accident "was arrogating to himself duties which he was neither engaged nor entitled to perform." In other words, the accident did not arise out of and in the course of the workman's employment for a reason with which s. 7 had no concern and to which it offered no answer. In this sense, and I suggest in this sense only, did LORD DUNEDIN use the words so often referred to ([1926] A.C. B at p. 385):

> "It was hinted at, rather than argued, that the effect of this section was to sweep away altogether the requirement of s. 1 that the accident should arise out of and in the course of the employment. This is obviously an untenable point."

C And so it was untenable if the contention involved the result that compensation could be claimed by the "arrogating" workman in the circumstances just stated. Subsection (1) (i) was certainly not to be swept away altogether. But LORD DUNEDIN did not mean that it might not quite frequently happen that compensation would be claimable as a result of s. 7, although the accident had not in fact arisen out of and in the course of the employment. *M'Ferrin's Case* (2) itself is just D such a case. But that will never be so where apart from s. 7 there is some independent ground for taking the accident out of sub-s. (1) (i). In such a case, says LORD DUNEDIN ([1926] A.C. at p. 387), still adhering to his illustration,

> "it is not that there is a specific prohibition: it is that it is not his employment which he was engaged in. There may be a specific prohibition as well, but that does not alter the case."

E

The soundness of LORD DUNEDIN's pronouncement may be tested by an illustration. There are two men, let us suppose, in the service of the respondents here, one a clerk to whose employment this regulation is not applicable, the other a miner to whose employment it is. They are involved in the same accident, both of them acting for the purpose of and in connection with the respondents' trade or F business, but both of them at the time arrogating to themselves duties which they were neither engaged nor entitled to perform. Both are killed. According to LORD DUNEDIN's rule, as I interpret it, the dependants would not in either case be entitled to compensation. But if the contention he was combating had been permitted to prevail, the dependants of the miner, who was so much the more blameworthy, in that he was committing a breach of a regulation applicable to G his employment, would receive compensation, while the dependants of the clerk, relatively less disobedient, for he need never have heard of the regulation at all, would receive none. The illustration, as it strikes me, at once explains the meaning of and the necessity for LORD DUNEDIN's pronouncement. But, one may ask, if all this is so clear, why should the Court of Appeal, not only in this but in sundry other cases, founding themselves upon LORD DUNEDIN's rule, and seeking H to apply it, why should they have considered themselves bound in effect to refuse compensation in every s. 7 case where the prohibition broken is one limiting the employment? That that is the position, according to the present practice of that court is clearly shown in the recent case of *Hannaby* v. *Llay Main Collieries, Ltd.* (8), where the court, although not unanimous in its application, were agreed upon the rule which is so stated or implied in all the judgments, but is expressed in I terms most apposite for my present purpose by SLESSER, L.J. He there says ([1931] 1 K.B. at p. 630):

> "It is now clear beyond question that, if the workman is injured or killed by an accident caused by an act done in such a way as to take it outside the scope of his employment, the workman cannot recover; and that in such circumstances s. 1 (2) of the Act of 1925 which otherwise may save the workman's claim from being defeated where he has done a prohibited act, will not bring back the accident within the sphere of the employment for which the employer is responsible (see the leading case in the House of Lords of *Wilsons*

> *and Clyde Coal Co., Ltd.* v. *M'Ferrin* (2), and the many authorities which have followed that decision)." A

In these words you have the present rule and the reason for it; you find *M'Ferrin* (2) stated in terms unrecognisable when the case itself is referred to. The truth is that in the line of authority to which the lord justice refers, *M'Ferrin* (2) has on this point been quite consistently misunderstood. Thus in *Guest* v. *Gaston & Co.* (9), a case at the beginning of the series, I find BANKES, L.J., saying with reference to *M'Ferrin* (2) ([1927] 1 K.B. at p. 8): B

> "It was held that the man was entitled to compensation because he was merely doing in a negligent way an act which was within the scope of his employment."

At the close of the series in *Hannaby* (8), I find counsel for the employer saying in argument that in *M'Ferrin* (2) it was decided that a shot firer was acting within the sphere of his employment although acting in breach of a regulation by returning too soon to the place where the shot had exploded and that [presumably for that reason] he came within the protection of s. 7. This statement, so completely at variance with the true position, as at all events I see it, was not challenged by counsel for the respondent and was apparently assumed to be correct by the court, being reproduced as above by SLESSER, L.J., and in terms accepted by the Master of the Rolls, who in his judgment, when speaking of *M'Ferrin's Case* (2), said ([1931] 1 K.B. at p. 613) that there "it was held that there was a breach of the prohibition within the sphere of employment." Based upon that view of *M'Ferrin's Case* (2), which involved what I must with all respect regard as the mistaken conclusion that there LORD DUNEDIN had advised compensation under s. 7 only because the regulation broken did not put the workman outside the sphere of the employment, the Court of Appeal has adopted the view that s. 7 does not, any more than s. 1 (1) (b), apply to any other than an accident *actually* arising out of and in the course of the employment of the workman. As it is put by the Master of the Rolls in *Hannaby* (8) ([1931] 1 K.B. at p. 608), where there has been a prohibition broken the question which arises is C D E F

> "whether the workman has done something lying outside the sphere of his employment or has merely committed a breach of some regulation within the sphere of his employment."

In the words of LAWRENCE, L.J. ([1931] 1 K.B. at p. 621): G

> "the question which the learned county court judge had (there) to determine was, whether the workman when he met with his accident had stepped outside the sphere of his employment or whether he was still within that sphere, although acting in contravention of a statutory and employer's prohibition."

And acting on that view a full examination of "pre-s. 7 cases" is called for in order to ascertain whether the regulation broken would then have taken the accident out of s. 1 (1), as for example "an added risk," or whether it would not—an inquiry quite irrelevant so soon as it is seen, as in my judgment is the case, that s. 7 is quite distinct from s. 1 (1) (b), and that the regulation which is essentially and primarily within s. 7 is a regulation limiting the employment, the breach of which necessarily takes the accident in fact out of s. 1 (1). H

The principles so enunciated in *Hannaby* (8) have been followed in the present case, with the result that the Court of Appeal have here rejected a claim shown to be within the express terms of the section and with nothing to stand in the way of full effect being given to it. The result is indeed extraordinary. Section 7 (s. 1 (2) of the present Act) is held to have no application to the only kind of regulation the breach of which rendered its enactment necessary. Section 7 on this view has effected nothing not already and not now covered by s. 1 (1) (b). It has on this view been powerless to secure compensation for the appellant. If the view be maintained and existing practice be continued, the result must be that I

s. 1 (2) itself—a remedial section—will become a dead letter, a legislative tragedy of the first order. I ought to add that had not the learned county court judge mistakenly supposed that the case in this House of *Stephen* v. *Cooper* (3) was a s. 7 case by which he was bound, he would, as he shows by his judgment, have acted upon the view of *Garrallan* (1), which I have above expressed. *Garrallan* (1) was before the Court of Appeal, and is referred to by LAWRENCE, L.J., along with *Stephen* v. *Cooper* (3). Unfortunately, the lord justice turns aside to observe upon the latter case, and does not deal with *Garrallan* (1) at all. It is difficult to see how the fixed views of the Court of Appeal to the effect above stated could have survived an examination of LORD DUNEDIN'S speech in that case, to say nothing of LORD WRENBURY'S. But it was not made. In the result I think that this appeal succeeds from whatever angle its consideration is approached.

LORD WARRINGTON.—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.JJ.), affirming an award of the county court judge dismissing the appellant's claim to compensation. The appellant is the widow and sole dependant of John Thomas, a hitcher employed by the respondents at one of their collieries in the county of Glamorgan. While in such employment he was injured by accident and such injury resulted in his death. The question is whether on the true construction of s. 1 of the 1925 Act, and in particular of sub-s. (2) thereof, and in the events which have happened the accident is to be deemed to have arisen out of and in the course of his employment. The learned county court judge and the learned judges of the Court of Appeal have all answered that question in the negative. Were they right in so doing? Section 1 (2) of the 1925 Act is a transcription verbatim of s. 7 of the 1923 Act. The history of this section is well known. In 1920 it was decided by this House in *A. G. Moore & Co.* v. *Donnelly* (7) that contravention by the workman of certain mining regulations took the miner outside the sphere of his employment, and that consequently the injury by accident did not in that case arise out of his employment. The section in question was obviously intended to meet what was regarded as a hardship to workmen killed or seriously and permanently disabled.

The true construction of s. 7 of the 1923 Act and, therefore, of the subsection now in question is no longer in doubt, having been settled once for all by the opinion of LORD DUNEDIN (concurred in by the other noble and learned Lords then sitting) in *Wilsons and Clyde Coal Co., Ltd.* v. *M'Ferrin* (2) and *Kerr* v. *James Dunlop & Co.* (2). His view is summed up in the following terms ([1926] A.C. at p. 386):

> "It [namely, the section in question] does not either repeal or amend the radical provision of the principal Act that the accident to entitle the workman to compensation must arise out of and in the course of his employment, but it does introduce a far-reaching, though artificial, consideration which prevents a certain class of evidence, available to show that the accident did not arise out of the employment, from being any longer in force."

In fact, in the noble and learned Lord's view, if the man was doing something which was not in his employment at all the section would not help him

> "for the simple reason that its language does not apply to it. It is not that there is a specific prohibition; it is that it was not his employment which he was engaged in."

These views were acted on in the decision of the two cases. In *M'Ferrin's Case* (2) the man was engaged in an operation which he was entitled to perform, but in performing it he contravened a statutory regulation and thereby incurred a peril which he would otherwise not have incurred. It was held that the section applied and that the accident must be deemed to have arisen out of his employment. In *M'Aulay's Case* (2), on the other hand, the man (a miner) was arrogating to himself the duties of a fireman which he was not entitled to discharge, and on that ground was not entitled to relief though he was at the same time acting in contravention of a regulation.

In the present case I am of opinion that on the findings of the learned county court judge the employment of the workman included work on both sides, the full side and the empty side, of the pit and that the passing from one side to the other was one of the things he was engaged to do. But on the occasion in question he passed from one side to the other across the pit bottom in contravention of a regulation to the effect that no person shall attempt to go on or across the uncovered space of the shaft bottom except for the purpose of working in the shaft bottom, and no person shall be allowed to work in such place unless the cages are stopped. In so doing the workman, of course, incurred an extra peril, but this was the very peril against which the regulation was directed, and if the incurring of such a peril should be held (as it has been held by the arbitrator and by the Court of Appeal in the present case) to prevent the accident from being deemed to arise out of and in the course of the employment the operation of the subsection would be virtually reduced to a nullity.

There is one requirement of the subsection to be referred to, namely, that "such act," namely, that which the workman was doing when the accident happened, "was done by the workman for the purposes of and in connection with his employer's trade or business." That this requirement was satisfied has been found by the county court judge in express terms. In *Garrallan Coal Co., Ltd.* v. *Anderson* (*or Devlin*) (1) the arbitrator had found that it was not proved that the act in question had been done by the workman for the purposes of and in connection with his employer's trade or business, and on this ground alone the claim to compensation failed. It is clear that but for this defect it would have been held that the section (7 of 1923) applied: see, particularly, LORD DUNEDIN ([1927] A.C. at p. 67):

> "Now I have no hesitation, and, indeed, here all the learned judges, including the arbitrator, have come to the same conclusion, that that is a prohibition which limited the scope of the employment."

And per LORD WRENBURY ([1927] A.C. at p. 75). It is, I confess with all respect, difficult to understand how the learned judges in the Court of Appeal could have come to the conclusion that the added peril involved in the breach of the regulation prevented the application of sub-s. (2) in the present case. I can only think that they have all been misled by misunderstanding *Stephen* v. *Cooper* (3). In that case no question arose upon the construction of the subsection now in question. Such a point had been originally raised but had been given up. The case was decided on the ground that the conduct of the workman was outside the scope of the employment and there was no statutory provision as there is here to the effect that an accident not actually arising out of the employment may under certain circumstances be deemed so to arise. In my opinion, those circumstances exist in the present case, and the result is that the appeal must be allowed with costs here and below and an award made accordingly.

LORD RUSSELL.—The crucial question which arises in this case is whether the accident, which caused the workman's death, arose out of and in the course of the employment within s. 1 (1) of the 1925 Act. If that subsection had stood alone, unaffected by sub-s. (2) it would be successfully argued that the accident did not so arise. But if the case is governed by the provisions of sub-s. (2), then there is no room for such an argument, because the subsection enacts that in such event the accident "shall be deemed to arise out of and in the course of the employment," for the purposes of the Act, which purposes include the purposes of sub-s. (1). In other words, the subsection provides that in the appropriate case the accident, whether or not it did arise out of and in the course of the employment, shall for the purpose of making the employer liable to pay compensation, be deemed so to arise.

Before considering the question it may be well to glance at the history of the subsection. The 1906 Act contained no provision corresponding with the subsection. In 1921 there came before this House the case of *A. G. Moore & Co.* v.

Donnelly (7). In that case Donnelly, a miner, in the course of his employment fired a shot and retired to a place of safety. In contravention of a regulation made under the Coal Mines Act, 1911, he returned to the place of the shot in less than one hour, when the shot blew off and inflicted permanent disablement upon him. It was held that, in disobeying the regulation, the miner was acting outside the sphere of his employment, and that consequently the injury to the workman had not been caused by an accident arising out of and in the course of his employment. It was pointed out also that the same result would follow if the regulation had not been statutory, but had been simply a term of his employment. As a result of this decision there was enacted s. 7 of the 1923 Act, the words of which are identical with the words of the present sub-s. (2). This s. 7 came under consideration here, and was the subject of decision in your Lordships' House. The case involved the consideration of separate accidents to two workmen called respectively M'Ferrin and M'Aulay. The facts must be noted. M'Ferrin, a miner, fired a shot and went to a place of safety, and believing that his shot had exploded, returned to the shot hole within the period during which all persons were prohibited by statutory regulation from approaching the shot hole. The shot exploded, and he was seriously and permanently disabled. I can detect no relevant distinction between the conduct of M'Ferrin and the conduct of Donnelly in the earlier case. M'Aulay, a miner, was engaged with a fireman in firing by electricity a series of shots in a mine. After one of the shots had exploded he came from his place of safety and coupled the electric cable to the detonator of the next shot. This was a breach of a statutory regulation under or by virtue of which the only person to do the coupling of the cable to the detonator was the fireman. By ill luck the fireman at that moment moved the handle of the firing battery which was still attached to the cable, with the result that the shot exploded, inflicting such injuries on M'Aulay that he died. It was held that in *M'Ferrin's Case* (2) s. 7 of the 1923 Act applied and that the accident must accordingly be deemed to arise out of and in the course of his employment; but that in *M'Aulay's Case* (2) the section did not apply because he was at the time of the accident arrogating to himself a duty restricted to the fireman.

LORD DUNEDIN delivered the leading judgment, and he undoubtedly used language in relation to s. 7 of the 1923 Act which, taken in its widest significance, would seem to indicate that notwithstanding the words "shall be deemed to arise out of and in the course of his employment" which occurred in that section, and which now occur in s. 1 (2) of the 1925 Act, it would still be necessary in all cases before the benefit of the second subsection could be claimed, to prove that the accident in question did in fact and in law arise out of and in the course of the employment. If this were right, *Donnelly's Case* (7) would still have to be decided now as it was decided in 1920, for in that case it was plainly stated that the workman, in breaking the regulation, was acting outside the sphere of his employment, i.e., he was doing what he was not employed to do. But M'Ferrin (although like Donnelly he was breaking a regulation and consequently acting outside the sphere of his employment) was held to be protected by s. 7. The general words used by LORD DUNEDIN cannot therefore bear their full signification. Indeed, if in all cases before a claimant could claim the benefit of this remedial provision he had to prove that the accident did arise out of and in the course of the employment, it is difficult to see how an opportunity for "deeming" it so to arise could ever present itself. Later portions of LORD DUNEDIN'S speech make his meaning clear. He limited the operation of s. 7 by saying that, notwithstanding that section it was still open to the employer to show that the accident did not arise out of the employment by showing "that the workman was doing something which was not his employment," or "doing something different in kind from anything he was required to do." If that were shown then, he said, the case never came within s. 7 at all. In the result M'Ferrin was held to be covered by s. 7, although he was doing something (namely, going on a prohibited area) which by reason of the prohibition was not within the scope of his employment. He was doing his job, but while doing his job he broke a regulation. On the other hand, M'Aulay was held to be outside the section, because he was doing something which (in addition to being prohibited by the regulation) was not his job at all. The present case upon its facts, and notwithstanding but consistently with the limitation placed by that decision upon the operation of s. 7 of the 1923 Act, falls in my opinion within the provisions of s. 1 (2) of the 1925 Act. As I read the judgment of the arbitrator here, he finds all the facts necessary to bring the case within the requirements of sub-s. (2). The workman's job took him to both sides of the pit bottom. He had been properly on the empty side and had to get back to the full side. When the accident happened he was doing his job, namely, getting back to the full side, although in doing it he was doing something which by reason of the regulation was not within the scope of his employment. That is what M'Ferrin had done, and that, to adopt Lord Dunedin's language, is precisely the case for the application of sub-s. (2).

That this view is correct is I think strongly borne out by the opinions expressed in the speeches of Lord Dunedin and Lord Wrenbury in the *Garrallan Case* (1). That case and the present one are similar in their facts except that we have here something which was absent in the *Garrallan Case* (1), namely, the finding of the arbitrator that the act in question was done by the workman for the purposes of and in connection with his employer's trade or business. I have no doubt that with such a finding on the record in the *Garrallan Case* (1), the decision must have been the other way. In that case the arbitrator found that the act of the workman was not proved to have been done by him for the purposes of and in connection with his employer's trade or business. Lord Dunedin, after stating that the regulation (which was the identical regulation here in question) was a prohibition which limited the scope of the employment, continues thus ([1927] A.C. at p. 67):

> "That being so, it is quite clear that if it had not been for the recent Act he could not have recovered, because the accident would not have been arising out of his employment. But then comes the recent Act of 1923 [and he reads s. 7]. There is no question, therefore, that it falls within the Act, only you must prove that it was done in contemplation and furtherance of his employer's business. It is clear that there the onus is upon the workman, and the question is: Has he discharged that onus?"

In that case the arbitrator found that he had not. In the present case the applicant has. Lord Wrenbury makes it equally clear that the dependants only failed because there was no finding of the fact which was required by the last words of s. 7.

The Court of Appeal seem to have decided the present case upon the footing that the arbitrator had found as a fact that the accident did not arise out of or in the course of the employment, and that such a finding must not be disturbed. This appears to me to be a misconception of the arbitrator's judgment. As I read that judgment, the arbitrator would have decided in favour of the applicant upon the strength of sub-s. (2), and the *Garrallan Case* (1), had it not been for a subsequent decision in this House of *Stephen* v. *Cooper* (3). The arbitrator treated that case as a decision on the subsection, and as deciding that if the act which the workman was doing at the time of the accident was outside the scope of his employment and added a peril to it, the subsection did not apply at all. He accordingly felt bound to hold that the accident did not arise out of the workman's employment and that the claim for compensation failed accordingly. This is not a finding of this as a fact upon the evidence. It is a misdirection based upon a misconception of *Stephen* v. *Cooper* (3). That case had nothing whatever to do with the subsection. The arbitrator's finding in *Stephen* v. *Cooper* (3), that the act of the workman was not done for the purposes of and in connection with his employer's trade or business, effectively prevented the subsection from having any connection with the case. The subsection is only mentioned in the judgments for the purpose of explaining that it does not arise for consideration. The only decision in the case was that the workman had by his conduct added a peril to his employment, and that he was therefore acting outside the scope of his employment, with the result that the accident could not be said to arise out of his employment as required by s. 1 (1). It is no authority for any purpose in relation to the second subsection. A claim for compensation where the accident results in death or serious and permanent disablement is placed by the Act upon a more favoured footing than a claim where the accident does not so result. By s. 1 (1) (b) the defence that the injury is attributable to the serious and wilful misconduct of the workman, is not open to the employer where death or serious and permanent disablement results. The second subsection might have been framed upon similar lines, and might merely have provided that the fact that the workman was acting in contravention of a regulation could not be pleaded as a defence. In that case, as in the case of the proviso to sub-s. (1), the requirements of subsection (1) would still have had to be fulfilled. The claimant would still have had to prove that the accident arose out of and in the course of the workman's employment. But sub-s. (2) is, and I must assume designedly, framed on other lines. It provides that if the circumstances there specified in fact exist, then the accident shall be deemed (i.e., whether it does or not) to arise out of and in the course of the workman's employment.

The circumstances which are specified in the subsection and which are appropriate to the present case are these: (a) The accident resulted in death; (b) the workman was at the time when the accident happened acting in contravention of a statutory regulation; and (c) the act was done by the workman for the purposes of and in connection with his employer's trade or business. They all exist in the present case. The limitation imposed upon the operation of the subsection by the decision in *M'Aulay's Case* (2) does not apply. In accordance, therefore, with the subsection the accident must be deemed to have arisen out of and in the course of the workman's employment; and it can be no answer for the employer to say that the contravention of the regulations added a peril, and put the workman outside the sphere of his employment. This case, in my opinion, falls directly within the language used by LORD DUNEDIN in *M'Ferrin's Case* (2), when he said ([1926] A.C. at p. 388):

> "The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in *A. G. Moore & Co.* v. *Donnelly* (7), namely, that the prohibition . . . made it clear that what the workman was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7. The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition."

For these reasons I would allow this appeal with costs here and below. The order of the Court of Appeal and the award of the arbitrator should be set aside, and an award made in favour of the applicant for the agreed sum of £300.

LORD WRIGHT.—The findings of fact of the learned county court judge mean, in my judgment, that at the time of the fatal accident, Thomas was busying himself about the job for which he was employed. He was a hitcher

> "whose proper place was on the loading or full tram side of the pit bottom, but he was expected to assist in case of emergency in dealing with empty trams on the other side of the pit";

the judge further says that

> "having regard to Thomas's character as a workman and to the place where he was seen near the empty trams, I feel bound to draw the inference that he crossed the pit bottom to see to the proper working of the empties towards the main road, and there is no doubt that he crossed back under the descending cage towards his proper working side in order to be ready to receive that cage when it landed. Both the crossing and re-crossing of the pit bottom were therefore for the purposes of and in connection with the employer's business."

On these findings it would, I think, be clear that the accident arose out of and in the course of the man's employment, but for the fact that he was, in crossing the pit bottom, acting in contravention of the regulation. On the authorities as they stood before s. 7 of the 1923 Act (now s. 1 (2) of the 1925 Act, and hereafter described as sub-s. (2)) his contravening the regulation would have been held to take his case outside the Act: of the many cases cited in this House embodying the rule it is enough to refer to *A. G. Moore & Co.* v. *Donnelly* (7), where it was held that the breach of the regulation expressly excluded the prohibited act from the man's employment, and also involved an added peril which was outside the sphere of the employment. But the amending section deals (inter alia) in express terms with breaches of regulations, statutory or otherwise, and provides that notwithstanding the breach, the accident, if resulting in death, or serious and permanent disablement,

> "shall be deemed to arise out of and in the course of the employment if the act was done by the workman [as the judge has here found to be the fact] for the purposes of and in connection with his employer's trade or business."

The peculiar language "deemed to arise" is, no doubt, chosen to exclude any such rule as was accepted by the courts in regard to the defence of serious and wilful misconduct; that defence could be countered on the reasoning stated above by the plea that the man's breach of regulation took the case outside the Act so as to defeat the claim. The amending provision, by enacting that the accident, notwithstanding the breach, is still to be deemed to arise out of and in the course of the employment, treats the position as a matter of law, so that if once the terms of sub-s. (2) are complied with, the claim must succeed, whereas before the amendment on the authorities it must have failed. The position is clearly stated by LORD DUNEDIN (though only as a matter of observation) in *Garrallan Coal Co., Ltd.* v. *Anderson* (*or Devlin*) (1), where the workman was fatally injured by a breach of the same regulation in circumstances substantially identical with those in the present case, save that sub-s. (2) was not satisfied because the arbitrator did not find that the act was done in contemplation and furtherance of the employer's business.

On the ground of the absence of that necessary finding, and on that alone, it was held that the claim must fail. LORD DUNEDIN said that it was quite clear that if it had not been for the amending Act the man could not have recovered because the accident would not have arisen out of his employment, but that there could be no question that it fell within the Act, subject to proof that it was done in contemplation and furtherance of the man's employment. The change effected by the amending section is also illustrated by comparing with *A. G. Moore & Co.* v. *Donnelly* (7), a case before the amending Act, the cases after the amendment of *Wilsons and Clyde Coal Co., Ltd.* v. *M'Ferrin*, *Kerr* v. *James Dunlop & Co.* (2). The former of these two later cases was the exact analogue of *Moore's Case* (7): this House held that by virtue of the amending Act the claim must succeed: LORD DUNEDIN said ([1926] A.C. at p. 388):

> "The facts are really precisely the same as they were in the cases of *A. G. Moore & Co.* v. *Donnelly* and *Fife Coal Co., Ltd.* v. *Sharp* (*or Greenwood, or Colville*) (7), but s. 7 obviously applies and so the arbitrator and the court of session held. The only reason for saying that the accident did not arise out of the employment was the reason which was successfully urged in those cases, namely, that the prohibition in the Act of Parliament made it clear that what the man was doing was not within the scope of his employment, but that is precisely the case for the application of s. 7."

"The accident is to be deemed to have arisen out of the employment notwithstanding the prohibition." It would, accordingly, seem to follow that on the facts of this case as found by the judge the claim must succeed. But the simple issue has been complicated by what I venture to think, with deference to the learned lords justices, is a misunderstanding of the language which LORD DUNEDIN used by

A the Court of Appeal in this and in other cases, which has been construed as meaning that in any case in which the amending section is invoked, there is still a question "of fact and degree" to be determined by the arbitrator, namely, whether, though it is merely the contravention of a prohibition which is relied on as taking the case out of the employment, that contravention was of such a nature as to take the case out of s. 1 (1) of the Act, and that for the determination of that B question the cases before the amending Act, such as *Plumb* v. *Cobden Flour Mills Co.* (4), embodying the "tests" of "prohibited territory" or "added peril," are still to be applied. To apply that ruling to such a case is, in my judgment, contrary to sub-s. (2) and to the decision of this House in the contrasted cases of M'Ferrin and M'Aulay. Subsection (2) excludes any such question of fact; the word "deemed" quite clearly substitutes for any such question a conclusion of law; it C cannot be construed as meaning "shall be deemed to arise, etc," "provided the arbitrator does not come to a contrary finding of fact." *M'Aulay's Case* (2), in which the claim failed, was distinguished by this House from *M'Ferrin's Case* (2) on the ground that M'Aulay had not merely infringed a prohibition, but had trespassed outside the sphere of his work as a miner and had taken upon himself the work of an entirely different employment, that of a fireman. LORD DUNEDIN said D ([1926] A.C. at p. 390):

> "I read the Explosives Order, not in the sense of finding in it a prohibition, but as defining the duties of the fireman. These are the special duties of the skilled man, and undoubtedly the deceased man was not engaged to perform these duties. He was not a fireman and was not qualified to undertake a fireman's duty."

E

LORD DUNEDIN is there careful to emphasise the marked and deliberate departure from the man's scope of employment into an employment of an entirely different category which must have taken place if the man is not to have the benefit of sub-s. (2). His language is in sharp contrast with what he said earlier in these cases in reference to *M'Ferrin's Case* (2), as quoted above. He sums up the dis- F tinction thus ([1926] A.C. at p. 387):

> "It is not that there is a specific prohibition; it is that it is not his employment which he was engaged in."

Such a question cannot arise in the present case, where there is a finding that, though the workman contravened the prohibition, he did so in the course of doing the job for which he was employed, though no doubt under the amended Act his G contravention would have taken the case outside the statute.

It was, indeed, submitted in argument before your Lordships that sub-s. (2) is self-contained in regard to the sphere of employment, so that if its precise conditions are fulfilled the matter is, ipso facto, concluded as a question of law, and hence no further question arises in regard to satisfying s. 1 (1). I think the decision of this House in *M'Aulay's Case* (2) precludes this contention; but in any H case, in my opinion, the precise conditions required by LORD DUNEDIN before any question of fact can be entertained to restrict the remedial operation of sub-s. (2) must be strictly observed, hence no question can arise of the case being excluded under sub-s. (1) on the ground of breach of prohibition; it must be found that the man had actually deserted the task for which he was paid in order to do someone else's work of a different category. He must be found to have changed his employ- I ment not in the artificial sense of contravening a regulation and thereby taking an unnecessary risk, but in the ordinary and everyday sense in which a man is said to be doing another job, as illustrated by *M'Aulay's Case* (2).

I have not so far dealt with the latter part of the learned county court judge's judgment or the reasoning which led him to feel that he was bound to hold as a conclusion of law that the accident did not arise out of Thomas's employment. I think he has done so because he has misapprehended the effect of *Stephen* v. *Cooper* (3), and has treated that case as an authority on the interpretation of sub-s. (2), whereas in that case no question under sub-s. (2) arose at all. The findings of the arbitrator were stated by LORD HAILSHAM, L.C. ([1929] A.C. at p. 573), as amounting to findings that the accident was caused solely by the man's foolhardy act of bravado. The House simply applied to these findings (which were perhaps somewhat harsh to the man) the rules laid down in cases like *Plumb* v. *Cobden Flour Mills Co., Ltd.* (4) and *Lancashire and Yorkshire Rail. Co.* v. *Highley* (5), to the effect that "added peril" or "enhanced risk" due to the man's own conduct took the case out of the Act; the remedial provision of sub-s. (2) was not in question and had no application to the case. It was, however, argued before your Lordships on the authority of *Stephen* v. *Cooper* (3) that in the present case, though the conditions of sub-s. (2) were fulfilled, the matter could still be envisaged from the standpoint that the infringement of the prohibition "added a peril," and this "added peril" took the case out of the employment and barred the claim notwithstanding sub-s. (2). Such an argument attempts to create a notional dissection of the single act from which the accident resulted. It is, however, only one act that caused the accident. The act cannot be split up into two aspects so that though it falls within sub-s. (2) as a breach of a prohibition it falls outside sub-s. (1) as an "added peril." Since a breach of prohibition must almost invariably involve an enhancement of risk, the contention would in effect nullify any remedial effect of sub-s. (2). But the argument completely fails, I think, on the sole ground that, for the reasons I have already stated, the express words of sub-s. (2) (once the conditions of the subsection are fulfilled) must override and exclude any "test" or "formula" such as that of "added peril." I think the actual conclusion of the learned county court judge is based on an erroneous understanding of law. I think the appeal should be allowed. A B C D

Appeal allowed. E

Solicitors: *Smith, Rundell, Dods, & Bockett*, for *Morgan, Bruce, & Nicholas*, Pontypridd; *Bell, Brodrick, & Gray*, for *Arthur J. Prosser*, Cardiff.

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

F

KOCH *v.* DICKS G

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), November 3, 4, 1932]

[Reported [1933] 1 K.B. 307; 102 L.J.K.B. 97; 148 L.T. 208;
49 T.L.R. 24; 38 Com. Cas. 66]

Bill of Exchange—Avoidance—Material alteration—Change of name of place where bill drawn—Inland bill converted into foreign bill—Burden of proof—Bills of Exchange Act, 1882 (45 *& 46 Vict., c.* 61), *s.* 64 (1). H

Completed bills of exchange which, on the face of them, were inland bills within s. 4 (1) of the Bills of Exchange Act, 1882, were altered by the substitution of a German town for London as the place where the bills were drawn, the bills thus becoming foreign bills within the subsection.

Held: an alteration which affected rights and obligations as between the parties to a bill was a material alteration within s. 64 (1) of the Act, whether it was beneficent or prejudicial to the party making it; the alteration in the present case must alter to some extent the relation of the parties to the bills and their rights and obligations; and, therefore, the bills were void. I

Per SCRUTTON, L.J.: A person who claims on a bill which is manifestly altered must take the burden of showing that the alteration does not change the liability of the parties to the bill.

Foster v. *Driscoll* (1), [1929] 1 K.B. 470, distinguished.

Notes. As to alterations in a bill of exchange, see 3 Halsbury's Laws (3rd Edn. 232–234, and for cases see 6 Digest 372 et seq. For Bills of Exchange Act, 1882, see 2 Halsbury's Statutes (2nd Edn.) 505.

Cases referred to:

(1) *Foster* v. *Driscoll*, *Lindsay* v. *Attfield*, *Lindsay* v. *Driscoll*, [1929] 1 K.B. 470; 98 L.J.K.B. 282; 140 L.T. 479; 45 T.L.R. 185, C.A.; Digest Supp.

(2) *Gardner* v. *Walsh* (1855), 5 E. & B. 83; 24 L.J.Q.B. 285; 25 L.T.O.S. 155; 1 Jur.N.S. 428; 3 W.R. 460; 3 C.L.R. 1235; 119 E.R. 412; 6 Digest 377, *2481*.

(3) *Pigot's Case* (1614), 11 Co. Rep. 266; 77 E.R. 1177; 17 Digest (Repl.) 248, *512*.

(4) *Master* v. *Miller* (1793), 2 Hy. Bl. 141; 1 Anst. 225; 126 E.R. 474; 5 T.R. 367; 2 R.R. 399, Ex. Ch.; 6 Digest 372, *2450*.

Appeal from an order of Charles, J.

The plaintiff, Carl Koch, of Tressingen, Germany, as endorser, sued the defendant, F. L. Dicks, an English merchant, as acceptor, of seven bills of exchange, one dated July 28, four dated Aug. 11, and two dated Sept. 1, 1931, payable in each case five months after date. As to two of the bills the defendant paid the sum claimed—£151 4s. 1d.—into court; as to the remaining five he pleaded that they had been materially altered without his assent, and so were avoided under s. 64 (1) of the Bills of Exchange Act, 1882.

The seven bills were accepted in payment for wireless apparatus sold to the defendant by a German company, Radio Aktien-Gesellschaft Vormals E. Manger. There was no evidence as to how exactly the bills were drawn or accepted. They were drawn on stamped paper, purported to be drawn in London, and were dated as above stated. The Court of Appeal drew the inference from the bills themselves that the defendant wrote his acceptance on the bills, and then sent them to the German company in Germany, who placed their name upon them as drawers, with the signatures of two directors. The bills, which were expressed to be payable to the order of the drawers, were endorsed to Carl Koch, whose bankers refused to discount them unless they were altered by substituting the name of "Deisslingen" for that of "London" as the place of drawing. Carl Koch took the bills to the drawers, who so altered the five bills which thus became foreign bills. The Court of Appeal refused to accept the contention of the plaintiff's counsel that on the evidence the court should conclude that the drawers were authorised by the defendant, the acceptor, to make these alterations. The alterations were plainly apparent upon the face of the five bills. In due course the seven bills were presented for payment and dishonoured, and this action was then brought. Charles, J., held that the five bills had been materially altered, as they had been changed from inland into foreign bills, whereby certain of the parties to the bill might become liable to the expenses of protest, apart from any loss due to the rate of exchange. Accordingly, he gave judgment for the defendant, and the plaintiff appealed.

The Bills of Exchange Act, 1882, provides:

> "Section 3 (4): A bill is not invalid by reason . . . (c) That it does not specify the place where it is drawn or the place where it is payable."
>
> "Section 4 (1): An inland bill is a bill which is or on the face of it purports to be both drawn and payable within the British Islands or drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. . . ."
>
> "Section 64 (1): Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration and subsequent endorsers. Provided that where a bill has been materially altered but the alteration is not apparent, and the bill is in the hands of a holder in

> due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor." A
>
> "Subsection (2): In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Van den Berg, K.C., and *Harold S. Simmons* for the plaintiff. B

J. B. Herbert for the defendant.

SCRUTTON, L.J.—This case, though it has no particular merits, raises a general principle applicable to negotiable instruments, and so, it appears to me, to be of some importance. It arises in this way. An English merchant named Dicks had bought some loudspeakers, or apparatus connected with radio, from a German C company carrying on business in Germany, Radio Aktien-Gesellschaft Vormals E. Manger. Mr. Dicks accepted certain bills of exchange, or documents which would become bills of exchange, for the price of those loudspeakers, and he was sued by Mr. Koch, a gentleman who, I understand, had put his name on the bills as having financed the German company in order that the German banks might discount them. D

Mr. Koch, the endorser, sued Mr. Dicks on the bills. The only point taken by the defendant was this: "You are suing me on seven bills, and as to five of them there is an apparent alteration on their face, in that the place of drawing, London, on the original bill, has been altered to Deisslingen, a place in Germany, and that alteration is a material alteration and avoids the five bills under s. 64 (1) of the Bills of Exchange Act, 1882." Two of the bills, apparently, had not that alteration, and as to those two bills the defendant paid the sum claimed into court, but he defended the action as against the other five bills. The learned judge at the trial in the short cause list found that this defence was good. E

There is great obscurity as to what exactly happened in England, because no evidence was really given about it. Counsel for the defendant says that the reason why no evidence was given about it was because the point which counsel F for the plaintiff has raised in the Court of Appeal that the circumstances in which the bills were accepted gave authority to the plaintiff who held the bills to alter the bills, was not raised in the court below. If it had been raised, he said, evidence could have been called as to what happened in London. No such point was taken, and we have not got any evidence as to what happened in London, except such as we can draw from looking at the bills themselves. The bills themselves are on G stamped paper, which is necessary where a bill is an inland bill under the Bills of Exchange Act, 1882. In the condition in which they were when they were accepted they were said to be drawn in London; there appears on the bills the word "London" and a date, and they were expressed to be payable five months after that date. The typing of the body of the order—"on such and such a date pay to the order of the Radio company"—is the same type, obviously, as the type in H which the bill is accepted—"accepted payable at Barclays Bank, Brondesbury Branch." Although it is rather an odd performance, I draw the inference that the bills were typed by the acceptor, of course, no doubt at the request of somebody on behalf of the proposed drawer. Whether that was done by letter, or whether it was done by some representative of the radio company appearing in London, seeing Mr. Dicks, and asking him to do this, there is no evidence and we I are quite in the dark as to what exactly happened. But I think we can gather from the bills that when each bill was accepted there was no drawer's name on it, and I assume, therefore, that this bill comes within the language of sub-s. (1) of s. 20 of the Bills of Exchange Act, 1882:

> "When a bill is wanting in any material particular, the person in possession of it has a primâ facie authority to fill up the omission in any way he thinks fit."

It looks as if, and I proceed in my judgment on the assumption that, when Mr. Dicks accepted these bills the drawer's name was not upon them. The bills in

A that condition were given to the radio company and, again, I infer from the bills that when each bill got back to them in Germany they then put the drawer's name on it, the name of the company with the signature, apparently, of two directors.

The next step was to obtain money for the bills. Mr. Koch's evidence is obscure—whether he and the interpreter did not understand each other, or whether he did not understand what he was being asked—but I gather that B Mr. Koch, who has financed the radio company, was ready to assist them to obtain money by putting his name on the bills as endorser. The bills being then completed bills, with the drawer's name filled in, and on the face of them being inland bills, as appears from s. 4 (1) of the Bills of Exchange Act, 1882, he went to a bank with those bills but the German bankers said: "No, we will not advance any money on those bills, even with your name on the back, but C if you alter the place of drawing from London to Deisslingen then we will do so." Whereupon Mr. Koch went away with the bills to the radio company, and they altered the bills, which were then completed bills, by changing the place of drawing from London to Deisslingen. This, I think as appears from the definitions in s. 4 of the Act of 1882, turned the bills, if they were at that time inland bills, into foreign bills.

D The question at issue is whether that alteration discharges the acceptor. Section 64 (1) of the Bills of Exchange Act, 1882, provides:

> "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent endorsers."

E The question raised in the court below was whether this is a material alteration. It is an apparent alteration because it appears quite clearly on the face of the bill that "London" has been struck out—it is visible still on the bill—and the directors of the radio company have made it quite clear that it is altered by putting on all the bills, except the two that were not altered, the word "changed," and signing F the alteration, so that it is clearly a bill that has been altered. Has it been materially altered? Subsection (2) of s. 64 provides:

> "In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

G Counsel for the plaintiff says, quite truly, that this subsection does not mention the place of drawing, and he says, which is also quite true, that subsection (4) of s. 3 of the Act provides:

> "A bill is not invalid by reason . . . (c) that it does not specify the place where it is drawn."

H He says it would not have mattered if no place of drawing had been put in, and consequently it is not material that the place has been put in and then altered. Now, s. 4 defines the difference between an inland bill and a foreign bill:

> "An inland bill is a bill which is, or on the face of it purports to be, both drawn and payable within the British Islands or drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill."

I Each bill, as it was when the drawer's name was inserted after it had been accepted, was a bill purporting to be drawn within the British Isles, and payable within the British Isles. Consequently, in its state when completed, it was an inland bill. By striking out "London" as the place of drawing, and inserting "Deisslingen," it ceased to be drawn within the British Isles and it became a foreign bill. There, undoubtedly, are differences in English law between an inland bill and a foreign bill: it may have different legal incidence. One difference is as to the necessity for protest which follows on the dishonour of a foreign bill: see s. 51 (2) of the Act; and the expenses of protest. It is a small matter, but it is a difference between the two kinds of bill. There may be another difference—I do not wish to speak too positively as to the exact nature of this difference—under the Stamp Act, 1891, because stamp duty has to be paid in a different way on a foreign bill from that which is necessary on an inland bill, where it must be done, as it was originally in this case, by means of an impressed stamp.

It only remains, therefore, to consider whether an alteration which does affect the rights as between the parties to a bill is a material alteration. I am of opinion that any such alteration, whether it be beneficial or prejudicial to the party making the alteration, is an alteration which renders the bill void. I think the law in that respect is the same as the law as to sureties, as expressed by LORD CAMPBELL, C.J., in *Gardner* v. *Walsh* (2) (5 E. & B. at p. 89):

> "But we conceive that he is discharged from his liability if the altered instrument, supposing it to be genuine, would operate differently from the original instrument, whether the alteration be or be not to his prejudice."

I decide this case chiefly on the fact that, in my view, the alteration of an inland bill to a foreign bill must be material, because it must alter to some extent the relation of the parties to the bill, and their rights and obligations. But I am also inclined to decide this case, and do, on this further ground. I am very much impressed by the fact that the German bankers, who know German law very well, would not deal with this bill unless it was altered from a London place of drawing to a German place of drawing, and I notice on the bills that some things have been done which are obviously not necessary by English law and which must, therefore, have been necessary for German law, and their presence, or absence, may involve material alterations in the rights or duties of the parties to the bill. No evidence was given as to German law, and, in my view, a person who claims on a bill which is manifestly altered must take the burden of showing that the alterations do not change the liability of the parties to the bill, and where those rights may be governed by German law he must show that by German law the alterations do not in any way affect the rights and liabilities of the parties to the bill.

There is only one matter further I ought to mention. The learned judge below refers to a view which has been put before me, that the decision of this court in *Foster* v. *Driscoll* (1), particularly a passage in my judgment ([1929] 1 K.B. at p. 494), shows that the alteration of the place of drawing would not in this case be material. In my view, *Foster* v. *Driscoll* (1) does not apply to this case, because the facts there were quite different. The alteration of the place of drawing in that case from "London," which was in a lithographed form, to "Lausanne," where the bill was in fact drawn, was made while the bill was an incomplete instrument, a purported English bill on unstamped paper, with no time for payment filled in; it was not a completed bill at the time. The alteration, such as it was, the striking out of the word "London," in the lithographed form, and putting in the word "Lausanne," was made to an instrument which was not a bill. In the present case the alteration was made to a completed bill; the names of the drawers had been put in, and on the face of it the bill was, as it stood then, an inland bill; a completed bill was then altered by striking out the purported place of drawing in the bill and substituting another place of drawing. In my view, that is quite a different position from that which occurred in *Foster* v. *Driscoll* (1), and the passage in my judgment in *Foster* v. *Driscoll* (1) is no authority for the proposition that an alteration of the place of drawing after the bill has been completed is immaterial.

For these reasons, which I have gone into at some length, not because there are any particular merits in this case, but because the general principles are, I think, of some importance with regard to negotiable instruments, I am of opinion that CHARLES, J., came to a right conclusion, and the appeal must be dismissed with costs.

GREER, L.J.—I have with great reluctance come to a similar conclusion, and my reluctance is due to the fact that the liability of the acceptor of this bill is in

A no respect larger or different from what it would be if it were rightly held to have been drawn as a German bill. His liability to pay is exactly the same, whether it is an inland bill or a foreign bill, because as against the acceptor it is not necessary to protest the foreign bill, but only in order to make the drawer or subsequent endorsers liable on such a bill: see s. 51 (2) and s. 52 (3) of the Bills of Exchange Act, 1882; but, of course, the acceptor is entitled to take any objection to his B liability on the bill which in law is open to him, leaving him if it happened to be right, liable on the original consideration, as he has not been found liable on the bill.

The first question which arises in this appeal is whether or not there was a material alteration in the bill, and the second question is whether, assuming that there has been a material alteration, that alteration was authorised by the only person we are here concerned with, namely, the acceptor, before the issue of the C bill. On the first question we were referred to a statement of the law in the article on Bills of Exchange and Promissory Notes in the latest edition (1931) of HALSBURY'S LAWS OF ENGLAND, vol. 2, p. 714—a statement for which, though inaccurate, I accept full responsibility. It is in these terms:

> "On the other hand, the following alterations have been held to be immaterial: the addition of a wrong date for the maturity of the instrument, the elimination D of the words 'or order' in an instrument payable to order, the conversion of an instrument payable to the payee or order into one payable to him or bearer, the alteration of the drawee's style when wrongly stated in the bill to his true style as signed by him in his acceptance, or alteration of the place where the bill was drawn":

E see now 3rd Edn., vol. 3, p. 233. We are only concerned with the last few words of that long sentence, "alteration of the place where the bill was drawn." I have no doubt that, in nine cases out of ten, that accurately represents the law. If a bill be drawn in London and is altered so that it appears to have been drawn, say, in Southampton, there would not be an alteration of anything which was material to the liability of anybody upon the bill, but if it is altered as between London F and a place in Germany, that raises quite a different situation, because the statute relating to bills of exchange has provisions which apply to inland bills and others which are different applying to foreign bills. It is not ad rem to say that, as between parties to the litigation, no alteration is made by reason of the change of place, because a bill of exchange is one of those unusual forms of contract that apply between diverse parties who have had no direct relation with one another, G by means of endorsement. Once the bill is made payable to bearer by delivery, other parties come into the contract which is made originally between the drawer and the acceptor, and if a bill has been so altered as to affect the liability between the subsequent parties, it seems to me impossible to say that such an alteration is not a material alteration of the bill. It does not matter, as was pointed out in *Gardner* v. *Walsh* (2) to which my Lord has referred, whether the alteration of H the bill makes it more favourable to the holder who seeks to enforce the obligations, or less favourable to the holder, if in fact it alters the legal incidence of the bill. As against the drawer, this alteration did alter the legal incidence of the bill; it made the drawer liable for what he would not otherwise have been liable, namely, to pay the sums due, if called upon, for protest of the bill, and although it is an alteration which the drawer made, an alteration which was for the benefit of every- I body else and which was to the detriment of the drawer, still that does not make it any the less a material alteration of the bill, which is a contract of the kind I have mentioned.

The only doubt I have had about this part of the case is whether or not some of the observations which were made in the case cited in HALSBURY'S LAWS OF ENGLAND, that of *Foster* v. *Driscoll* (1), do not seem to involve the proposition that an alteration of the place of the drawing of the bill from one country to another is not a material alteration, because it looks as if the facts in this case were identical with the facts in *Driscoll's Case* (1), with one exception, namely, that it may be said in the present case it was too late to undo the mistake that had been made by those who signed the bill as drawers on behalf of the radio company, because if, instead of altering the bill after it had got into the hands of the holder and of the holder's bank, the drawers had got it back while it was in the hands of the messenger and altered it, it would seem that that alteration would be effective, and if the bill had gone into circulation the bill would have been a good bill. But that exception does seem to distinguish this case. For when the facts in this case are carefully considered, the very thing which was intended to be rendered illegal, or unauthorised and ineffective by the Bills of Exchange Act, 1882, was done after the document became a bill effective in the hands of the holder, and not before. For these reasons, though with some reluctance, I think the point made on behalf of the appellant that the alteration was not a material alteration necessarily fails.

The other question is a question of some difficulty also. Can we say that sufficient facts have been established to enable the court to conclude that the drawers were authorised by the acceptor and the holder to make this alteration in the bill? There can be no doubt whatever that the holder was quite content that the alteration should be made, because he sent it back through his bank in order that the alteration should be made. The only point left is whether we can say that there was authority on the part of the acceptor, who was not present at the time of the alteration—authority given in advance—which would enable the drawer, or anybody who was interested, to say that the alteration made by the drawer was made with the authority and consent of the acceptor. The first of these bills, when it started on its journey, had the words on it: "London, July 28, 1931." A bill is primarily a document which is supposed to be drawn by the drawer of the bill and addressed to the acceptor, and when you find "London" on the top of it before the words which created the obligation of the acceptor to accept and pay, it necessarily means that that is the address which the drawer is putting upon the bill, or if the bill is written out before it comes to the hands of the drawer, the address which it is intended that the drawer should put as his address upon the bill, and I think, by sending over the bills in this form with the address of "London" upon the top as the address which the acceptor expected the drawer to put in the bill, there is authority, and only authority, to make this bill in a form in which it will purport to be an inland bill, and will therefore have the effect of an inland bill, although everybody may learn afterwards that it was not in fact so. I cannot draw the inference we were asked to draw that there was authority in the first instance to the German drawers to draw the bill in any other form, except in the form in which it was sent over, namely, as a bill purporting to be an English inland bill.

No doubt, on the authority of *Driscoll's Case* (1) there would have been nothing fatal to the instrument if the bill had been drawn in the first instance as a bill drawn in Deisslingen, notwithstanding the fact that the name "London" was still upon the bill, it would then have been a foreign bill and would have passed subject to the incidence of a foreign bill and would have been available in the hands of the holder as a foreign bill, but possibly there might have been some claim on behalf of the acceptor if he had suffered damage by reason of the drawer having, without his authority, converted what was intended to be an inland bill into a foreign bill. But it is difficult to see how any damages could in fact arise, not even the amount of the protest. However that may be, that is a different situation from the situation created by altering the bill after in fact it had become a bill, by being issued to a holder. For these reasons, though with great regret because there are absolutely no merits in the defence put forward by the acceptor of these bills, I agree that this judgment must stand and the appeal must be dismissed with costs.

SLESSER, L.J.—I agree. This bill was drawn in Germany; it contained on the face of it the place of drawing "London," and was, under s. 4 (1) of the Bills of Exchange Act, 1882, an inland bill in that, on the face of it, it purported to be

A both drawn and payable within the British Islands. The name of that place, "London," after the bill became a complete instrument, both the name of the acceptor and of the drawer being upon it, was altered to the name of a place called Deisslingen, and by that alteration, if the bill be regarded after that alteration, it was a foreign bill within the meaning of the Bills of Exchange Act, 1882, and so there was brought about an alteration in the bill. The question we have to consider
B is whether that alteration was a material alteration so as to avoid the bill within the meaning of s. 64 of the Bills of Exchange Act, 1882.

The particular point we have to consider never appears to have been specifically decided. Counsel for the plaintiff has called our attention to the fact that sub-s. (2) of s. 64 contains a number of instances of alterations which are thereby defined by statute to be material. The language used is:

C

> "In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Those particular instances appear to be a collocation of alterations which have been
D decided from time to time as being material. The particular alteration here made, namely, the alteration of the place where the bill was drawn, has not been the subject of judicial consideration, and I have come to the conclusion that this is a material alteration, not because the name of the place has been altered, but because, in the particular circumstances of this case, the alteration of the name has altered the bill from an inland bill to a foreign bill. It may well be that an
E alteration, say, from London to Ealing, or from Birmingham to Bristol, may not be a material alteration, but an alteration which produces a different order of bill altogether must, in my opinion, of necessity be a material alteration. Indeed, in a way, the alteration is more essentially material than the cases cited in sub-s. (2) of s. 64, because those are alterations as to the facts of the particular bills concerned, alterations of date, sums payable, and the like, but here the alteration is
F introducing a general change in the whole nature of the bill under the statute, not only as between the parties, but as a matter of general law. I find it impossible to think, when something has been done which, as a matter of general law, alters the whole nature of the instrument, that it can possibly be said that such an alteration is not a material alteration.

For that reason, because the bill has been turned from an inland bill into a
G foreign bill, I think it must of necessity follow that the alteration must be material. As my Lord has pointed out, there is ample authority for the proposition that this question must not be looked at from the point of view of the benefit or detriment of the parties; it is the alteration of the bill as such which decides the matter. This language as to the material alteration of the bill is from a very ancient authority; it is derived, I think, from the second resolution in *Pigot's Case* (3),

H

> "when any deed is altered in a point material by the plaintiff himself or by any stranger without the privity of the obligee . . . the deed thereby becomes void."

That case has been often followed and referred to, more particularly on the authority of *Master* v. *Miller* (4), which extends the doctrine from a deed to a bill
I of exchange, and I take the word "material" here to mean, in addition to the matters specifically mentioned in sub-s. (2), any such alteration which would produce a change in the legal nature of the instrument. That is a point which has not yet been decided. It in no way conflicts with, or agrees with, the decision in *Foster* v. *Driscoll* (1), which was dealing with the case of an instrument which had not yet become complete. Here the instrument is stated to be drawn in London on the face of it; it is only afterwards that there was an alteration made, and as that alteration is a material alteration, and as, in my view, it cannot possibly here be said that the assent of the party liable on the bill had been obtained

(apart from the fact that it appears that point was never considered in the court A below), as certainly there was no evidence of it, it follows that sub-s. (1) of s. 64 is a complete defence in this case, and therefore this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Leader, Plunkett, & Leader*; *Alexander Fine, Hawkins & Co.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*] B

C

LEON AND OTHERS *v.* CASEY

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), April 25, 26, 1932]

[Reported [1932] 2 K.B. 576; 101 L.J.K.B. 578; 147 L.T. 165; D
48 T.L.R. 452; 37 Com. Cas. 330; 18 Asp.M.L.C. 300]

Insurance—Marine insurance—Discovery—Ship's papers—Policy in form marine policy and including warehouse to warehouse clause.

If a policy of insurance is in the form of a marine policy covering risk at sea the fact that it covers not only transit by sea but also preliminary and subsequent transits by land does not preclude an order for discovery of ship's E papers being made in an action on the policy.

Goods were insured for the voyage from Cairo to Jaffa by a named steamer, the policy also containing a warehouse to warehouse clause. On the transit by land from Cairo to Alexandria by motor lorry, the goods were burnt. An order for discovery of ship's papers having been made,

Held: the policy, being substantially a marine policy, the order for discovery F of ship's papers had been rightly made.

Harding v. *Bussell* (1), [1905] 2 K.B. 83, followed.

Notes. As to the practice on an application for an order of discovery of ship's papers, see R.S.C., Order 31, r. 12A, and 22 HALSBURY'S LAWS (3rd Edn.) 172–175, and for cases see 18 DIGEST 93–95.

G

Cases referred to:

(1) *Harding* v. *Bussell*, [1905] 2 K.B. 83; 74 L.J.K.B. 500; 92 L.T. 531; 21 T.L.R. 401; 10 Asp.M.L.C. 50; 10 Com. Cas. 184, C.A.; 18 Digest 93, *451*.

(2) *Goldschmidt* v. *Marryat* (1809), 1 Camp. 559; 18 Digest 94, *454*.

(3) *Fraser & Co.* v. *Burrows* (1877), 2 Q.B.D. 624; 46 L.J.Q.B. 501; 18 Digest 94, *456*. H

(4) *West of England Bank* v. *Canton Insurance Co.* (1877), 2 Ex.D. 472; 18 Digest 93, *442*.

(5) *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.*, [1922] 1 K.B. 563; 91 L.J.K.B. 370; 126 L.T. 620; 15 Asp.M.L.C. 445; 27 Com. Cas. 130, C.A.; 18 Digest 94, *455*.

(6) *China S.S. Co.* v. *Commercial Assurance Co.* (1881), 8 Q.B.D. 142; 51 I L.J.Q.B. 132; 45 L.T. 647; 30 W.R. 224, C.A.; 18 Digest 95, *461*.

(7) *China Traders' Insurance Co., Ltd.* v. *Royal Exchange Assurance Corpn.*, [1898] 2 Q.B. 187; 67 L.J.Q.B. 736; 78 L.T. 783; 46 W.R. 497; 14 T.L.R. 423; 42 Sol. Jo. 507; 8 Asp.M.L.C. 409; 3 Com. Cas. 189, C.A.; 18 Digest 93, *447*.

(8) *Henderson* v. *Underwriting and Agency Association*, [1891] 1 Q.B. 557; 60 L.J.Q.B. 406; 64 L.T. 774; 39 W.R. 528; 7 T.L.R. 367, D.C.; 18 Digest 93, *449*.

(9) *Village Main Reef Gold Mining Co.* v. *Stearns* (1900), 5 Com. Cas. 246; 18 Digest 93, *450.*

(10) *Schloss* v. *Stevens* (1905), 10 Com. Cas. 224, C.A.; 18 Digest 94, *452.*

(11) *Tannenbaum & Co.* v. *Heath*, [1908] 1 K.B. 1032; 77 L.J.K.B. 634; 99 L.T. 237; 24 T.L.R. 450; 52 Sol. Jo. 375; 13 Com. Cas. 264, C.A.; 18 Digest 94, *453.*

(12) *Teneria Moderna Franco-Española* v. *New Zealand Insurance Co.*, [1924] 1 K.B. 79; 93 L.J.K.B. 169; 130 L.T. 139; 16 Asp.M.L.C. 236, C.A.; 18 Digest 94, *456.*

Appeal from an order of MACKINNON, J., made in chambers.

The plaintiff's claim was for the loss by fire of hosiery and cotton goods in transit by lorry from Cairo to Alexandria, insured for £2,257 under a policy of insurance subscribed by the defendant and other underwriters. The defendant was an underwriting member of Lloyd's. The risk covered in the policy was "from Cairo to Jaffa in the good ship *Lotus*," and the policy contained a warehouse to warehouse clause. On April 11, 1932, MACKINNON, J., made the usual order for discovery of ship's papers by the plaintiffs.

The plaintiffs appealed.

H. G. Robertson for the appellants.
W. L. McNair for the respondent.

SCRUTTON, L.J.—This is an appeal from an order of MACKINNON, J., on a writ against Lloyd's underwriters endorsed:

> "The plaintiffs' claim is for the loss by fire of goods in transit by lorry from Cairo to Alexandria on or about June 9, 1931, insured under a policy of insurance dated July 2, 1931, and subscribed by the defendant and other underwriters. The plaintiff, Esther Crespin, sues as assignee of her co-plaintiffs."

On that writ MACKINNON, J., has ordered what is known as an affidavit of ship's papers. The plaintiffs appeal on the ground that this was not a case for an affidavit of ship's papers, but a case in which the ordinary order for discovery ought to be made. I need hardly explain that whereas the ordinary order for discovery is made after pleadings and relates only to documents which are or have been in possession of the plaintiff, an order for ship's papers goes very much farther and requires the plaintiff to produce from all persons who have any interest in the adventure—not in the policy but in the adventure—any material documents which are in their possession or to show that he has endeavoured to get but has not succeeded in getting them. People not accustomed to marine insurance have always felt a difficulty in understanding why this distinction should be made and have tried to restrict it as much as possible; and, in my view, it has always been logically difficult to account for the cases in which the order must be made and the cases in which it need not be made.

The origin of the order for ship's papers goes back to the time of LORD MANSFIELD. In those days common law courts did not order discovery, and if you wanted to obtain discovery of the papers in possession of the other side you had to apply for a bill in equity and get discovery in equity, and very frequently an action in the King's Bench was delayed while equity proceedings were going on. Partly in consequence of that and partly in consequence of the fact that insurance has always been said to be a transaction involving the utmost good faith where the assured is bound to communicate everything in his knowledge to the insurance company, both at the inception of the risk and at every subsequent proceeding during the risk—for instance, where he makes a claim—the King's Bench courts invented the order for ship's papers which is made as soon as the writ is issued in an action on a policy of marine insurance. The particular case which is always referred to, *Goldschmidt* v. *Marryat* (2), shows what was happening because there the plaintiff desired to get his case advanced so that he might go to trial without the bill of discovery in equity being filed, and there was a discussion there by the judges in which doubts were expressed whether this order for ship's papers was one which was usually made and ought to be made. In that case it will be seen that SIR JAMES MANSFIELD, C.J., sent Mr. Campbell, who was then a reporter in the Court of King's Bench, to inquire from the court what the practice was upon the subject, and Mr. Campbell having done so came back and reported in these terms: A B

> "Campbell, upon his return, certified, that LORD MANSFIELD had laid it down as a rule, that, although he would not wait for any proceedings in equity, he would on no account take a cause out of its course at nisi prius for the purpose of defeating them; and that the same rule had been observed by his two noble and learned successors, LORD KENYON and LORD ELLENBOROUGH."

C

The report then proceeds:

> "In the course of the discussion it was stated, on the part of the defendants, that they had applied to HEATH, J., for an order upon the plaintiff to produce upon affidavit all the papers in his possession concerning the cause, but that that learned judge had refused to make any order, except for the production of specific papers mentioned by the defendant, or, generally, for all papers without any affidavit." D

SIR JAMES MANSFIELD said:

> "I have great difficulty in believing this statement to be correct. I have made fifty such orders since I became Chief Justice of this court. I was, to be sure, a good deal surprised when they were first applied for, as nothing of the sort was known when I practised in the King's Bench. But I consulted the other judges, and found they had become extremely common. I think they have been very properly introduced, as they often obviate the necessity of going into a court of equity, and save a great deal of delay, expense, and litigation. Without requiring the plaintiff to produce the papers on affidavit, the order would be nugatory. He would only select such as could be of no use to the opposite party. Nor would it answer to limit the order to such papers as are specifically named, since there may be others which the party has not the means of describing, and which may be got at through the medium of a court of equity." E F

From that time there has been a regular practice in cases concerning policies of marine insurance, or, as one may also express it, in adventures involving marine insurance, to make an order, as soon as the plaintiff has issued his writ, that he shall disclose to the other side all material documents, not only those which he has in his own possession, but those which persons interested in the adventure—not merely interested in the policy, but interested in the adventure—must also have in their possession. If he cannot get the other doucments he must show on affidavit that he has been unable to get them. At that time insurance was almost entirely marine. Then the big companies came into existence and Lloyd's confined themselves to marine insurance, and it was not until enterprising underwriters at Lloyd's began insuring all sorts of risks which their predecessors never thought of, such as that a cricket match would not be spoilt by rain, that servants would be faithful and not commit frauds concerning their master's money, excess of bad debts, and so on, that a large volume of insurance grew up which was not marine in any sense, and in which the adventure never involved any marine risk. G H I

When the Judicature Act, 1873, was passed, and rules were made under it, it was held by some of the judges that the order for ship's papers had been superseded by the rules made under that Act: see *Fraser* v. *Burrows* (3). But in a case within six months of that order (*West of England Bank* v. *Canton Insurance Co.* (4)) another order in chambers to the same effect came before KELLY, C.B., sitting with CLEASBY, B. KELLY, C.B., who had been a party to the previous case, A was instructed by CLEASBY, B., and changed his mind, saying that the order for ship's papers continued. In *Graham Joint Stock Shipping Co.* v. *Motor Union Insurance Co.* (5) this court said again that *Fraser* v. *Burrows* (3) was wrongly decided, and that the order for ship's papers continued in its old form. In that case the court declined to make any order to produce the ship's papers relating to the ship which was, in fact, found to have been scuttled.

B As the scope of insurance grew at Lloyd's, other questions began to arise. Before I go into that I ought to say that BRETT, L.J., in *China Transpacific Steamship Co.* v. *Commercial Union Assurance Co.* (6) gave the reasons for the order for ship's papers and A. L. SMITH, L.J., repeated them in *China Traders' Insurance Co., Ltd.* v. *Royal Exchange Assurance Corpn.* (7). The extension of insurance from marine insurance to insurance for semi-marine or other than marine risks C soon began to raise the question how far the order for ship's papers extended. Logically it has always seemed to me that, if the justification of the order for ship's papers was the duty to disclose on the part of the assured, the order for ship's papers ought to extend to all insurances. But the development has not been logical. The reason given for the order for ship's papers applies equally to many other insurances, but it has not been extended beyond policies of marine insurance.

D As far as I know, the first case in which the question arose was *Henderson* v. *Underwriting and Agency Association, Ltd.* (8), and one of the difficulties in that case, so far as I can recollect, was that no one knew exactly how the papers were conveyed. But, on the case coming before CAVE, J., and JEUNE, J., a compromise order was made. The order for ship's papers was not made, but an order for discovery before pleadings was made, giving some effect to the duty of the assured E to disclose, but not the full effect that would be given by an order for ship's papers. *Henderson's Case* (8) was followed by a case before KENNEDY, J. (*Village Main Reef Gold Mining Co.* v. *Stearns* (9)), in which goods were insured from the mines in South Africa to London. The loss there occurred on the railway going down to the port of shipment, and KENNEDY, J., purported to follow the decision in *Henderson's Case* (8). The next case came before MATTHEW, L.J.—*Harding* v. *Bussell* F (1), which concerned goods in transit from various places in England, the farthest being Hull, to various ports, London or Southampton, and thence by sea to South Africa, and it was argued that, as the policy was partly for land transit, an order for ship's papers ought not to be made. There is a slight difference in the report of that case as between the COMMERCIAL CASES report and the report in the LAW REPORTS. In the report in COMMERCIAL CASES, MATHEW, L.J., said (10 Com. Cas. G at p. 188):

> "As I have said, the rule equally applies where the transit, though partly by land, is covered by a policy such as a policy in this form, which is substantially a policy of marine insurance. I am, therefore, unable to concur in the decision of KENNEDY, J., in *Village Main Reef Gold Mining Co.* v. *Stearns* (9), or of H the Divisional Court in *Henderson* v. *Underwriting and Agency Association, Ltd.* (8) if the latter case is to be regarded as a departure from the ordinary practice. I can see no reason why the ordinary practice should not be followed, though part of the transit covered by the policy be by land."

That is reported not quite so strongly in the LAW REPORTS—whether MATHEW, L.J., revised the report I do not know—but the passage in the LAW REPORTS as to I *Henderson's Case* (8) ([1905] 2 K.B. at p. 86) is this:

> "If I were called on to express an opinion I should doubt whether the decision was a correct one. It appears to have influenced my brother KENNEDY in the case that came before him, and he appears to have treated it as an authority that wherever any portion of the venture is a transit by land there is no right to an affidavit of ship's papers. In that view I cannot concur. As I have said, the reasons for ordering an affidavit of ship's papers apply equally in a case where a part of the transit is by land. The other cases which were cited

as authorities for the general rule need not be discussed, and I see no reason why the ordinary practice should be departed from in this case."

Very shortly afterwards the same learned judge, Mathew, L.J., had before him *Schloss* v. *Stevens* (10). In that case there was an insurance upon the goods "at and from on board the import vessel" at her port of discharge "to any place or places in the interior of the Republic of Colombia." It appeared that the transit was by railway, by mule pack and by river steamer and that the delay which had happened which had caused deterioration of the goods was owing to a breakdown of the railway. Mathew, L.J., said that the affidavit for ship's papers was ordered in marine insurance and not in an insurance of risks in inland waters, and as the only trace of "marine" in this case was the inland waters of the inland river the order for ship's papers did not apply. I have always wondered what would have happened if, the mode of transit being railway, mule pack and partly river, it had been partly up the Amazon where a steamer can go a thousand miles up the river and may ground and possibly suffer any amount of water damage. However, it was not, and being, by mule pack and railway, Mathew, L.J., said that inland waters were not a matter for ship's papers.

In *Tannenbaum & Co.* v. *Heath* (11), in the Court of Appeal, Lord Alverstone, C.J., presiding, sitting with Farwell, L.J., we find four different classes of adventure put into the same policy. Three of them have nothing whatever to do with marine insurance. The first is fire, limited to a place inland. The second is what is always known technically as the in-and-out policy by which the fidelity of servants in taking money in and out of a bank is guaranteed—again having nothing to do with the sea. The third is the risk in transportation of theft of the assured's property shipped to or from any salesman or customer by registered mail, express or messenger—again having nothing to do with marine—and the fourth is risk of transportation by sea. The particular adventure, the subject-matter of that claim, was fire on land, and the two arguments presented were these. On the one hand it was said: Here is a policy which in some circumstances may carry a marine risk, and, therefore, to the whole of the policy, whether it has anything to do with marine adventure or not, the rule of ship's papers ought to be applied. On the other hand it was said: This might have been marine adventure under this policy, but it was not; the thing which was insured had nothing to do with the sea or any marine adventure. Following that line, though giving, in my view, somewhat inconsistent reasons, the court said that the rule as to ship's papers would not apply to that adventure.

I need not go through the judgment in *Graham's Case* (5), which has been cited because there I gave, possibly at not the same length as I am doing now, the history of the procedure, which is set out in great detail in ss. 1271 and 1272 of Arnould on Marine Insurance. But one of my expressions in *Graham's Case* (5) was misunderstood by the counsel who argued the next case, *Teneria Moderna Franco-Española* v. *New Zealand Insurance Co.* (12); and an argument was put forward to limit the affidavit of ship's papers to documents in the possession of someone interested in the policy other than someone interested in the adventure, and the Court of Appeal had occasion there, while commenting on the form of the order for ship's papers, to say that it applied, not merely to people interested in the policy but also to people interested in the subject-matter of the adventure, such as the shipowner, though he had no interest in the policy on the goods. The court suggested that the order for ship's papers should be revised; the Lord Chancellor appointed a committee consisting of some counsel and solicitors specially experienced in insurance matters; I was chairman of the committee and we made a report to the Lord Chancellor, in consequence of which the present form of order for ship's papers was sanctioned by the Rule Committee and incorporated in the rules.

In my view, in order to see whether the matter comes within the order for ship's papers, you must look at the policy and the adventure giving rise to the action.

The question is: Is the policy a marine policy—because that is really what it began with and ended with—that in connection with every marine policy an order for ship's papers should be made. Is the adventure in respect of which a loss is being claimed a marine adventure? If you find that the adventure has nothing to do with the sea at all, as, for instance, the in-and-out policy in *Tannenbaum's Case* (11), you will say: "No ship's papers," and if you find that the policy is not in the marine form at all, you will say: "No ship's papers." But if you find the policy in the form of a marine policy involving risk at sea, it does not, as MATHEW, L.J., said in *Harding* v. *Bussell* (1), exclude the order for ship's papers, although you find that in addition to the transit by sea there are preliminary and subsequent transits by land. That does not take the case out of the class of marine adventures, and it becomes very marked when you remember that of recent years—because it is a comparatively recent alteration—every marine policy, every policy for transit by sea, has included the warehouse to warehouse clause involving at the beginning and end of the marine adventure a transit by land; and in the case of transit at the end of the marine adventure it is extremely important that you should have full discovery. When the transit to the warehouse takes place, damage to the goods may be discovered, and there may be a question whether it happened at sea, and, if so, whether the ship was seaworthy, or whether it happened on land by reason of something not in any way connected with the sea. So far as regards the warehouse to warehouse clause at the end of the adventure, the reason is obvious, and, in my view, the practice has always been that the rule as to ship's papers applies though there is a warehouse to warehouse clause in the policy. It is curious that except in *Harding* v. *Bussell* (1) nothing has been said about it, but I think the explanation is that the limited class of people who deal with marine insurance and with the order for ship's papers have known that the practice is such that nobody has ever dreamt of raising the question; and it is only when very able and ingenious people who are not familiar with marine insurance make an incursion into that sacred sphere that words begin to be used that no man familiar with marine insurance would ever dream of using.

If that is the line to be followed, I look at the policy to see what it is. Obviously we have not got all the documents, because I have no doubt that there is behind this policy an open cover under which declarations will be made by the assured to the underwriter, but owing to the English stamp laws you cannot sue under an open cover; you are not able to fulfil the stamp law requirements of the policy that it should specify the adventure because the open cover is made before the adventures that are going to be declared on it are known. Means have been discovered to get round that system, and this is one of them. In this form of policy every week the adventures that have been declared during the week on the open cover are put into a stamped policy; that can be done at the end of the week because everything has been declared, and you can declare the amount and the adventures. Accordingly, one finds that this policy is a record of the risk covered for the week ended June 5, 1931. The policy bears on the outside: "Lloyd's, London. Steamers as specified. Voyages as specified. £6,028 on interest"—£6,028 being the amount that has been declared during the week. In the schedule of risks declared appears a particular number "Advices," so and so, "Insured, Leon"—Leon being the name declared—by the steamship *Lotus*. "Voyage from Cairo to Jaffa," and looking at the policy one finds the warehouse clause. The policy itself is in a marine form, but being drawn up in this form before the declarations were made it is for voyages as specified; and they are specified in the schedule in the policy: "Steamers as specified and/or steamers and/or conveyances as specified subject to classification clause as attached for steamers unnamed"—"Interest as specified." It is, therefore, obviously in form a marine policy with land risks before and after the marine risk of the same nature as the warehouse to warehouse clause which is also included. In my view, such a policy comes clearly within the decision of the Court of Appeal in *Harding* v. *Bussell* (1), and the order for ship's papers should, therefore, be made. MACKINNON, J., himself, a very experienced judge in marine insurance matters, has come to the conclusion that this policy and the risk insured under it requires an order for ship's papers none the less because the loss is alleged to have occurred on the voyage by land before the shipment by the *Lotus* which is contemplated in the policy. For these reasons I think MacKinnon, J., came to a right conclusion and the appeal must be dismissed.

GREER, L.J.—I have with much regret come to the same conclusion, that is to say, that the authorities which have been cited oblige me to hold that this order of MacKinnon, J., was an order which he was entitled to make and with which we cannot interfere.

Before dealing with the law on the subject and with the facts of this case, I should like to make two general observations. The first is that no more unpleasant duty has to be performed by a judge than the duty of deciding a case in accordance with a previous decision of courts which are binding on him which he thinks, as applied to the facts of the case before him, is both unreasonable and unjust. That is the task which I have before me in the present case. The plaintiff wanted to get some goods from Cairo to Jaffa. He went to an insurance agent to get his adventure insured, and if he had got a policy in the form of the certificate which was given to him by the insurance broker he would have had on the same document two insurances: (i) an insurance of a land journey from Cairo to Alexandria, or whatever port the *Lotus* was going to sail from, and (ii) an insurance of the marine voyage on board the *Lotus*. Those two adventures are kept separate in the certificate. But unfortunately for him the broker did not obtain—in fact, has not yet obtained—a policy in that form; what he obtained was the ordinary marine policy with the warehouse to warehouse clause which in form is a marine policy covering the sea voyage and the ancillary journey by rail from Cairo to the port. In those circumstances I cannot escape the conclusion that we are bound to regard the policy which has been taken out, and is the only document upon which the action can be brought, as a marine policy liable to the legal incidents of a marine policy.

The other general observation I should like to make is that nothing blinds the vision so much as custom and habit. There was a time when the criminal law of this country was in a state which would have been a disgrace to a half-civilised community, and, notwithstanding that fact, judges in high authority and writers of textbooks who had been brought up to regard the law as it was in their time wrote expressing the view that it was the perfection of human wisdom, and I cannot help thinking that those members of my profession who have been largely engaged both at the Bar and on the Bench in considering questions of marine insurance have been infected with the idea that that which has always been applied in marine insurance is that which ought to be applied, and that the law as it stands is incapable of improvement. I take exactly the opposite view. I think that when the rule as to ship's papers was invented it was necessary to do justice to the case of the insurers, but it has in time been so extended by judicial decision that it has become an unfair and unjust weapon in the hands of insuring companies and the insurers of Lloyd's. I have known case after case which came before the judge taking the Commercial List where defendants who had no real defence to the claim have been enabled by means of this engine of oppression to keep the plaintiffs out of their insurance money for long periods of time; and I regret that the court has not felt itself justified in holding a tighter hand over the power to order an affidavit of ship's papers than it has done. But it has ultimately been decided that, if the case is one of marine insurance and if there is a single document that has not been accounted for by the plaintiff, the defendant can hold up the case until the plaintiff searches all over the world for that document, which is just as available for search by the assured as it is by the insurers. It is possible under the existing powers of the court to give the judge on the hearing of the summons a greater control over the order for ship's papers, so that he might

A exercise his discretion in each case as to whether it is really being used for the necessary purposes of the litigation or whether it is being used as an engine of oppression on behalf of the insurance company or the defendant Lloyd's insurer. I doubt whether it is possible to do that by rules of court now, but if it is, at any rate, I should think the change would be a welcome one to those who desire that justice shall be done and that there shall be an early end to litigation.

B That, of course, is by the way, and it is not possible for me to decide this case on general principles. I have to decide it in accordance with the previous decisions. In the present case the claim was expressly made as a claim relating to that part of the insured adventure which took place on land, and it was contended that in any case where the claim is confined to that portion of the adventure which takes place on land, then the rule as to the affidavit of ship's papers does not apply, C because what is the use, it is said, of having ship's papers when the voyage by ship has nothing whatever to do with the matters in dispute in the action? But, of course, it has been clearly laid down, and frequently acted upon, that the affidavit of ship's papers does apply to a marine adventure with a warehouse to warehouse clause; and it is impossible to say that ship's papers in the literal sense of the word may have nothing to do with a transit which begins on land, a substantial D part of it being continued on sea. There may, for example, be such a thing as a through bill of lading and there may be in the course of performing the journey covered by that through bill of lading a deviation either on that part of the journey which takes place on land or on that part of the journey which takes place on sea; and I think it has been decided that where the adventure is substantially a marine adventure the rule as to an affidavit of ship's papers applies. Then the question E has to be determined in each case whether the adventure is or is not substantially a marine adventure; and in deciding that it seems to me that it is not possible to leave out of account the kind of contract which was made with the insurers. It is not possible to leave out the form of the contract made with the insurers because that is an indication as to what the adventure was that the two parties were considering when the policy was entered into.

F I think in this case that what the parties were considering when the policy was taken out was a marine adventure starting on land, but an adventure which was substantially a marine adventure within the meaning of s. 2 of the Marine Insurance Act, 1906, which provides that

> G "A contract of marine insurance may, by its express terms, or by usage of trade, be extended so as to protect the assured against losses on inland waters or on any land risk which may be incidental to any sea voyage."

I think, without looking at the cases, that those words are wide enough to cover the contract of insurance in this case; and I think the authorities show that in order to determine whether there should or should not be an affidavit of ship's papers you have to look, not at what the claim in the action is, but at what the H nature of the contract is that is sought to be enforced by the action at law. I think that view is consistent with all the cases, and I doubt whether *Village Main Reef Gold Mining Co.* v. *Stearns* (9) is in the least inconsistent with it, although MATHEW, L.J., seemed to think that it was, because in the course of his judgment in that case KENNEDY, J., says (5 Com. Cas. at p. 248):

> I "Of course, if the insurance is substantially one of sea carriage, although the subject-matter is also covered while on shore, it would still be a marine insurance."

I think the case upon which my Lord has particularly relied as deciding this matter in the Court of Appeal is *Harding* v. *Bussell* (1), but I think that is on the same lines. The only question that the court had to determine in each of these cases was whether the contract in question was or was not a contract substantially for a marine risk. In giving his judgment in *Harding* v. *Bussell* (1), MATHEW, L.J., says (10 Com. Cas. at p. 187):

> "Here the policy sued upon is substantially a marine policy, but we are asked to say that because a small portion of the transit covered by the policy is by land, and because the policy covers the goods from warehouse to warehouse and while there, the whole of the established practice should be altered." A

I do not regard that as in any way conflicting with the decision of KENNEDY, J., to which I have referred.

Then came the case in the Court of Appeal which has given me the most trouble B —*Tannenbaum & Co.* v. *Heath* (11), a decision of LORD ALVERSTONE, C.J., and FARWELL, L.J. It is difficult to follow from the words of LORD ALVERSTONE exactly what his view was; he appears to hesitate between two different views—one, that the right to an affidavit of ship's papers is to be determined by the nature of the claim made by the assured, and the other that the right is to be determined by the nature of the contract on which he is making the claim. LORD ALVERSTONE says C this ([1908] 1 K.B. at p. 1036):

> "There [in *Harding* v. *Bussell* (1)] the decision in *Henderson* v. *Underwriting and Agency Association, Ltd.* (8) was questioned, and it was held that, where an insurance was substantially a marine insurance, the fact that part of the transit was by land did not affect the right of the defendant to an affidavit of ship's papers. That case is important, because it shows that for this purpose D that which has to be looked at is the substance of the claim in the action."

That is not what is to be looked at. What is to be looked at is the substance of the contract upon which the claim is made which is put as a test in the next sentence:

> "MATHEW, L.J., at the beginning of his judgment, called attention to the fact E that the policy in that case was in substance a marine policy, although it did cover a short transit by land, from ship to warehouse."

On the next page the learned chief justice says:

> "In *Harding* v. *Bussell* (1), discovery of ship's papers was ordered, where the real claim was on a marine insurance. . . . What is really the nature of the insurance upon which the action is brought? Here it is not disputed that F the action is upon a policy of fire insurance on precious stones on land."

That case was concerned with a policy of insurance which was obviously in its substantial incidence a fire policy and a policy against the dishonesty of servants for acts committed on land with incidentally the clause which covered an event which might have happened, namely, that occasionally these goods were travelling by sea. I do not regard the case as a decision to the effect which was relied upon G by counsel for the plaintiffs—that you have to look at the nature of the claim and see whether it is a claim for a loss which occurred on land or a claim for a loss which occurred at sea. The true view seems to be that you must look at the contract of insurance and ask yourself: Is that substantially a contract of marine insurance? and, whatever might have been the view I could have taken if a policy had been drawn up in accordance with the certificate which was obtained, I find H myself unable to hold that the policy which has been handed over, which is the only one which can be made the subject-matter of action at the present moment, is not substantially a marine policy. For those reasons, though I do not see how the usual affidavit of ship's papers can be of any real use to the insurers in this case, I think it is a case in which the learned judge was entitled to make the order, and we cannot interfere with it. I

SLESSER, L.J.—I agree that this policy must properly be considered to be substantially a policy of marine insurance. Indeed, I doubt if counsel for the plaintiffs really contests that point. As I understand his argument, it is this. He says: "We have to have regard to the claim with reference to the misadventure which here befell." There may be cases where it is doubtful whether the misadventure took place on land or on sea, cases, for example, such as the disappearance of the goods when the ship reaches the point of destination or the final

A warehouse. Here, however, he says that his claim as appears in the writ is based specifically and only on a loss incurred before the goods were at sea at all; and, having regard to the narrowness of his claim and basing himself upon the original purpose and intention of all discovery, he says there is here nothing further to be inquired into than there would be in the case of a loss insured solely in respect of land risks, and, therefore, that the underwriters are not entitled to those particular B privileges which are conferred upon them with regard to marine insurance.

I can find no authority at all for that proposition, except a passage in the judgment of LORD ALVERSTONE, C.J., in *Tannerbaum & Co.* v. *Heath* (11). The authorities which I have read and considered are all concerned with this question: Was the contract one substantially of marine insurance or not?—not with the question: Was the loss actually covered by such part of the policy as did not apply C to the marine adventure? The only case, as I say, which does contain some passages which might raise the contrary view are to be found in *Tannenbaum's Case* (11) and, like GREER, L.J., it is that case which has caused me the greatest trouble here. In *Tannenbaum's Case* (11) it is quite true that there was ample material on which the court could have come to the conclusion, having regard to the nature of the policy and the risks there insured, which were of four kinds, one D only of which had any relation to transportation by sea, that the policy was not one of marine insurance taking it as a whole, and, therefore, the case might well have been held to fall within the decision of *Schloss* v. *Stevens* (10) and cases on that side of the line rather than the cases of which *Harding* v. *Bussell* (1) is the chief representative. But LORD ALVERSTONE was not content in *Tannenbaum's Case* (11) to found himself, as I read the judgment, wholly on the question of the E nature of the contract. He discusses the nature of the claim, and he says this ([1908] 1 K.B. at p. 1037):

> "If the claim had been under that clause [that is, cl. 4, which was the clause dealing with marine risks] I do not say that there might not have been an order for discovery of ship's papers. But, when one finds that the only claim in this case is on a fire insurance, that the exceptional privilege given to under- F writers of a marine policy has never been extended to other insurances."

If that means, as counsel for the plaintiffs contends it means, that, even if it be assumed that the policy be substantially one of marine insurance, one has to look at the particular part of the risk covered to see where the loss was—to see whether it was a marine loss or a land loss—I think that what LORD ALVERSTONE is saying is inconsistent with the whole line of authority. But, rather than take that view, G I would prefer to think that LORD ALVERSTONE there was treating the policy in that case as really being four separate policies, and when he speaks of the claim there he means the claim on that part of the policy which is dealing with marine matters and not on that part of the policy which is dealing with land matters. If he is treating the insurance in *Tannenbaum's Case* (11) as four separate insurances, the inconsistency between that case and the other cases, which otherwise leaps to H the eye, does not arise. However that may be, it is quite clear, I think, that FARWELL, L.J., took the view, because he says:

> "In this case the claim is not upon such a policy [he is referring to marine policy]. It is immaterial that, in another clause of the same document, which is not sued upon, there is an insurance against marine risks."

I I think it is quite clear that FARWELL, L.J., is treating the insurance in *Tannenbaum's Case* (11) as one of four separate insurances. He is not speaking of the claim arising out of the particular loss. He is saying that this claim is on the insurance against fire which, although contained in the same document, is a separate contract and severable from the marine insurance.

In that way after much hesitation I have gone into that case: and, that being so and the case not in any way throwing any doubt upon the leading case of *Harding* v. *Bussell* (1), I think that, as far as it is substantially marine insurance, the misadventure has occurred within the limits of that insurance between warehouse and warehouse, and, therefore, the principle laid down in *Harding* v. *Bussell* (1) would apply. I would only add one word, and that very reluctantly, on the more general question of policy. My reluctance arises for two reasons—first, because I feel myself incompetent to express an opinion, and, secondly, from a natural hesitation to appear to invade the province of the legislature. For my own part, in the conflicting views which may be expressed on the merits or demerits of these orders for ship's papers, I should be inclined to come to this view. On the one hand, it is said they may be used as instruments of oppression and delay; on the other hand, it is pointed out that in the form in which underwriters grant their policies they do not get that specific information which is usual when a declarant fills up a paper in any policy on land. Speaking for myself, my natural conservative inclination would lead me to believe that where a practice has developed over many years' dealing with a very difficult matter, the probability is that it is right and not wrong; and, if there is to be any alteration in this matter, it should be done with care and discretion and after long consideration. As I say, the probability is that that which has prevailed on the whole, so far as I can see from the authorities, with the acquiescence both of the insurers and the assured, is probably the most expedient way in which to deal with this difficult matter.

Appeal dismissed.

Solicitors: *Montagu's & Cox & Cardale*; *William A. Crump & Son.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

HILLAS & CO., LTD. *v.* ARCOS, LTD.

[HOUSE OF LORDS (Lord Tomlin, Lord Warrington, Lord Thankerton, Lord Macmillan and Lord Wright), May 3, 5, 6, July 5, 1932]

[Reported 147 L.T. 503; 38 Com. Cas. 23]

Contract—Commercial contract—Construction—Effect, so far as possible, to be given to contract—Future contract—Details left for adjustment—Agreement merely to negotiate a contract.

The problem of a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men may, as far as possible, be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains: per LORD TOMLIN.

It is the duty of the court to construe agreements made by business men—which often appear to those unfamiliar with the business far from complete or precise—fairly and broadly, without being astute or subtle in finding defects; on the contrary, the court should seek to apply the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete or uncertain: per LORD WRIGHT.

A contract de præsenti to enter into what in law is an enforceable contract is simply that enforceable contract, no more, no less. If what may, not very accurately, be called the "second contract" is not to take effect until some future date, but is otherwise an enforceable contract, the operation of the contract is postponed. But in each case there is eo instanti a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract, the position is different. There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing. Yet, even then there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciate value to the injured party: per LORD WRIGHT.

By a contract, dated May 21, 1930, the plaintiffs agreed to buy from the defendants "22,000 standards of softwood goods of fair specification over the season 1930" under certain conditions one of which (contained in cl. 9 of the contract) was: "Buyers shall also have the option of entering into a contract with the sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and prices which show to them a reduction of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931." In an action by the plaintiffs for breach of the contract,

Held: on the true construction of the contract as a whole and having regard to the evidence given as to the course of trade, the words "softwood goods of fair specification" must be read into cl. 9 after the word "standards"; "of fair specification" meant goods distributed over kinds, qualities, and sizes in fair proportions having regard to the output of the season, such fair proportions, in the event of dispute, being capable of ascertainment by recourse to the courts; "conditions" meant conditions as to supply, demand, and prices prevailing in 1931; and in those circumstances the words "option of entering into a contract" and "such contract to stipulate that" only indicated that there would be no binding contract until the option was exercised and did not result in the agreement being one merely to make an agreement; and, therefore, the contract was an enforceable contract for the breach of which the plaintiff was entitled to recover.

Pleading—Amendment—Necessity for—Point not pleaded raised during hearing of action.

Where a party is allowed to raise a point which he has not pleaded the appropriate alteration in the pleadings should always be made.

Notes. Considered: *Foley* v. *Classique Coaches, Ltd.*, [1934] All E.R. Rep. 88; *Saxton* v. *Nicholson & Co.*, [1935] All E.R. Rep. 653. Referred to: *Jewson & Sons, Ltd.* v. *Arcos, Ltd.* (1933), 39 Com. Cas. 59; *British Homophone, Ltd.* v. *Kunz and Crystellate Gramophone Record Manufacturing Co.*, [1935] All E.R. Rep. 627; *Way* v. *Latilla*, [1937] 3 All E.R. 759; *Scammell* v. *Ouston*, [1941] 1 All E.R. 14; *Electric Transmission, Ltd.* v. *Danneberg* (1948), 65 R.P.C. 439.

As to the essentials of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 69 et seq., and for cases see 12 DIGEST (Repl.) 53 et seq. As to amendment of pleadings, see 26 HALSBURY'S LAWS (2nd Edn.) 55–57, and for cases see DIGEST (Pleading and Practice), 92 et seq.

Cases referred to:

(1) *May and Butcher, Ltd.* v. *Regem* (1929), [1934] 2 K.B. 17, n.; 103 L.J.K.B. 556, n.; 151 L.T. 246, n.; Digest Supp.

(2) *Charrington & Co., Ltd.* v. *Wooder*, [1914] A.C. 71; 83 L.J.K.B. 220; 110 L.T. 548; 30 T.L.R. 176; 58 Sol. Jo. 152, H.L.; 39 Digest 408, *430*.

(3) *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182; 69 L.J.P.C. 22; 82 L.T. 102; 48 W.R. 591; 16 T.L.R. 211, P.C.; 17 Digest (Repl.) 333, *1385*.

(4) *Jackson* v. *Rotax Motor and Cycle Co.*, [1910] 2 K.B. 937; 80 L.J.K.B. 38; 103 L.T. 411, C.A.; 39 Digest 451, *787*.

(5) *Dominion Coal Co., Ltd.* v. *Dominion Iron and Steel Co., Ltd. and National Trust Co., Ltd.*, [1909] A.C. 293; 78 L.J.P.C. 115; 100 L.T. 245; 25 T.L.R. 309, P.C.; 39 Digest 437, *661*.

(6) *Hoadly* v. *M'Laine* (1834), 10 Bing. 482; 4 Moo. & S. 340; 3 L.J.C.P. 162; 131 E.R. 982; 39 Digest 410, *446*.

(7) *Loftus* v. *Roberts* (1902), 18 T.L.R. 532, C.A.; 12 Digest (Repl.) 58, *320*.

Appeal by the plaintiffs from an order of the Court of Appeal (Scrutton, Greer and Romer, L.JJ.) directing that the judgment of MacKinnon, J., given on the trial of the action in the Commercial List (with a City of London special jury), whereby it was ordered that judgment should be entered in favour of the plaintiffs for £30,000 with costs, should be set aside and judgment entered in favour of the defendants with costs, except that the costs attributable to one issue should be the plaintiffs' costs.

The plaintiffs, who were timber merchants carrying on business at Hull, sued the defendants for breach of a contract in writing, dated May 21, 1930. The defendants pleaded that this contract had been cancelled by mutual consent in July, 1930. By the document of May 21, 1930, the plaintiffs agreed

> "to buy 22,000 standards softwood goods of fair specification over the season 1930 under the following conditions . . ."

By cl. 9:

> "Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before Jan. 1, 1931."

On Dec. 22, 1930, the plaintiffs wrote to the defendants:

> "We beg to give you formal notice that we hereby exercise the option conferred upon us under our agreement with you for the purchase of 100,000 standards of softwood of fair specification for delivery during 1931. The terms of this option are set out in cl. 9 of the contract of which our part bears date, May 21, 1930. . . ."

On Dec. 24, 1930, the defendants wrote:

> "We have your letter of the 22nd inst., but you have apparently overlooked the arrangement which we have made with you in July last, by which the contract of May 21 was cancelled."

The plaintiffs having brought their action for breach of contract, Roche, J., left to the jury the question whether the agreement of May 21, 1930, had been cancelled, and the jury found that it had not been cancelled. Counsel for the defendants then raised certain legal points, but not that the agreement of May 21, 1930, was an agreement to make an agreement and so unenforceable. Roche, J., was then about to go on circuit, and without any judgment being drawn up, by consent it was arranged that the special jury should be discharged, and that the question of damages should be tried before MacKinnon, J. On the second day of the hearing before MacKinnon, J., after the cross-examination of the first witness, counsel for the defendants took the point that the agreement in cl. 9 of the document of May 21, 1930, was an agreement to make an agreement, the terms of which were not defined, and so was unenforceable. Counsel for the plaintiffs objected that the point was not open as it had not been pleaded, and it could not now be raised after the discharge of the jury. No application was made for the recall of any witnesses.

MacKinnon, J., held that the words in the earlier clause of the document of May 21, 1930, "of fair specification" had to be read into cl. 9. The agreement was one in which the parties had agreed upon the terms being those which were

A reasonable, though these would have subsequently to be ascertained. *May and Butcher, Ltd.* v. *Regem* (1) was not brought to the attention of the court, and the learned judge did not deal with the question whether the point was open to the defendants. He held that there was an enforceable contract, assessed the damages at £30,000, and gave judgment for the plaintiffs for that amount.

The defendants appealed to the Court of Appeal, and the plaintiffs cross-appealed B on the issue as to the amount of damages, which they alleged should be £132,000. The Court of Appeal allowed the appeal and dismissed the cross-appeal, and the plaintiffs appealed to the House of Lords.

Stuart Bevan, K.C., and *Philip Vos* for the appellants.

Van den Berg, K.C., and *Gordon Alchin* for the respondents.

The House took time for consideration.

C July 5. The following opinions were read.

LORD TOMLIN.—On July 28, 1931, the Court of Appeal ordered a judgment in the appellants' favour against the respondents for £30,000 damages with costs, to be set aside, and directed judgment to be entered for the respondents. The action was one in which the appellants sought to make the respondents liable in damages D for breach of a contract for the sale and purchase of Russian softwood timber for delivery in 1931, alleged to have been constituted by a document in writing signed by the representatives of the parties on May 21, 1930, and a letter dated Dec. 22, 1930, written by the appellants to the respondents and purporting to exercise an option expressed to be conferred by cl. 9 of such document. The writ was issued on Jan. 30, 1931. The case was set down in the Commercial List. The breach E alleged in the heads of claim was that the respondents had, on Nov. 20, 1930, contracted to sell to a third party the whole of the softwood timber which the respondents should import into the United Kingdom during the Russian timber season of 1931, and by letter dated Dec. 24, 1930, had repudiated the option. The only defence set up by the points of defence was that the agreement contained in the document of May 21, 1930, had been cancelled by mutual consent in the month of F July, 1930, and that there was, therefore, no option open to the appellants when the letter of Dec. 24, 1930, was written.

The action was tried in May, 1931, by ROCHE, J., with a City of London special jury. The question left to the jury was whether the option contained in cl. 9 of the document of May 21, 1930, was subsisting in the month of December, 1930, or whether it had been cancelled. The jury found for the appellants. It was agreed G that the question of the amount of the damages should be left to be determined by MACKINNON, J., at a future date, as ROCHE, J., was about to go on circuit, and after hearing argument on some points of law not material for the present purpose, ROCHE, J., gave judgment for the appellants for an amount to be assessed, with costs, and directed that if the respondents desired to appeal their time should be extended until one month after the amount of damages had been ascertained and H the judgment containing the amount so ascertained drawn up. The jury was then discharged. No formal judgment embodying the conclusions of ROCHE, J., was drawn up.

In June, 1931, the matter was proceeded with before MACKINNON, J., for the purpose of having the damages assessed. At this hearing before MACKINNON, J., the respondents for the first time raised the point that there was no contract at I all, contending that the document of May 21, 1930, did not contain a sufficient description of the goods to be sold to enable them to be identified, and that it in fact contemplated in the future some further agreement upon essential terms. No amendment was made in the pleadings putting the plea into a definite form. The appellants objected that it was too late for the respondents to take the point, and that in any case the point was not good. The learned judge held that the point was not well founded, and that, therefore, it was not necessary to consider whether the respondents were too late in taking it. He further assessed the damages at £30,000, and gave judgment for the appellants for that amount with costs. A formal judgment was drawn up, the preamble of which stated that the hearing of A the action had been resumed before MacKinnon, J., for assessment of damages.

The respondents appealed. The appellants cross-appealed upon the amount of the damages, which they regarded as insufficient. This cross-appeal was dismissed by the Court of Appeal, and in that dismissal the appellants have acquiesced. The respondents' appeal succeeded before the Court of Appeal, the court being unanimously of opinion that there was no contract and that the respondents were not B too late in taking the point. Accordingly, by the formal order of the Court of Appeal, the judgment in the appellants' favour was set aside and judgment was directed to be entered for the respondents with costs, other than the costs of the issue of cancellation, which were given to the appellants. It is of this order that the appellants complain before your Lordships' House.

Before examining the relevant documents it will be convenient to explain the C respective positions of the parties and the circumstances of the Russian softwood timber trade as appearing from the evidence. The appellants are an English company carrying on in this country the business of timber merchants, the governing director being Mr. William Newland Hillas. The respondents are an English limited company through which the Russian Soviet government conducts its trading operations in this country. Russian softwood timber is of at least two kinds, D namely, whitewood and redwood. Of these kinds there are various qualities. Quality is to some extent dependent upon the districts in which the timber is grown. Some timber is sold sorted into qualities, other timber is sold unsorted. Again, the timber is prepared for market in a great number of different sizes. The kinds, qualities and sizes which a purchaser requires must to some extent determine the port from which any consignment to him is shipped. The timber is cut in the E winter for the following season, and in January the respondents first prepare stock notes giving estimates of the quantities which will be available at the various ports of shipment of the different kinds, qualities and sizes of timber. From time to time supplementary stock notes are prepared during the season as further or better information becomes available. The shipments begin as soon as there is open water at the ports of shipment, that is about May from Leningrad and about June F from the White Sea. The shipments continue through the season. The first open water shipments are generally the most sought after. In each year prior to 1931 an official price list was issued by the respondents showing the prices for the different kinds, qualities, and sizes of Russian softwood timber for the current season. As, however, on Nov. 20, 1930, the respondents sold the whole of the output of the 1931 season to the Central Softwood Buying Corpn. the only list G issued for 1931 was the list (referred to in the proceedings as the yellow list) of the c.i.f. prices at which the Central Softwood Buying Corpn. as sole selling agents were free to sell the 1931 output to the public.

The document of May 21, 1930, is in the following terms:

> "*Heads for the Purchase of Russian Goods.* H
>
> "We agree to buy 22,000 standards of softwood goods of fair specification over the season 1930 under the following conditions: (i) On all purchases made under this present contract buyers to receive a bonus of 7 per cent. on the f.o.b. value, and a similar allowance on all previous contracts made by buyers for 1930 shipment. If, however, buyers increase their purchase up to 30,000 standards the bonus to be 7½ per cent. on the f.o.b. value. (ii) All 1930 I purchases to be invoiced as per new revised schedule on the usual c.i.f. terms, less 2½ per cent. discount for cash, or four months acceptances, at buyers' option; except 50 per cent. of the purchases prior to May 20, 1930, on which buyers are only entitled to a 70 per cent. reduction between the old official prices and the new revised prices. (iii) No extras to be charged on account of size of steamer for goods ordered to ports where 900 standard steamers can be shipped if ordered before Sept. 15. Goods to be shipped together with goods for other receivers. Small outports usual extras. (iv) *Payment:* Buyers

A undertake to pay on the usual trade terms, namely, 2½ per cent. discount for cash, or four months bills, at buyers' option. (v) If buyers should be unable to meet all the bills drawn as per the foregoing paragraph, or part of them, for a proportion of the unsold goods, sellers agree to renew such bills, but not for a period of more than three months. (vi) Buyers to arrange shipping dates and loading instructions according to the readiness of the goods B purchased. (vii) Buyers shall have the option of increasing this contract up to 50,000 standards under the same terms for shipment during the season, subject to the goods being unsold. (viii) Should sellers at any time during 1930 reduce their new scale prices, or give any advantage to any one buyer, which in effect constitutes a general reduction in cost prices, such reduction shall be made applicable to all purchases which buyers have made during the C year. This shall also particularly apply to any reduction that may be made by sale later in the season to the existing syndicate, or successors, or their nominees. (ix) Buyers shall also have the option of entering into a contract with sellers for the purchase of 100,000 standards for delivery during 1931. Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of D 5 per cent. on the f.o.b. value of the official price list at any time ruling during 1931. Such option to be declared before Jan. 1, 1931. (x) A clause to be drawn up later regarding the question of consignment of up to 25,000 standards. (xi) This agreement cancels all previous agreements."

On Dec. 22, 1930, the appellants, being at that time aware of the contract of E Nov. 20, 1930, wrote to the respondents a letter containing the following passage:

> "We beg to give you formal notice that we hereby exercise the option conferred upon us under our agreement with you for the purchase of 100,000 standards of softwood of fair specification for delivery during 1931. The terms of this option are set out in cl. 9 of this contract, of which one part still bears date May 21, 1930."

F Now, the plea of cancellation having been negatived by the verdict of the jury, it is plain that the letter of Dec. 22, 1930, together with the earlier document of May 21, 1930, constituted a binding contract, unless upon the true construction of these documents the essentials of a contract were absent and there was nothing more than what has been called an agreement to make an agreement—that is, something which in law is no agreement at all. Commercial documents prepared G by business men in connection with dealings in a trade with the workings of which the framers are familiar often by reason of their inartificial forms confront the lawyer with delicate problems. The governing principles of construction recognised by the law are applicable to every document, and yet none would gainsay that the effect of their application is to some extent governed by the nature of the document. On the one hand the conveyance of real estate presenting an artificial form grown H up through the centuries and embodying terms of art whose meanings and effect have long since been determined by the courts, and, on the other hand, the formless document, the product of the minds of men seeking to record a complex trade bargain intended to be carried out, both fall to be construed by the same legal principles, and the problem for a court of construction must always be so to balance matters that, without violation of essential principle, the dealings of men I may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains. The principles are not in dispute. It is in the application of them to the facts of a particular case that the difficulty arises; and the difficulty is of such a kind as often to afford room for much legitimate difference of opinion and to present a problem the solution of which is not as a rule to be found by examining authorities.

In the present case one or two preliminary observations fall to be made. First, the parties were both intimately acquainted with the course of business in the Russian softwood timber trade and had without difficulty carried out the sale and purchase of 22,000 standards under the first part of the document of May 21, 1930. Secondly, although the question here is whether cl. 9 of the document of May 21, 1930, with the letter of Dec. 22, 1930, constitutes a contract, the validity of the whole of the document of May 21, 1930, is really in question so far as the matter depends upon the meaning of the phrase "of fair specification." Thirdly, it is indisputable, having regard to cl. 11, which provides that "this agreement cancels all previous agreements," that the parties intended by the document of May 21, 1930, to make, and believed that they had made, some concluded bargain.

The case against the appellants is put on two grounds. First it is said that there is in cl. 9 no sufficient description of the goods to be sold; and, secondly, it is said that cl. 9 contemplates a future bargain the terms of which remain to be settled. As to the first point it is plain that something must necessarily be implied in cl. 9. The words "100,000 standards" without more do not even indicate that timber is the subject-matter of the clause. The implication at the least of the words "of softwood goods" is, in my opinion, inevitable, and, if this is so, I see no reason to separate the words "of fair specification" from the words "of softwood goods." In my opinion, there is a necessary implication of the words "of softwood goods of fair specification" after the words "100,000 standards" in cl. 9.

What, then, is the meaning of "100,000 standards of softwood goods of fair specification for delivery during 1931"? If the words "of fair specification" have no meaning which is certain or capable of being made certain, then not only can there be no contract under cl. 9, but there cannot have been a contract with regard to the 22,000 standards mentioned at the beginning of the document of May 21, 1930. This may be the proper conclusion; but before it is reached it is, I think, necessary to exclude as impossible all reasonable meanings which would give certainty to the words. In my opinion, this cannot be done. The parties undoubtedly attributed to the words in connection with the 22,000 standards some meaning which was precise or capable of being made precise. SCRUTTON, L.J., laid stress upon the evidence of Mr. Hillas as indicating a different view on the part of the parties. I am unable to think that upon a question of construction such evidence, if directed to the intention of the parties, was admissible at all. In fact, I think, Mr. Hillas's evidence was misunderstood. It really amounted, in my opinion, to nothing more than a statement as to how the parties would in the first instance proceed, just as on a purchase of property at its fair value the parties would no doubt first endeavour to reach agreement as to the fair value.

Reading the document of May 21, 1930, as a whole, and having regard to the admissible evidence as to the course of the trade, I think that upon their true construction the words "of fair specification over the season, 1930," used in connection with the 22,000 standards, mean that the 22,000 standards are to be satisfied in goods distributed over kinds, qualities, and sizes in the fair proportions having regard to the output of the season 1930, and the classifications of that output in respect of kinds, qualities, and sizes. That is something which if the parties fail to agree can be ascertained just as much as the fair value of a property. I have already expressed the view that cl. 9 must be read as "100,000 standards of fair specification for delivery during 1931" and these words, I think, have the same meaning, mutatis mutandis, as the words relating to the 22,000 standards. Thus, there is a description of the goods which, if not immediately, yet ultimately, is capable of being rendered certain.

The second point upon cl. 9 that it contemplates a future agreement remains to be considered. The form of the phrases "the option of entering into a contract" and "such contract to stipulate that" upon which stress has been laid by the respondents seems to me unimportant. These phrases are but an inartificial way of indicating that there is no contract till the option is exercised. The sentence that such contract is to stipulate that whatever the conditions are the buyers are to obtain the goods at a certain reduction is more difficult. The words "whatever the conditions are" being governed by the word "that" which follows the words "to stipulate" must be intended to be part of the contract. If so the word "con-

A ditions" cannot mean terms of the contract, but must connote some extrinsic condition of affairs, and the condition of affairs referred to is, I think, the conditions as to supply and demand which may prevail during 1931. Upon this view of the matter it cannot, I think, be said that there is nothing more than an agreement to make an agreement.

It was also urged as a minor point that there was no provision as to shipment B and that this was an essential of such a contract. I am not prepared without further consideration to accept the view that in the absence of a provision in relation to shipment there can be no contract in law in such a case as the present. In my opinion, however, the point does not arise here. Clause 9 is one of the clauses containing the conditions upon which the sale of the 22,000 standards is made. This fact, together with the presence of the word "also" in cl. 9, satisfies C me that upon the true construction of the document the sale conditions in relation to the 22,000 standards are so far as applicable imported into the option for the sale of the 100,000 standards, and, in particular, that cl. 6, relating to shipping dates and loading instructions, is so imported.

Reference was made in the course of the arguments before your Lordships and in the judgments in the Court of Appeal to the case before your Lordships' House D of *May and Butcher, Ltd.* v. *Regem* (1). In the agreement there under consideration there was an express provision that the price of the goods to be sold should be subsequently fixed between the parties. Your Lordships' House reached the conclusion that there was no contract, rejecting the appellants' contention that the agreement should be construed as an agreement to sell at the fair or reasonable price or alternatively at a price to be fixed under the arbitration clause contained E in the agreement. That case does not, in my opinion, afford any assistance in determining the present case, the result of which must depend upon the meaning placed upon the language employed.

It is only after anxious consideration that I recommend to your Lordships a conclusion upon the construction of the relevant documents contrary to that unanimously reached by the Court of Appeal. This is my justification for having stated F my reasons at some length. This conclusion renders it unnecessary to determine whether the point as to there being no contract in law was open to the respondents when they first took it, but as the matter was dealt with by the Court of Appeal and was argued before your Lordships I desire to say that herein I agree with the conclusion of the Court of Appeal, though I should not be prepared without further consideration to accept all that was said in that court with reference to what need G or need not be pleaded. I may add that, in my opinion, wherever an amendment in the pleadings is allowed in the course of an action the appropriate alteration in the formal pleadings should always be insisted upon.

It was urged on behalf of the respondents before your Lordships that, if there was a contract, still it was one upon which only nominal damages should have been awarded—first, because the respondents were free to give to other customers an H equal or greater reduction in price, and, secondly, because there was no adequate material upon which the damages could be assessed. Neither of these grounds appears to me to be well founded. With regard to the first ground I think the phrase "the official price list at any time ruling during 1931" makes plain that the reduction given is from the general operative price and not from a merely nominal price which is not being adhered to in actual practice. With regard to the second I ground, the absence of material was due in part to the fact that the respondents had broken their contract and had not, therefore, issued an official list for 1931 in the same form as in earlier years, and in part to the fact that they abstained from placing before the judge the stock notes for 1931 or other information which they alone could furnish as to the output for 1931. The learned judge did the best he could with the material before him, and I cannot think that those to whose default the deficiency of material was due can complain of the result on the ground of such deficiency. I do not think that the learned judge made any error in principle in assessing the amount of the damages.

In the result, therefore, I am of opinion that the appeal should be allowed and A
that the judgment of the Court of Appeal should be reversed and that of the court of first instance should be restored with costs here and below. I beg to move your Lordships accordingly.

LORD WARRINGTON and **LORD MACMILLAN** concurred in the judgment delivered by LORD TOMLIN.

B

LORD THANKERTON.—I have had the privilege of considering the opinion which has been delivered by my noble and learned friend on the Woolsack, and in which he has fully narrated the material facts of this case and the terms of the document of May 21, 1930. Subject to some doubts that I have felt as to the proper construction of the words "of fair specification" and as to which I desire to add some observations, I find myself in entire agreement with the construction C
which my noble and learned friend has put upon the document of May 21, 1930, and I also agree with his conclusion that it is not open to the respondents to maintain that there was no concluded agreement.

The question on which I have had doubt is whether the words "of fair specification," on their proper construction, will enable the subject to be identified by the court. In other words, do they provide a standard by which the court is enabled D
to ascertain the subject-matter of the contract, or do they involve an adjustment between the conflicting interests of the parties, which the parties have left unsettled and on which the court is not entitled to adjudicate. Does the phrase mean a specification which is fair as between the interests, on the one hand, of the seller in respect of the stock of wood, comprising various kinds of wood and various qualities and sizes, available for sale in the season of 1931, and, on the other hand, E
the interests of the buyer in respect of the requirements of his trade during that season? Or does the phrase mean a fair selection from the seller's stock of wood available for sale in that season? If the former construction be the proper one, I would be of opinion that the court would not be entitled to adjudicate between the opposing interests of the two parties. If the latter construction be the proper one, the ascertainment of a fair selection from the seller's available stock is within the F
province of the court; in that case the court is applying a standard which is provided by the contract, and is thereby merely identifying the subject-matter of the contract.

While I have had considerable doubt on this question of construction, I am affected by the consideration that the contract is a commercial one and that the parties undoubtedly thought that they had concluded a contract; and I have come G
to the conclusion, in agreement with the noble Lord, that the second alternative construction above stated is the proper one and that there was here a concluded contract. I, therefore, concur in the motion proposed.

LORD WRIGHT.—The determination of this case turns on the true construction of the document of May 21, 1930, the full terms of which are already before your H
Lordships, or, to state the problem more precisely, the true construction of a part of that document, namely, cl. 9. This is a question of law on which evidence is not relevant, except to the extent clearly stated by LORD DUNEDIN in *Charrington & Co., Ltd.* v. *Wooder* (2) ([1914] A.C. at p. 82), where the words "fair market price" were to be construed:

> "Now, in order to construe a contract the court is always entitled to be so I
> far instructed by evidence as to be able to place itself in thought in the same position as the parties to the contract were placed, in fact, when they made it, or, as it is sometimes phrased, to be informed as to the surrounding circumstances. As LORD DAVEY says in the case of *Bank of New Zealand* v. *Simpson* (3) ([1900] A.C. at p. 188), quoting from a decision of LORD BLACKBURN'S:
>
> > 'The general rule seems to be that all facts are admissible (to proof) which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used.' "

A The effect in the present case of that class of evidence, which was not very precisely given, may thus be summarised. The appellants, who were plaintiffs in the action, are a company carrying on business as timber merchants and importers on a large scale in this country; the respondents are an English limited company, who handle in the British Islands as agents for Exportles of Moscow the timber exported from Russia for these islands. This timber is shipped from a number of B ports, in particular, among others, Leningrad and the White Sea ports; the timber is manufactured at various mills in the different districts in Russia and is of various kinds, in particular whitewood and redwood, and varies to some extent according to the district where it was grown; it is sawn up at the mills in various lengths and in various scantlings of each length, so that a very complex range of descriptions is involved. The programme of the year's manufacture is prepared early in C the year in the form of stock notes, which contain specifications of the different descriptions, lengths, scantling, intended to be produced, distinguished according to regions, mills, and shipping ports. The actual sawing proceeds principally in the spring and summer, and shipment is made during the season, that is the period over which shipment is possible by reason of the ports being ice free; shipment begins at what is called first open water or F.O.W., which is at Leningrad about D May in each year, and, in the White Sea, about June, and no doubt there is competition among buyers for early shipments. Shipping ends with the close of navigation at Leningrad about January, and, in the White Sea, about November. Each year the shippers, the respondents, have published an official price list specifying prices for each description and scantling, with the various ports of shipment and on a c.i.f. basis, for destinations primarily of a range of east coast ports, E but subject to variation in respect of freight if buyers designate other British ports. As goods are ready, or becoming ready, for shipment, stock notes are prepared and notice of readiness may be given to buyers so that they can give final shipping instructions.

By letter dated Dec. 22, 1930, the appellants claimed to exercise the option under cl. 9 of the agreement of May 21, 1930, but the respondents repudiated their F right to do so, on the ground that the agreement, including the option, had been cancelled. The respondents had in fact by a contract made on Nov. 20, 1930, with the Central Softwoods Corpn, Ltd., sold to that company their entire production for the British Islands for the 1931 season, minimum 500,000, maximum 600,000 standards, and had bound themselves not to ship during that season to the British Islands otherwise than under the contract. The question now to be considered G was not raised by the respondents until the hearing as to damages before MACKINNON, J., who continued the trial of the action after a special jury directed by ROCHE, J., had decided against the respondents' contention that the agreement of May 21, 1930, had been cancelled; until then it had been neither pleaded nor submitted by the respondents that the agreement was not binding. That contention, however, which was rejected by MACKINNON, J., who entered judgment for H the appellants for £30,000 and costs, found favour on appeal with the Court of Appeal, who ordered judgment to be entered for the respondents. From that decision the matter now comes before your Lordships' House.

The document of May 21, 1930, cannot be regarded as other than inartistic, and may appear repellant to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. I Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law,

as, for instance, the implication of what is just and reasonable to be ascertained by A
the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete nor B
uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted.

The document in question is expressed to be "Heads for the Purchase of Russian C
Goods." Clause 11, the final clause, is: "This agreement cancels all previous agreements." It is signed by R. N. Hillas and J. Axenoff, who are admittedly agents for the appellants and respondents respectively. It does not otherwise define the parties, but there can be no doubt on a fair construction who the parties are. The first paragraph runs:

> "We (that is, the appellants) agree to buy 22,000 standards of softwood goods D
> of fair specification over the season 1930, under the following conditions:"

the conditions then follow in cll. 1 to 11. The first six conditions deal primarily with the purchase of 22,000 standards. Clauses 1, 2, and 3 deal with price, which is to be according to the new revised schedule for 1930 purchases, subject to certain bonuses and discounts: the parties were in fact referring to the schedule issued by E
the respondents. Clauses 4 and 5 deal with terms of and other matters relating to payments; cl. 6 deals with shipping dates in these general terms:

> "Buyers to arrange shipping dates and loading instructions according to the readiness of the goods purchased."

The contract is clearly an instalment contract "over the season 1930," since the whole quantity could not be delivered in one shipment. It is obvious that the F
parties either cannot or do not desire to fix precise dates for the plurality of shipments which is contemplated; hence they leave the apportionment of these shipments over the period to be determined as circumstances require, first, by the readiness of the goods, including, no doubt, ports of shipment, which will depend on the position of the respondents, who, accordingly, will have to declare it from time to time, and, secondly, on the action of the appellants, who on receiving these G
declarations will be entitled to a reasonable time on each occasion in which to give the necessary shipping instructions in accordance with which the respondents will have to provide tonnage—because it is a c.i.f. contract. Such matters may require, as the performance of the contract proceeds, some consultation and even concessions between the sellers and the buyers, but there is no uncertainty involved because, if there eventually emerge differences between the parties, the standard H
of what is reasonable can, in the last resort, be applied by the law, which thus by ascertaining exact dates makes precise what the parties in the contract have deliberately left undefined. Hence, in view of this legal machinery, id certum est quod certum reddi potest.

It is easy to find parallels in the authorities where even greater vagueness or elasticity appears in the contract, thus, in *Jackson* v. *Rotax Motor and Cycle Co.* I
(4), there was a contract for the sale of a large quantity of motor horns, delivery as required: the Court of Appeal found no difficulty in reading this as "a contract in which deliveries are to be made as and when required by the purchasers." In *Dominion Coal Co.* v. *Dominion Iron and Steel Co.* (5) the Privy Council found no difficulty in construing a contract as being for the sale by the coal company of coal reasonably suitable in quality to the extent that the same could be obtained by the reasonable and proper working of the designated mines over a period of many years, and directing an assessment of damages. As to price, that is specifically

fixed in this contract by the clauses which have reference to the respondents' new revised schedule supplemented by a further provision in cl. 8 that the appellants were to have the advantage of any beneficial terms granted to any other buyers which directly or in effect reduced the price paid or consideration given for the goods in 1930. Clause 7 gave an option to the appellants of increasing the contract quantity to 50,000 for shipment during the (sc. 1930) season under the same terms. That option was, in fact, exercised up to 40,000 standards. Clause 10 has reference to a prospective consignment to the appellants as agents for sale on commission; but, as that scheme did not eventuate, it may be disregarded.

I have, so far, said nothing about the words "of fair specification." The only relevant question is whether these words were too vague or uncertain to give effect to the contractual intention of the parties; and I merely observe here that no one has suggested that any difficulty was experienced in 1930 in applying these words to the actual delivery from time to time of the different instalments that made up the 40,000 standards. I shall discuss these words more fully when I turn, as I now do, to consider cl. 9, which is the crux of this case. That clause must not be construed as if it stood by itself; it is an integral part of the whole agreement: the option under it is given as one of the conditions under which the appellants agree to buy the 22,000 standards, and is part of the consideration for their agreeing to do so. It is, accordingly, a binding offer, which the appellants are entitled, by accepting before Jan. 1, 1931, to turn into a contract if other objections do not prevail. Some confusion has been imported, as I think, into the question by dwelling on the exact words—"the option of entering into a contract," and it is said that this is merely a contract to enter into a contract, whereas in law there cannot be a contract to enter into a contract. The phrase is epigrammatic, but may be either meaningless or misleading. A contract de præsenti to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more and no less; and if what may, not very accurately, be called the "second contract" is not to take effect till some future date, but is otherwise an enforceable contract, the position is as in the preceding illustration, save that the operation of the contract is postponed. But in each case there is eo instanti a complete obligation. If, however, what is meant is that the parties agree to negotiate in the hope of effecting a valid contract, the position is different. There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.

However, I think the words of cl. 9 in this case simply mean that the appellants had the option of accepting an offer in the terms of cl. 9 so that when it was exercised a contract at once came into existence, unless, indeed, the terms of the option embodied in the clause were not sufficiently certain and complete; before considering this matter I ought to deal with a further contention based on a construction of the second paragraph of cl. 9, which is in these terms:

> "Such contract to stipulate that, whatever the conditions are, buyers shall obtain the goods on conditions and at prices which show to them a reduction of 5 per cent. on the f.o.b. value of official price list at any time ruling during 1931."

It is argued that these words, read with the preceding paragraph, confirm the view that the option was merely for the preparation and agreeing of a formal contract, because the words "whatever the conditions are" mean "whatever the conditions of the contract are." Such an argument involves adding the words "of the contract," which are not expressed, and on other grounds I do not think that it is correct. I think the word "conditions" refers to conditions affecting other people in the trade, primarily as regards price, and such analogous advantages as are dealt with in cl. 8 in connection with the 1930 season. What the appellants are stipulating is that they are to have, throughout the year 1931, such conditions of this character and such prices as will secure to them in any event a clear 5 per cent. advantage over other buyers who might compete. On a fair reading of the words, I think the contract is clear and complete in its stipulations as to price. It was contended that no official price list might be issued in 1931, so that the contract price was in that way uncertain and contingent. But in past years in the conduct of this business it had been an invariable practice of the respondents to issue such a list; the evidence and finding in the present case are that an official price list was issued in 1931; indeed, it is difficult to see how the respondents could carry on the business unless it was issued. I think that as regards the definition of the machinery for fixing the price there is sufficient certainty here for a business transaction; the issue in 1931 of the official price list is not a mere contingency but a practical certainty; it is unnecessary to consider what would have been the legal position if the respondents had ceased to carry on business or had been dispossessed by war or revolution. Such considerations are not relevant to determining whether there is a good contract or not, but relate to such questions as frustration or breach of the contract.

The description of the goods offered to be sold in 1931, in cl. 9, is also, in my judgment, sufficient in law. I so hold simply as a matter of construction, having regard to the context. "100,000 standards," divorced from the rest of the agreement, no doubt would be too uncertain; abstractly they might be incapable of any definite meaning. But the definition comes from the context. The agreement is headed as being for the purchase of Russian goods which to this extent must define the 100,000 standards; the words "50,000 standards" in cl. 7 have clearly to be read as embodying the same description as in the first paragraph of the agreement, that is, standards of softwood goods of fair specification; and, in my judgment, the same description must apply to the 100,000 standards in cl. 9, not as a matter of implication, but as one of construction. Hence the 100,000 standards are to be of Russian softwood goods of fair specification. In practice, under such a description, the parties will work out the necessary adjustments by a process of give and take in order to arrive at an equitable or reasonable apportionment on the basis of the respondents' actual available output, according to kinds, qualities, sizes and scantlings; but, if they fail to do so, the law can be invoked to determine what is reasonable in the way of specification, and thus the machinery is always available to give the necessary certainty. As a matter of strict procedure, the sellers would make a tender as being of fair specification, the buyers would reject it, and the court or an arbitrator decide whether it was or was not a good tender. It is, however, said that in the present case the contract quantity is too large, and the range of variety in descriptions, qualities, and sizes is too complicated to admit of this being done. But I see no reason in principle to think that such an operation is beyond the powers of an expert tribunal, or of a judge of fact assisted by expert witnesses. I cannot find in the record any evidence to justify this contention of the respondents, even if such evidence be at all competent. On the contrary, it seems that a prospective specification for the 500,000 or 600,000 standards which formed the subject of the contract of Nov. 20, 1930, between the respondents and the Central Softwood Corpn., Ltd., was agreed between these parties at Moscow in a few days, which appears to confirm that the ascertainment of a fair specification of Russian softwood goods, even for a very large quantity and over a whole season, is not of insuperable difficulty to experts. Accordingly I see no reason to think that, as regards the quality and description of the goods, the contract is either uncertain or incomplete. Nor can it justly be objected that, though a fair and reasonable specification may not be impossible of ascertainment, the reasonable specification is impossible. The law, in determining what is reasonable, is not concerned with ideal truth, but with something much less ambitious, though more practical.

There still remains the question of shipping dates or times or ports of delivery. I think here again, as matter of construction, cl. 9 is to be read as embodying cl. 6,

A which, therefore, I think, applies equally to the 100,000 standards as to the 40,000 standards. I have explained my view of the operation and effect of that clause. If I were wrong in that, I should still regard the matter as sufficiently dealt with by the term which the law would imply in such a case, namely, that the deliveries are to be at reasonable times: s. 29 (2) of the Sale of Goods Act, 1893, applies, I think, to a contract such as this, where delivery is to be by instal-
B ments, equally with a contract under which there is only to be a single delivery, and imports the standard of reasonable time, which, by s. 56 of the same Act, is a question of fact, no doubt to be determined in view of all the relevant circumstances, however complicated. In my judgment, the contract is neither uncertain nor incomplete as regards times of delivery or shipment.

In the result, I arrive at the same conclusion as MACKINNON, J., namely, that
C the contract is valid and enforceable and that the appellants are entitled to recover damages from the respondents for its repudiation. The judgment of the Court of Appeal was otherwise. Apart from their conclusion that cl. 9 was no more than an arrangement to negotiate in the future terms of a new contract for 1931, they held that in any view cl. 9 was uncertain and incomplete. SCRUTTON, L.J., held that,

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> "Considering the number of things left undetermined, kinds, sizes, and quantities of goods, times and ports and manner of shipment . . . which had in this case to be determined by agreement after negotiation,"

the option clause was not an enforceable agreement. With respect to the learned lord justice, and for the reasons I have already explained, I cannot agree with that
E conclusion. He seems to base his conclusion in part at least on the evidence of Mr. Hillas as to how in working out the contract in practice there would be mutual concessions and arrangements. I do not question that, as I have already explained, this would be so, but I prefer the statement of the learned lord justice at another part of his judgment that witnesses

F
> "were not entitled to construe the agreement or give their opinion as to how it could or ought to be worked."

The conclusion of SCRUTTON, L.J., would in very many cases exclude in law the possibility of business men making big forward contracts for future goods over a period, because in general in such contracts it must be impossible, as I have already indicated, to specify in advance all the details of a complicated perfor-
G mance. Indeed, GREER, L.J., expressly states the view that such contracts are impossible in law, though he regrets the conclusion. He holds that

> "if there are any essential terms of a contract of sale undetermined and therefore to be determined by a subsequent contract, there is no enforceable contract";

H he adds that the courts have not power to make for parties a contract which in its view it is probable they would have made if there had been further negotiation to deal with matters not already decided. This latter proposition stated in general terms may be correct, but I have already explained why, in my judgment, this contract was complete and enforceable without further negotiation. It must always be a matter of construction of the particular contract whether any essential
I terms are left to be determined by a subsequent contract.

When the learned lord justice speaks of essential terms not being precisely determined, i.e., by express terms of the contract, he is, I venture with respect to think, wrong in deducing as a matter of law that they must, therefore, be determined by a subsequent contract; he is ignoring, as it seems to me, the legal implication in contracts of what is reasonable, which runs throughout the whole of modern English law in relation to business contracts. To take only one instance, in *Hoadly* v. *M'Laine* (6), TINDAL, C.J. (after quoting older authority), said (10 Bing. at p. 487):

> "What is implied by law is as strong to bind the parties as if it were under their hand. This is a contract in which the parties are silent as to price, and therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." A

It is unnecessary, in my judgment, to multiply illustrations of this principle, which goes far beyond matters of price. After all, the parties, being business men, ought B to be left to decide what degree of precision it is essential to express in their contracts, if no legal principle is violated. The learned lords justices (for ROMER, L.J., took the same view) relied, I think, mainly in regard to this aspect of the case on an unreported decision of this House in the appeal of *May and Butcher, Ltd.* v. *Regem* (1), which SCRUTTON, L.J., thought compelled him to decide as he did. There was there a contract for the sale of certain goods, somewhat in- C elegantly called "tentage," with an option to buy further quantities at prices to be agreed upon between the parties when the material was ready for sale. SCRUTTON, L.J., had taken the view in the Court of Appeal that there was an effective intention to contract to sell and buy, on the terms that, if the parties did not agree, the price it was by implication to be a reasonable price; but he was in a minority in the Court of Appeal, and this House held that there was no binding D contract there till prices had been agreed. A somewhat similar decision on another contract was given in the Court of Appeal in *Loftus* v. *Roberts* (7), where the rule was summed up as being "Promissory expressions reserving an option as to the performance do not create a contract." No one would dispute such a rule, and its application to the instrument before the House in *May and Butcher, Ltd.* v. *Regem* (1) has been finally determined in that case; but, in my judgment, the Court of E Appeal were not justified in thinking that this House intended to lay down universal principles of construction or to negative the rule that it must be in each case a question of the true construction of the particular instrument. In my judgment, the parties here did intend to enter into, and did enter into, a complete and binding agreement, not dependent on any future agreement for its validity. But in any event the cases cited by the Court of Appeal do not, in my judgment, apply here, F because this contract contains no such terms as were considered in those cases; it is not stipulated in the contract now in question that such matters as prices or times or quantities were to be agreed. I should certainly share the regret of the lords justices if I were compelled to think such important forward contracts as the present could have no legal effect and were mere "gentlemen's agreements" or honourable obligations. But, for the reasons given, I feel constrained to dissent G from their conclusions—I have only with great diffidence arrived at this conclusion —but I am supported by reflecting that I am in agreement with a learned judge very experienced in these questions.

I need only refer shortly to two further matters. It was contended on behalf of the respondents that in any event MACKINNON, J., has arrived at his award of damage on a wrong principle, and that there was no evidence on which he could H find other than nominal damages. The appellants put before the judge a specification based on the deliveries of the 40,000 standards in 1930, multiplied by two-and-a-half times. The respondents, though they at that time had in their possession the specification for their programme for 1931, did not lay that before the judge, who, doing his best with the material before him, awarded damages on the appellants' figures of specification, taking on matters of price the respondents' official I price list for 1931, but subject to a considerable abatement for contingencies of the market. As the respondents did not give him such help as was in their power, with the full knowledge they possessed, they cannot, in my judgment, complain of his decision. One other point—namely, that with reference to the pleadings—now calls for only a passing notice here. The respondents in their defence pleaded that the agreement was cancelled; they did not raise the plea of there being no agreement enforceable in law until the inquiry as to damages, and then did not amend. The Court of Appeal thought no amendment was necessary. I think that under the rules the respondents were bound, if they desired to deny either the agreement in fact or its sufficiency in law, to plead so expressly in the alternative to their plea that it was cancelled. But the issue has now been discussed without amendment, and I think no further evidence of fact was involved in the new plea. In any case I think this House would have had full discretion to amend.

The appeal should, in my judgment, be allowed, with costs in this House and in the courts below, and the judgment of MACKINNON, J., restored and the case remitted to the King's Bench Division.

Appeal allowed.

Solicitors: *Linklaters & Paines*; *Wynne-Baxter & Keeble.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

NATBORNY *v.* NATBORNY

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), June 24, 1932]

[Reported [1933] P.1; 101 L.J.P. 58; 147 L.T. 252; 96 J.P. 351; 48 T.L.R. 590; 30 L.G.R. 447; 29 Cox, C.C. 509]

Justices—Husband and wife—Maintenance order—Discharge—Adultery—Application competent "at any time"—No limitation to six months after knowledge of adultery by husband—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict., c.* 43), *s.* 11*—Summary Jurisdiction (Married Women) Act,* 1895 (58 *&* 59 *Vict., c.* 39), *s.* 7.

By s. 1 of the Summary Jurisdiction Act, 1848, justices may issue summonses, inter alia, "in all cases where a complaint shall be made . . . upon which . . . they have . . . authority by law to make any order for the payment of money or otherwise." By s. 11: "In all cases where no time is already or shall hereafter be specially limited for making any such complaint . . . such complaint shall be made . . . within six calendar months from the time when the matter of such complaint . . . arose." By s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, a court of summary jurisdiction may, on the application of a married woman or her husband, "at any time" alter, vary, or discharge a separation, custody, or maintenance order. The section further provides: "If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged." By s. 8: "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts . . ."

The words "at any time" in s. 7 apply to both limbs of the section, and, therefore, an application by a husband for the discharge of a maintenance order on the ground of the wife's adultery falls within the exception in s. 11 of the Act of 1848 as being "specially limited" and is competent although brought more than six months after he has obtained knowledge of the adultery.

Notes. The relevant provisions of s. 1 of the Summary Jurisdiction Act, 1848, have been replaced by s. 43 of the Magistrates' Courts Act, 1952. Section 11 of the Act of 1848 has been replaced by s. 104 of the Act of 1952.

Referred to: *Teall* v. *Teall*, [1938] 3 All E.R. 349.

As to the summary procedure in matrimonial cases, see 12 HALSBURY'S LAWS (3rd Edn.) 487 et seq., and for cases see 27 Digest (Repl.) 722 et seq. For Magistrates' Courts Act, 1952, see 32 HALSBURY'S STATUTES (2nd Edn.) 416.

Cases referred to: A

(1) *Johnson* v. *Johnson*, [1900] P. 19; 69 L.J.P. 13; 81 L.T. 791; 64 J.P. 72; 16 T.L.R. 26, D.C.; 27 Digest (Repl.) 727, *6940*.

(2) *Waller* v. *Waller*, [1927] P. 154; 96 L.J.P. 58; 136 L.T. 542; 43 T.L.R. 285; 71 Sol. Jo. 232; 28 Cox, C.C. 329, D.C.; 27 Digest (Repl.) 724, *6925*.

(3) *Bragg* v. *Bragg*, [1925] P. 20; 94 L.J.P. 11; 132 L.T. 346; 41 T.L.R. 8; 69 Sol. Jo. 73; 27 Cox, C.C. 729, D.C.; 27 Digest (Repl.) 722, *6907*. B

(4) *Mellars* v. *Mellars* (1931), 145 L.T. 550; 95 J.P. 169; 29 L.G.R. 563; 29 Cox, C.C. 344, D.C.; 27 Digest (Repl.) 725, *6927*.

(5) *Dutch* v. *Dutch* (1928), 98 L.J.P. 44; 140 L.T. 96; 92 J.P. 197; 45 T.L.R. 33; 72 Sol. Jo. 796; Digest Supp.

Appeal from an order of a Divisional Court of the Probate, Divorce and Admiralty Division for the discharge of a maintenance order made in 1924. C

On Oct. 13, 1924, the wife was granted at Old Street Police Court a maintenance order, on the ground of desertion, under which the husband was ordered to pay her 30s. a week. In June, 1930, the amount was varied to £1 a week. In April, 1931, the husband petitioned for divorce on the ground of his wife's adultery, and on Nov. 5, 1931, the wife not appearing to contest the charge, he was granted a decree nisi. D On Dec. 16, 1931, the husband took out a summons for the discharge of the maintenance order on the ground of fresh evidence, alleging that the wife had committed adultery in August, 1928. The summons was heard on Jan. 7 when the husband said that he first knew of his wife's adultery in 1930, but he did not come to the court until six months after he found out about it. Reference was made to *Johnson* v. *Johnson* (1) as to the meaning of "fresh evidence." The magistrate's decision was as follows: E

> "In this case the act of adultery was four years after the order. The second part of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, covers such act of adultery and the husband neglected to take advantage of it within the time. There is no obligation to discharge the order under the first part of s. 7 and I doubt if I have the power to do so in the present case. F Having regard to all the circumstances I would not exercise my discretion in this case. Summons dismissed."

The husband appealed on the grounds that the magistrate was wrong in law in holding that there was no fresh evidence on which he could revoke the order, and that he should have done so on the ground of the adultery committed since the order; that he was wrong in holding that the proceedings were out of time; and G that there was sufficient evidence for exercising his discretion in favour of the appellant. A Divisional Court of the Probate, Divorce and Admiralty Division (LORD MERRIVALE, P., and BATESON, J.) dismissed the appeal on the ground that s. 7 of the Act of 1895 was governed by s. 11 of the Summary Jurisdiction Act, 1848, which provided that in all cases where no time was specially limited for making a complaint before a court of summary jurisdiction the complaint should H be made within six calendar months from the time when the matter of such complaint arose. The husband appealed to the Court of Appeal.

The Summary Jurisdiction (Married Women) Act, 1895, s. 7, enacts that the court may

> "on the application of the married woman or of her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court at any time, I alter, vary, or discharge any [maintenance] order, . . . If any married woman upon whose application an order shall have been made under this Act . . . shall commit an act of adultery, such order shall upon proof thereof be discharged."

Section 8 provides:

> "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts."

By the Interpretation Act, 1889, s. 13 (7), these meant the Summary Jurisdiction Acts, 1848 and 1879, and any Act amending those Acts.

M. Lush for the husband.
D. S. Musson for the wife.

LORD HANWORTH, M.R.—This appeal must be allowed. It raises an interesting point of considerable importance in a number of cases. In 1916 the husband married, and there were two children of that marriage. His wife died in 1923, and in 1924 he married again. There was considerable hostility between the spouses, and in August of that year, when the husband and wife were living at the wife's mother's house, the husband was turned out of the home, and he went and lived with an uncle. On Oct. 13, 1924, he was summoned for desertion, and an order was made against him that he should pay his wife, for herself and the children, 30s. a week. He did make some payments, and apparently always paid a money contribution to the bringing up of the children, but he did not pay the full sum, apparently, I dare say, because he felt indisposed to assist his wife. On June 16, 1930, he made an application to the magistrate, and for reasons good and sufficient the magistrate reduced the sum payable by the husband from 30s. a week to 20s. In July, 1930, the husband heard that his wife had been guilty of adultery, that adultery having taken place two years before, some time in 1928, but, according to his statement, although there might be some controversy about it, he did not know or appreciate that until 1930. On April 18, 1931, the husband presented a petition to the Divorce Court alleging adultery by his wife which had been committed in 1928. On July 28 the wife put in an answer and, in the course of that answer, although she denied some of the charges, she admitted that in August, 1928, she had committed adultery. On Nov. 5, 1931, the petition was heard; the wife did not contest it, and a decree nisi was made in the husband's favour. On May 30 of this year the decree was made absolute. After the decree nisi had been made, on Dec. 16, 1931, the wife summoned her husband for the arrears of the allowance which he had been ordered to pay to her. On Dec. 17 the husband took out a summons and asked for the discharge of the order of October, 1924, as amended by the order of June, 1930, on the ground that the wife had committed adultery. The hearing took place before the magistrate, and he clearly indicates in his judgment that the situation under the sections, to which I will refer, is somewhat difficult owing to a number of decisions that have been given. He felt himself bound to say that, inasmuch as the adultery that had been charged, the admitted adultery, was of the date of August, 1928, it was more than six months before the application was made to him, with the result that, following what he thought was the decision in *Waller* v. *Waller* (2), he must refuse to make any order for the discharge of the order of October, 1924. The husband appealed to the Divisional Court, and that court upheld the attitude of the magistrate and referred to *Waller* v. *Waller* (2) and one or two other cases. From that decision the appeal is taken to this court.

The point taken against the application of the husband to the magistrate is this. The statute under which the order of October, 1924, was originally made was passed in 1895, and by s. 8 it is provided that:

> "All applications under this Act shall be made in accordance with the Summary Jurisdiction Acts, . . ."

The Act itself is entitled the Summary Jurisdiction (Married Women) Act, 1895. I think that the wording of s. 8 indicates a plain direction to apply to applications under the Act the system provided by Summary Jurisdiction Acts, 1848 and 1879. It is provided by s. 1 of the Act of 1848 that justices may issue summonses

> "in all cases where a complaint shall be made . . . upon which . . . they have . . . authority by law to make any order for the payment of money or otherwise."

By s. 11 it is provided that a time shall be limited for such complaint—that such A complaint shall be made within six calendar months from the time when the matter of the complaint arose. It is a little difficult to determine, if it were necessary to do so, whether that means when the matter on which the complaint is based came to the knowledge of the complainant, or whether it refers to the date when the actual facts took place upon which the complaint is based. But, however that may be, it seems plain enough that the application is to be one to which a time limit of B six months applies. In *Bragg* v. *Bragg* (3) it was held that dissolution of a marriage by a decree absolute of divorce does not ipso facto discharge a maintenance order previously obtained by a wife under the Summary Jurisdiction (Married Women) Act, 1895, nor does such dissolution compel the court of summary jurisdiction to discharge such an order, but every such case comes within the discretion given to the court by s. 7 of the Act to vary or discharge the order on evidence of C fresh facts. In the course of his judgment in that case the learned President refers to s. 7 of the Act of 1895, and indicates that it is that section which provides the machinery which at the present time is lacking from the Divisional Court itself.

I turn, therefore, to see what is the meaning of the statute of 1895, and I think it is useful to call attention to the earlier Acts. The first Act to which our attention must be directed is the Matrimonial Causes Act, 1878, and that provides, by D s. 4, that if a husband is convicted of an aggravated assault upon his wife, and the court is satisfied that the wife is in peril, they may make an order of separation. They may further provide that the husband shall pay to his wife a weekly sum, and it is to be enforced against him, and the court or magistrate shall have power from time to time to vary the sum on the application of a husband or wife, and so on. Then there is a proviso that no order for payment of money shall be made in E favour of a wife who shall be proved to have committed adultery, unless such adultery has been condoned, and that any order for payment of money may be discharged upon proof that the wife has, since the making thereof, been guilty of adultery. It will be observed that the original power to vary, which is exercisable from time to time, is one which contains a proviso that the order for payment shall be discharged upon proof of adultery. The next statute is one of 1886, and that F was to amend the law relating to maintenance of married women who had been deserted by their husbands, and enabled the courts to make an order in favour of a wife who had been deserted. It will be noticed that the 1878 Act applied only to cases of aggravated assault and the 1886 Act gave additional power in any case of desertion. But, again, there was the power given to the justices from time to time to vary the sum, and there was also a proviso that no order shall be made in G favour of a wife who shall be proved to have committed adultery, subject, of course, to condonation, and also a proviso that justices may re-hear such summonses at the instance of the husband at any time.

It would seem from those two statutes that there was a power to alter, vary, discharge or re-hear "at any time." Those statutes were put together in the statute with which we are dealing, the Act of 1895. It will be found that this H repealed the whole of the Married Women (Maintenance in Case of Desertion) Act, 1886, and s. 4 of the Act of 1878. So the two statutes I have been referring to have now been incorporated together in this Act of 1895. I come, then, to see what has been done by s. 7 of that Act. It is provided there that a court of summary jurisdiction may, on the application of a married woman or her husband, and upon cause being shown upon fresh evidence to the satisfaction of the court, at any time I alter, vary, or discharge any such order. The order that is there referred to is any order under the Acts mentioned in the schedule to the Act, and those are the Acts to which I have been referring. The section goes on:

> "If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged."

A When I look at that, bearing in mind the terms of s. 8 of the 1895 Act, whereby all applications have to be made in accordance with the system of the Summary Jurisdiction Acts, it appears to be clear that the court is given power when an application is made to exercise a discretion in one case, and has a mandatory duty thrown upon it in the second. More than that, one is confronted with the apparent injustice of a husband being unable to free himself from an order under which he B has got to make a payment to an adulterous wife if he is not able to make an application under s. 7 within the prescribed six months because the fresh evidence is not available. He cannot go to the Divisional Court and get free from it. If the time limit is an impediment in his way it may be that many a man is suffering because an order has been made in the interests of his wife, and she has now found a new lover and is living with him, while her husband, in spite of her C adultery, has no means of freeing himself from the original order. One hesitates to say that that is what the legislature contemplated. It will be noticed that the opening words of s. 7 are: "A court of summary jurisdiction . . . may . . ." And it is upon cause being shown, on fresh evidence to the satisfaction of the court, that "at any time" an application may be made.

"At any time." The ordinary rules of the construction of statutes seem to indi- D cate that s. 7 freed the Act from the restriction which s. 8, in combination with s. 11 of the Act of 1848, imposed on an applicant, with the result that there is an opportunity to come at any time, and the six months' limit does not apply. The spouses may come at any time, and when that application is made there is freedom for the exercise of the discretion in all matters which have to be considered under the earlier part of the section. But if a married woman has committed adultery E there is a direction given to the court of summary jurisdiction as to what it is to do—that is to say, the order is to be discharged. That reading of the section seems quite plain to me. It was a mandatory direction to the court of summary jurisdiction, and that seems to be plain when one turns to look at s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, which amends s. 7 of the Act of 1895. Section 2 of the Act of 1925 says this:

F

> "(1) Section 7 of the principal Act (which provides, amongst other things, that if a married woman, upon whose application an order has been made under that Act, shall commit an act of adultery, such order shall upon proof thereof be discharged) shall have effect as though at the end thereof the following proviso were inserted: 'Provided that the court may, if the court think G fit (a) refuse to discharge the order if, in the opinion of the court, such act of adultery as aforesaid was conduced to by the failure of the husband to make such payments as in the opinion of the court he was able to make under the order.' "

It seems to me a clear indication by the legislature that, whereas the duty of the court was absolute in the case of adultery, now there shall be added to that section H a proviso which will give the court a certain discretion, and the proviso says that if the court think fit they may refuse an order where there was conduct conducing. When one turns to s. 2 of the Act of 1925 it seems plain enough that the mandatory effect of s. 7 is clear.

Is there any difficulty in adopting that construction? It is said that *Waller* v. *Waller* (2) confronts the court and that it has stood for some time. I do not quite I understand what the court did intend to decide in that case, but it is quite clear from the order that they made that both the President and HILL, J., thought that s. 7 does make it clear that an application to vary or discharge may be made at any time, but otherwise s. 11 of the 1848 Act applies. In other words, it seems to indicate that the court were of opinion that these applications that were referred to in s. 7 were ones which could be made at any time, and that it was only otherwise that s. 11 imposed a time limit. It seems, therefore, that so far *Waller* v. *Waller* (2) does not conflict with the view that I have presented; if it does, I do not hesitate to say that I do not accept its conclusions. In that case no reference was made to the discretionary power under the earlier part of s. 7, and I observe a note in STONE'S JUSTICES' MANUAL, at p. 844 in the 1932 edition, which says:

> "[*Waller* v. *Waller* (2).] In obiter dicta in *Mellars* v. *Mellars* (4) the words 'at any time' in the discretionary portion were overlooked."

That is true: they were overlooked. They do, to my mind, take away the restrictive effect of s. 11 of the 1848 Act, and the result is that where there is new evidence, but it cannot have been obtained before, there is no time limit of six months, and the matter can be brought before the court, and then, if it is proved that the wife has committed an act of adultery, the right course is to discharge the order, because she ought no longer to receive any money as maintenance from her husband.

The result will be that the appeal will be allowed, but the matter must go back to the magistrate because he will still have to exercise the discretion left open to him under s. 2 of the Act of 1925. When the magistrate said that he would not in any case have exercised his discretion in favour of the husband he (the magistrate) does not mean to indicate a concluded view. The magistrate is far too experienced to have expressed a final decision until all the material matters were before him.

SLESSER, L.J.—I agree that this appeal must be allowed. The Divisional Court found themselves bound to follow a decision, previously given by a Divisional Court in 1927, in *Waller* v. *Waller* (2). That case seems to have proceeded on the assumption that s. 7 of the Act of 1895 contains two separate limbs. The court appears to have taken the view that under the first limb an application might be made to alter, vary, or discharge an order, and that in the matter the magistrate would have a discretion and that an application to vary the amount under that limb might be made at any time. But, proceeding to the second limb, they seem to assume that an application by the husband for the discharge of an order on the ground that the wife had committed adultery was subject to the limitation of six months imposed by s. 11 of the Act of 1848, that period dating from the time of the act of adultery, or, possibly, as was suggested in a later case, from the time when the knowledge of the act came to the attention of the applicant. That is expressed in the judgment of HILL, J., where he says:

> "Application to vary the amount may be made at any time. But otherwise it seems to me that s. 11 applies."

If that is a right construction of s. 7 of the Act of 1895, I think that there is very great weight to be attached to the view expressed by the Divisional Court. Indeed, if an application could be made under the second limb complaining only of an act of adultery, I think that it would be right to say, applying s. 8 of the Act of 1895, that all applications should be made in accordance with the Summary Jurisdiction Acts, that s. 11 of the 1848 Act would apply, and that it would be a case where, there being no time specially limited, such complaint should be made within six calendar months. But the error into which I think that the Divisional Court fell in *Waller* v. *Waller* (2) and the two subsequent cases [*Mellars* v. *Mellars* (4) and *Dutch* v. *Dutch* (5)] that have been cited is that, when one looks at s. 7 closely, it appears that it does not contemplate two separate applications at all. There is only provision made for application to the court in cases of varying, altering, or discharging orders, on one application, of the married woman or her husband.

> "A court of summary jurisdiction . . . may, on the application of the married woman or of her husband, . . . alter, vary, or discharge any such order,"

and that application may be made "at any time." If the application may be made "at any time," that means any time while the order is in force, the case still falls within s. 11 of the Act of 1848, but it also falls within the excepting words:

> ". . . where no time is already or shall hereafter be specially limited for making any such complaint. . . ."

A By s. 7 of the 1895 Act, the words are limited for making any such complaint, that is, they are to be "at any time," and any time is to be during the currency of the order that is to be altered, varied, or discharged. Therefore, the first limb substitutes for the limitation of six months any time during the existence of the order. The second part does not deal with a separate application at all; there is only one application possible, to alter, vary, or discharge—one of those three. All that the B legislature does thereafter is to require that, if the married woman shall commit an act of adultery, the order shall be discharged. That is to say, in the case of discharge, not of alteration or variation, the court must, subject to the subsequent amendment in s. 2 of the Act of 1925, discharge the order, where otherwise there remains a discretion. I observe that in *Waller* v. *Waller* (2) this argument was addressed to the court by counsel, who said:

C

> "The effect of s. 7 as a whole is that the application to discharge may be made at any time and not necessarily within six months."

But the court seems to have been concerned rather with the question whether there was a complaint within s. 11 of the Act of 1848, and not to have considered, or at any rate to have rejected, the argument.

D I state my views, which agree with those of my Lord, for three reasons. First, because we are differing from the Divisional Court; secondly, because we are differing from an existing practice; and thirdly, because the social consequences of this decision may be very serious indeed. I cannot but construe the section as I have indicated, and counsel for the husband has given me this further reason for differing—that the whole history of this legislation goes to show that the earlier E Acts did give power to apply "at any time," or "from time to time," and that the Act of 1895 has made the discharge of the order mandatory in certain cases. It would be a remarkable result if an Act which, on the face of it, appears to have been intended to make an order mandatory, should nevertheless have put a limitation on the time in which the application should be made which the earlier Acts have carefully abstained from doing. If the legislation had produced that result F we would have given effect to it, but there is only one application, and that application may be made at any time.

ROMER, L.J.—I agree. If on fresh evidence an application is made under the first part of s. 7 of the Act of 1895, asking the court to alter, vary, or discharge an order, and such fresh evidence shows that the wife has either voluntarily resumed cohabitation, or has committed an act of adultery, the court no longer has the wide G discretion that it would have had in other cases. It is compelled to discharge the order, subject only to the limited discretion now imposed on it by s. 2 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. It seems plain from the use of the words "at any time" in the first part of the section that the application is not limited to be made within the six months referred to in s. 11 of the Summary Jurisdiction Act, 1848. That was held, and, in my opinion, rightly H held, by the Divisional Court in *Waller* v. *Waller* (2), but that decision should also apply to the second and mandatory part of s. 7, so that an application under that part of the section can also be made at any time and is not limited to six months from the time the matter was raised. That being so, it appears to me that the magistrate in this case has no discretion in the matter except the limited discretion imposed on him by the amending Act of 1925. I agree, therefore, that the appeal I must be allowed, and the case go back to the magistrate to exercise that limited discretion.

Appeal allowed.

Solicitors: *Braby & Waller*; *Curwen, Carter, & Evans.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

R. *v.* EDITOR, ETC., OF "DAILY HERALD" AND DAVIDSON
Ex parte THE BISHOP OF NORWICH
R. *v.* EDITOR, ETC., OF "EMPIRE NEWS" AND DAVIDSON
Ex parte THE BISHOP OF NORWICH

[KING'S BENCH DIVISION (Lord Hewart, C.J., MacKinnon and Hawke, JJ.), February 22, 1932]

[Reported [1932] 2 K.B. 402; 101 L.J.K.B. 305; 146 L.T. 485; 48 T.L.R. 253; 76 Sol. Jo. 165]

Contempt of Court—Consistory court—Contempt of—Jurisdiction of King's Bench Division to punish.

The King's Bench Division has jurisdiction to punish contempt of a consistory court.

Notes. As to contempt of inferior courts, see 8 HALSBURY'S LAWS (3rd Edn.) 19, 20, and for cases see 16 DIGEST 11, 12.

Cases referred to:

(1) *R.* v. *Daily Mail, Ex parte Farnsworth*, [1921] 2 K.B. 733; 90 L.J.K.B. 871; 125 L.T. 63; 37 T.L.R. 310, D.C.; 16 Digest 12, *54*.

(2) *Ricketts* v. *Bodenham* (1836), 4 Ad. & El. 433; 5 L.J.K.B. 102; 111 E.R. 850; sub nom. *Bodenham* v. *Ricketts*, 1 Har. & W. 753; 6 Nev. & M.K.B. 170, 537; 16 Digest 385, *2237*.

(3) *Burder* v. *Veley* (1840), 12 Ad. & El. 233; Arn. & H. 175; 4 Per. & Dav. 452; 9 L.J.Q.B. 267; 4 J.P. 379, 394; 4 Jur. 382; 113 E.R. 801; affirmed sub nom. *Veley* v. *Burder*, 12 Ad. & El. 265; 1 Arn. & H. 196; 4 Per. & Dav. 475; 10 L.J.Ex. 532; 5 Jur. 1013, Ex. Ch.; 16 Digest 372, *2109*.

Rules nisi for attachment for contempt.

The court granted two rules nisi at the instance of the Bishop of Norwich calling on (a) the editor, printers, and publishers of the "Daily Herald" and the Rev. H. F. Davidson, and (b) the editor, printers and publishers of the "Empire News" and the Rev. H. F. Davidson, to show cause why writs should not issue against them for contempt in publishing matters calculated to prejudice the fair hearing of a complaint preferred by the Bishop of Norwich under the Clergy Discipline Act, 1892, against the Rev. H. F. Davidson in the Consistory Court of Norwich.

The complaint, which was dated Jan. 8, 1932, and was served on the Rev. H. F. Davidson, rector of Stiffkey-with-Morston, on Jan. 21, 1932, included a number of charges of immoral conduct, and, in particular, charges of immorality with a woman named Ellis. In the issue of Feb. 4 the "Daily Herald" published an article headed: "Woman's Own Story in Rector case. I made charges when I was hard up." The article gave an account of an interview between Ellis and a reporter in the employment of the "Daily Herald," in which Ellis was alleged to have said that two persons had been brought to see her with regard to Mr. Davidson, and that afterwards, when under the influence of drink and on promise of payment, she made a statement to one of these persons accusing Mr. Davidson of improper conduct, that that statement was untrue, and that when she realised what had happened she swore an affidavit retracting what she had said.

On Feb. 7, 1932, the "Empire News" published an article headed: "Challenge to my Traducers: By the Rector of Stiffkey. 'Bribery, Corruption and Blackmail.' " The article was prefaced with an assertion that the rector was determined to refute "the vile accusations mysteriously launched against him," and contained a statement purporting to have been made by him to the effect that he had determined to place before the public a letter written by him to the bishop so that they might understand

> "upon what evidence some of the accusations have been brought, and that the woman on whose statements one of the charges had been made had subsequently sworn an affidavit retracting those statements."

On Feb. 14, 1932, the same newspaper published a further article headed: "Why I am fighting. Disclosures by the Rector of Stiffkey," which was a continuation of the rector's former statement, and alleged that the woman in question had been approached by inquiry agents for information detrimental to the rector.

Norman Birkett, K.C. (*Theobald Mathew* with him), showed cause on behalf of the editor, printers and publishers of the "Daily Herald."

Sir Patrick Hastings, K.C. (*Theobald Mathew* and *St. John Davidson* with him), showed cause on behalf of the editor, printers and publishers of the "Empire News."

Walter Samuel, K.C. (*E. Ryder Richardson* with him), showed cause on behalf of the Rev. H. F. Davidson.

Roland Oliver, K.C. (*W. T. Monckton, K.C.*, and *Humphrey King* with him), in support of the rules.

The judgment of the court was delivered by

LORD HEWART, C.J.—These are rules nisi for writs of attachment for contempt. The applications have been made, in each case, at the instance of the Bishop of Norwich, and the alleged contempt consists in the publication of matter calculated to prejudice the fair hearing of a certain complaint preferred by the bishop under the Clergy Discipline Act, 1892, against the Rev. H. F. Davidson in the consistory court of the diocese on charges of immoral conduct. The persons concerned in the first rule are the editor, printers, and publishers of the "Daily Herald," and in the second rule the editor, printers, and publishers of the "Empire News," and in each case the Rev. H. F. Davidson himself.

The court has heard a long and interesting argument on the question of jurisdiction in such a case. None of us has any doubt that this court has jurisdiction. The jurisdiction is an inherent one, and just as this court may correct an inferior court such as the consistory court, so also in proper circumstances it may protect such a court. I need not refer to the cases which have been cited, and by which the matter is made quite clear: *R.* v. *Daily Mail, Ex parte Farnsworth* (1); *Ricketts* v. *Bodenham* (2) (4 Ad. & El. at p. 441); *Burder* v. *Veley* (3) (12 Ad. & El. at p. 259). I will read only one short passage with reference to the argument that a provision in a statute has taken away the inherent jurisdiction of the court. In *R.* v. *Daily Mail, Ex parte Farnsworth* (1) ([1921] 2 K.B. at p. 753), AVORY, J., dealing with a similar point, based on s. 126 of the Army Act, 1881, said:

> "I find in that section no provision either express or implied which takes away the right of a party to proceedings before a court martial who is aggrieved by a contempt of that court to move this court to exercise the inherent jurisdiction which it possesses over all inferior courts."

The same considerations, in our opinion, apply here, and the inherent jurisdiction remains untouched by the Ecclesiastical Courts Act, 1813, and the Ecclesiastical Courts (Contempt) Act, 1832.

In some respects this was a gross contempt, and we have discussed with care what the appropriate penalties should be. We think it quite clear that the Bishop should not be called on to pay any costs at all in the matter. We think the rules should be made absolute, and we impose a fine of £100 in the case of the "Empire News" and a fine of £50 in the case of the "Daily Herald," and we think that all the parties should be ordered to pay the costs as between solicitor and client. The order is made against all the respondents. The writs will lie in the office for a period of fourteen days.

Rules absolute.

Solicitors: *John T. Monks*; *Theodore Goddard & Sons*; *Glynn Barton & Co.*; *Lee, Bolton, & Lee.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

BRYANT *v.* MARX

[KING'S BENCH DIVISION (Lord Hewart, C.J., Talbot and Humphreys, JJ.), July 15, 1932]

[Reported 147 L.T. 499; 96 J.P. 383; 48 T.L.R. 624; 76 Sol. Jo. 577; 30 L.G.R. 405; 29 Cox, C.C. 545]

Road Traffic—Offence—Obstruction of "road"—Inclusion of footway—Motor Vehicles (Construction and Use) Regulations, 1931 (*S.R. & O.* 1931, *No.* 4), *regs.* 3, 74 (1).

By reg. 74 (1) of the Motor Vehicles (Construction and Use) Regulations, 1931: "No person driving or in charge of a motor vehicle when used on a road shall . . . (b) allow the motor vehicle or any trailer drawn thereby to stand on the road so as to cause any unnecessary obstruction thereof."

"Road" in the above regulation includes the footway as well as the carriage-way.

Notes. Regulation 74 of the regulations of 1931 has been replaced by reg. 89 of the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. 1955, No. 482).

As to meaning of "road," see 19 HALSBURY'S LAWS (3rd Edn.) 16, 17, and for cases see 26 DIGEST 262 et seq.

Cases referred to:

(1) *R.* v. *United Kingdom Electric Telegraph Co., Ltd.* (1862), 2 B. & S. 647, n.; 3 F. & F. 73; 31 L.J.M.C. 166; 6 L.T. 378; 26 J.P. 390; 8 Jur.N.S. 1153; 10 W.R. 538; 9 Cox, C.C. 174; 121 E.R. 1212; 26 Digest 313, *452*.

(2) *Loveridge* v. *Hodsoll* (1831), 2 B. & Ad. 602; 109 E.R. 1267; 26 Digest 313, *451*.

(3) *Derby County Council* v. *Matlock Bath and Scarthin Nick Urban District*, [1896] A.C. 315; 65 L.J.Q.B. 419; 74 L.T. 595; 60 J.P. 676; 12 T.L.R. 350, H.L.; 26 Digest 395, *1219*.

Case Stated by a metropolitan police magistrate.

The appellant Bryant, a police constable, preferred an information under s. 111 (3) of the Road Traffic Act, 1930, and reg. 74 of the Motor Vehicles (Construction and Use) Regulations, 1931, against the respondent Marx, charging her that on Dec. 3, 1931, she, being the person in charge of a motor vehicle on a road at Durham House Street, W., unlawfully allowed the vehicle to stand on the road so as to cause unnecessary obstruction.

At the hearing of the information it was proved or admitted that the respondent was in charge of a motor vehicle which was standing on the pavement in Durham House Street from 3 p.m. to 5.30 p.m. in front of a lock-up garage and over a fire hydrant. No one wanted to make use of the garage or hydrant while the motor vehicle was standing on the pavement. Pedestrians were obliged to step off the pavement into the carriage-way in consequence of the presence of the motor vehicle on the pavement, but no actual obstruction of the carriage-way was caused. Neither party was legally represented before the magistrate, who took the point that the word "road" meant the carriage-way as distinct from the footpath, and that, as the motor vehicle was not standing on the carriage-way, no offence had been committed under reg. 74. He, accordingly, dismissed the information, and in the Case Stated supported his decision by the contentions (a) that in s. 58 of the Road Traffic Act, 1930, a distinction was drawn between roads and footpaths inasmuch as there was in that section a reference to footpaths by the side of roads; (b) that on the facts the proceedings should have been instituted under s. 72 of the Highway Act, 1835, for wilfully obstructing the passage of a footway. He added that it might be argued for the appellant that s. 121 of the Road Traffic Act, 1930, and reg. 3 of the Motor Vehicles (Construction and Use) Regulations, 1931, both contained a definition of road in the following terms:

> "Road means any highway and any other road to which the public has access, and includes bridges over which a road passes,"

and that at common law footpaths by the side of carriage-ways were (primâ facie at any rate) part of the highway: see *R.* v. *United Kingdom Electric Telegraph Co., Ltd.* (1); *Loveridge* v. *Hodsoll* (2).

Vernon Gattie for the appellant.

The respondent was not represented.

LORD HEWART, C.J.—This case has been very clearly and fairly stated by the magistrate, but, with all respect to him, I think that he has come to a wrong conclusion. It seems clear, not only from the Road Traffic Act, 1930, itself, but also from decisions like *Derby County Council* v. *Matlock Bath and Scarthin Nick Urban District* (3), that "road" includes the footway no less than the carriage-way. It seems to be no answer by a person charged with allowing a motor car to stand on a road so as to cause unnecessary obstruction to say: "It was only standing on the footpath and obstructing foot passengers." The appeal will be allowed.

TALBOT, J.—I agree.

HUMPHREYS, J.—I agree.

Appeal allowed.

Solicitors: *Wontner & Sons.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

Re VOCALION (FOREIGN), LTD.

[CHANCERY DIVISION (Maugham, J.), May 9, 11, June 6, 1932]

[Reported [1932] 2 Ch. 196; 102 L.J.Ch. 42; 148 L.T. 159; 48 T.L.R. 525; [1933] B. & C.R. 1]

Company—Winding-up—Stay of other proceedings—Proceedings in foreign court—Company registered here and abroad—Creditor's action in foreign country of registration—Injunction—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 177.

By s. 177 of the Companies Act, 1929 (now s. 231 of the Companies Act, 1948): "When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose."

This section has no application to actions or proceedings in foreign courts even though English subjects may be concerned with such proceedings and the persons sought to be restrained from proceeding can be served with a summons in this country.

There is a clear jurisdiction in the Court of Chancery to restrain persons within its jurisdiction by an injunction operating in personam from instituting or prosecuting suits in foreign courts if the circumstances are such as would make it the duty of the court to restrain a party from instituting proceedings in this country, but where the official receiver and provisional liquidator of a company which was registered both in England and abroad and was being wound-up, sought to restrain a creditor of the company from suing for his debt in the foreign country of registration,

Held: the court ought primâ facie not to exercise this equitable jurisdiction because, in general, it would be more conducive to substantial justice that the foreign proceedings should be allowed to proceed; in the circumstances of the present case the court ought not to interfere; and, therefore, the applications for injunctions would be dismissed.

Notes. Section 177 of the Companies Act, 1929, has been replaced by s. 231 of the Companies Act, 1948, and ss. 172, 174, 223, and 344 of the earlier Act by ss. 226, 228, 276, and 407 of the later Act respectively.

As to staying proceedings by reason of a winding-up, see 6 Halsbury's Laws (3rd Edn.) 692 et seq., and for cases see 10 Digest (Repl.) 1012 et seq. For Companies Act, 1948, see 3 Halsbury's Statutes (2nd Edn.) 452.

Cases referred to:

(1) *Re Belfast Shipowners' Co.*, [1894] 1 I.R. 321; 10 Digest (Repl.) 1125, **3273*.

(2) *Re Central Sugar Factories of Brazil, Flack's Case*, [1894] 1 Ch. 369; 63 L.J.Ch. 410; 70 L.T. 645; 42 W.R. 345; 10 T.L.R. 150; 38 Sol. Jo. 113; 1 Mans. 145; 8 R. 205; 10 Digest (Repl.) 1012, *6960*.

(3) *Re Commercial Bank of South Australia* (1886), 33 Ch.D. 174; 55 L.J.Ch. 670; 55 L.T. 609; 2 T.L.R. 714; 10 Digest (Repl.) 1305, *9185*.

(4) *Employers Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; 42 T.L.R. 749; sub nom. *Sedgwick Collins & Co., Ltd.* v. *Rossia Insurance Co. of Petrograd*, 136 L.T. 72, H.L.; Digest Supp.

(5) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (1890), 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503; 6 T.L.R. 393, C.A.; 11 Digest (Repl.) 423, *723*.

(6) *Re International Pulp and Paper Co.* (1876), 3 Ch.D. 594; 45 L.J.Ch. 446; 35 L.T. 229; 24 W.R. 535; 10 Digest (Repl.) 1012, *6958*.

(7) *Re Jenkins & Co., Ltd.* (1907), 51 Sol. Jo. 715; 10 Digest (Repl.) 1013, *6963*.

(8) *Moor* v. *Anglo-Italian Bank* (1879), 10 Ch.D. 681; 40 L.T. 620; 27 W.R. 652; 10 Digest (Repl.) 983, *6768*.

(9) *New Zealand Loan and Mercantile Agency Co.* v. *Morrison*, [1898] A.C. 349; 67 L.J.P.C. 10; 77 L.T. 603; 46 W.R. 239; 14 T.L.R. 141; 5 Mans. 171, P.C.; 10 Digest (Repl.) 1126, *7847*.

(10) *Re North Carolina Estate Co., Ltd.* (1889), 5 T.L.R. 328; 10 Digest (Repl.) 1012, *6961*.

(11) *Re Oriental Inland Steam Co., Ex parte Scinde Rail. Co.* (1874), 9 Ch. App. 557; 43 L.J.Ch. 699; 31 L.T. 5; 22 W.R. 810, L.JJ.; 10 Digest (Repl.) 903, *6137*.

(12) *Re South-Eastern of Portugal Rail. Co., Ltd.* (1869), 21 L.T. 220; 17 W.R. 809, L.JJ.; 10 Digest (Repl.) 917, *6264*.

(13) *Re Wanzer, Ltd.*, [1891] 1 Ch. 305; 60 L.J.Ch. 492; 39 W.R. 343; 7 T.L.R. 151; 10 Digest (Repl.) 1017, *6993*.

(14) *Carron Iron Co.* v. *Maclaren* (1855), 5 H.L.Cas. 416; 24 L.J.Ch. 620; 26 L.T.O.S. 42; 3 W.R. 597; 10 E.R. 961, H.L.; 9 Digest (Repl.) 33, *31*.

(15) *Re Maudslay, Sons & Field, Maudslay* v. *Maudslay, Sons & Field*, [1900] 1 Ch. 602; 69 L.J.Ch. 347; 82 L.T. 378; 48 W.R. 568; 16 T.L.R. 228; 8 Mans. 38; 10 Digest (Repl.) 820, *5355*.

Adjourned Summonses.

The company was registered in England and also in Victoria where it carried on business. On Jan. 11, 1932, it was ordered to be wound-up, and in February, 1932, three summonses were taken out. By these the official receiver and the provisional liquidator sought to restrain the Bank of New South Wales, a corporation incorporated in Australia and registered in England pursuant to the Companies Act, 1929, s. 344, from proceeding with (i) an action against the company in the Supreme Court of Melbourne for payment of a sum of £2,584 12s. 11d., with interest; (ii) another action against them and Joseph Wharton, the receiver

A appointed by the company over the assets of Vocalion (Australasia), Ltd., and Charles Gendle, the company's registered agent in Australia, for specific performance of an alleged undertaking to give security over the company's assets in Australia. By the third summons the bank sought an order that it might be at liberty to proceed notwithstanding the winding-up order.

The debt sued for in the first action was alleged to have been due for commission B for work done by the bank in Australia as banker for the company and for money lent to the company, or paid at its request, and for interest. The writ in that action was served on the company in London on Nov. 5, 1931. The second action was brought to enforce a security over the freeholds (if any) and all other the assets of the company. The alleged security was given by Mr. Gendle for and on behalf of the company on March 10, 1930, and was in the form of an under- C taking by the company to give to the bank such security for all moneys owing by the company to the bank over the freeholds (if any) and all other assets of the company as the bank might require whenever called upon so to do, and, in the meantime, not to pledge or in any way encumber or raise money on any of the said assets, except with the consent in writing of the bank. The writ in that action has never yet been served on the company. It claimed specific performance of the D undertaking mentioned above and an order that the company, or Mr. Gendle, or some other fit and proper person, should execute a transfer or assignment by way of security to the bank of the company's assets. An ex parte injunction was, however, granted on Dec. 17, 1931—the date of the issue of the writ—purporting to restrain the company and Mr. Gendle and Mr. Wharton and each of them from selling or dealing with the assets of the company or any of them pending the giving E of certain security, and from dealing with any of the assets of the company contrary to the rights of the bank. On March 1, 1930, the company had agreed to sell its leasehold land, buildings, etc., and the whole of its undertakings in Australia for the sum of £65,000, payable as to £5,000 in cash, as to £40,000 by the issue to the company of a first mortgage debenture of the nominal value of £40,000, containing the usual charge, and as to £20,000 by the allotment to the company of 80,000 F fully paid shares of 5s. each in the capital of a company to be formed. The company referred to was in fact duly formed in Australia under the name of Vocalion (Australasia), Ltd. The debenture was granted to the company on Aug. 6, 1931, and the company appointed Mr. Wharton receiver under the debenture. On Dec. 16, 1931, Mr. Wharton purported to sell all the undertaking and assets of Vocalion (Australasia), Ltd., to a company called the Merchandise Trading Co. for G the sum of £4,500, of which sum £1,000 has been paid to Mr. Wharton, and the balance of £3,500 was due and payable at the date when the security action was commenced. Mr. Wharton was joined as a defendant in the security action, on the allegation that he was endeavouring to defeat the rights of the bank under the undertaking. The Merchandise Trading Co., Ltd., was not joined as a defendant in the security action. The debenture to secure the sum of £40,000 granted by H Vocalion (Australasia), Ltd., was duly registered in the State of Victoria on Aug. 9, 1930. By s. 101 of the Companies Act, 1928, of the State of Victoria, any mortgage or charge created by a company which was not registered in the office of the Registrar-General in manner provided by that section was void as against the liquidator and any creditor of the company, so far as any security on the company's property was concerned. By s. 7 of the Act the word "company" included a foreign I company carrying on business in Victoria.

J. B. Lindon, for the Official Receiver, referred to the following cases: *Re Belfast Shipowners Co.* (1), *Re Central Sugar Factories of Brazil* (2), *Re Commercial Bank of South Australia* (3), *Employers Liability Insurance Corpn., Ltd.* v. *Sedgwick* (4), *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (5), *Re International Pulp and Paper Co.* (6), *Re Jenkins & Co.* (7), *Moor* v. *Anglo-Italian Bank* (8), *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (9), *Re North Carolina Estate Co.* (10), *Re Oriental Inland Steam Co.* (11), *Re South-Eastern of Portugal Railway* (12), and *Re Wanzer, Ltd.* (13).

Vanneck, for the company, cited *Carron Iron Co.* v. *Maclaren* (14) and *Re Maudslay, Sons & Field* (15).

Cur. adv. vult.

June 6. **MAUGHAM, J.**, read a judgment in which he stated the facts and continued: In the above circumstances, three questions, I think, arise for consideration. The first is whether s. 177 of the Companies Act, 1929, has any application to an action or proceeding in any court other than a court in Great Britain. The second question is whether, assuming that question to be answered in the negative, this court can, in the exercise of its equitable jurisdiction, in personam restrain a respondent properly served in this country from proceeding with an action so brought. The third question is whether such a jurisdiction, if it exists, ought to be exercised in the circumstances of the present case.

Dealing with the first question, I should observe that s. 177 must be considered in connection with s. 172 (b) (which gives the court power to stay or restrain proceedings, other than proceedings in the High Court or the Court of Appeal in England or Northern Ireland, against a company after the presentation of a winding-up petition), s. 174 (which renders void any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up), and s. 223 (which provides for enforcement throughout the United Kingdom of orders made in winding-up). Now, by the decision of the Privy Council in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (9) it has been made evident that the various Companies Acts do not either by express words or by necessary implication extend to the colonies, and that the said Acts were not intended to bind the colonial courts. The judgment of the board points out the distinction in this respect between the Bankruptcy Acts and the Companies Acts. It is apparent, then, that in regard to the matters I have to consider the Supreme Court of Melbourne is in precisely the same position as a completely foreign court—for instance, a court in Russia or Turkey. It will be noted that s. 177 contains the words

> "no action or proceeding shall be proceeded with or commenced against the company except by leave of the court"

—a phrase which seems to involve that the legislature imagined that the winding-up order would probably become known to an intending plaintiff before commencing his action. If s. 174 is considered it would seem to be impossible to hold that the legislature intended to say that an attachment or distress or execution put in force under the jurisdiction of some foreign court against the assets of a company in a foreign land should be void to all intents; and it may be observed that a provision of that kind would in almost every case be nugatory. But, apart from these considerations of the language of the relevant sections, I think the observation of MELLISH, L.J., in *Re Oriental Inland Steam Co.* (11) is undeniable.

> "Of course [he says], Parliament never legislates respecting strictly foreign courts. Nor is it usually considered to be legislating respecting colonial courts or Indian courts, unless they are expressly mentioned."

Apart from authority, in my judgment it is reasonably clear that s. 177 has no application to actions or proceedings in foreign courts. It seems to me impossible so to construe this and the other sections as to hold that they are limited either to British subjects who may be concerned with such proceedings or to persons who can be served with a summons in this country.

The authorities on this point are not wholly satisfactory; but, in my opinion, the Court of Appeal in *Re Oriental Inland Steam Co.* (11) did decide that the section in the Companies Act, 1862, was not applicable, though they thought fit, in the circumstances of that case, and in the exercise of an equitable jurisdiction in personam, to prevent a creditor from obtaining the fruits of an attachment over certain property in India belonging to the company. It will be noted that JAMES, L.J., did not refer to the section at all, and that MELLISH, L.J., clearly treated that section as not being applicable to proceedings in India. The dicta of SIR GEORGE JESSEL, M.R., in *Re International Pulp and Paper Co.* (6) seems to me to support the same view, for he gives reasons for supposing that the Companies Act, 1862, related to the whole of the United Kingdom and did not, as I understand the language he used, extend beyond it. In *Re North Carolina Estate Co.* (10) CHITTY, J., restrained a creditor from proceeding with an action in the Supreme Court at Burke County, North Carolina, seeking to attach the property of the company in that State. The learned judge made this observation after referring to the decision in *Re Oriental Inland Steam Co.* (11):

> "It was quite true, as was said by MELLISH, L.J., that Parliament did not legislate for a foreign country. The point, however, was: Would the court grant an injunction which was ineffectual, not as being against the foreign court, but as being against a person who could not be reached? Supposing, for instance, the case was one of a French creditor suing in a French court, or of an American creditor in an American court, the court, of course, could not grant an injunction, the reason being that the order would be ineffectual. But here the creditor was within the jurisdiction of the court, had come in under the winding-up order and claimed, and moreover was a British subject permanently residing here. He thought that the case quite fell within the decision in *Re International Pulp and Paper Co.* (6). The doctrine of the court with respect to injunctions was that they were directed against the person. They were a personal remedy, and in the present case an order for an injunction would be an effectual order against the person sought to be restrained."

There is, I think, a certain ambiguity in the report as to the reasons for the decision, but, in my view, the learned judge was simply enforcing the equity referred to in *Re Oriental Inland Steam Co.* (11), and was not purporting to decide that the section he had to deal with (s. 87 of the Companies Act, 1862) could be held to apply to foreign proceedings.

The next case is *Re Central Sugar Factories of Brazil, Flack's Case* (2). NORTH, J., there purported to follow the authority of *Re Oriental Inland Steam Co.* (11), and I do not think there is in his judgment anything which conflicts with the view I have taken of the true construction of the sections. The last case I shall refer to on this point is the decision of the Court of Appeal in Ireland in *Re Belfast Shipowners' Co.* (1). The court included WALKER, L.C., PALLES, C.B., and FITZGIBBON, L.J., and the judgment of PALLES, C.B., begins with this observation in reference to s. 87 of the Act of 1862 as applicable to proceedings in the Superior Court of Massachusetts to attach certain sums the property of the company after a winding-up order:

> "Although s. 87 does not include courts in foreign countries, I am of opinion that the court, under its general jurisdiction, was competent to make an order against the appellants in personam, such as that now under appeal. The appellants, although resident in England, are clearly liable to this jurisdiction, as the company is an Irish one, which can be wound-up in this country only, and the appellants are the petitioners upon whose application the winding-up was directed to be continued under supervision. The only real question in the case is, not that of the jurisdiction, which is undoubted, but of its exercise."

The conclusion, therefore, at which I arrive is that, upon principle and authority, s. 177 does not extend to the actions or proceedings which have been commenced in the Supreme Court of Melbourne.

The next question is, in my view, determined by the authority of the Court of Appeal in the case cited—*Re Oriental Inland Steam Co.* (11). It was there held that by the effect of an Act of Parliament the assets of the company became subject to a statutable trust for creditors, and that—as a general rule—so far as the British court has jurisdiction no one creditor ought to be allowed to have a larger share of the assets than any other creditor. The bank, having been registered here under

s. 344, is properly brought within the jurisdiction of the court, and I have no doubt that, following the decision of the Court of Appeal, this court has jurisdiction to grant an injunction restraining the prosecution of the proceedings in Melbourne by an injunction operating in personam on the grounds given in the various cases above referred to. The real question in the case, to borrow the language of PALLES, C.B., is not that of the jurisdiction, which is undoubted, but of its exercise. This question is, I think, one of considerable difficulty and importance.

It will be convenient in the first instance to consider the question apart from the effect of s. 344 of the Companies Act, 1929—that is, on the assumption that the court is dealing with an application for an injunction to restrain a foreign corporation properly served within the jurisdiction, from endeavouring, by proceedings brought in its own courts, to enforce payment of a debt notwithstanding the liquidation in this country. It would be difficult to distinguish such a case from the position that would arise if the respondent were not a corporate body, but a person domiciled abroad temporarily resident in this country. Would it be right to restrain such a corporation or such a person from exercising such rights of action as may exist in the foreign country? It must be observed in the first place that an injunction in such circumstances might well be ineffectual; for the respondent, if a corporate body, might cease to carry on business in the jurisdiction and remove its assets, and the same might take place in regard to a respondent individual. The court in general is very reluctant to exercise a jurisdiction in personam against a foreigner in relation to a matter in which there cannot be an effective order. It may be added that the court ought to be satisfied, before making the order, that it will not hesitate, if the order is disobeyed, to commit or sequestrate the property of the person or company in default. In the second place, it must be remembered that foreign creditors of a company in liquidation, not being within the jurisdiction of the court, cannot be restrained from taking such proceedings as they may be advised in their own country; and the only result of an injunction to restrain a particular creditor who can be sued in this country from exercising the rights which the laws of this country would give him may be to benefit other foreign creditors without in any way increasing the amount of the assets ultimately distributable in the liquidation in this country.

Next, it is to be noted that the rights of creditors in foreign countries—for instance, in France and Germany—are often more extensive as against their debtor and his assets than they are in this country. For example, they often include a right to hold up, so to speak, both the movable and immovable estate of the alleged debtor before judgment, so as to make it available for the payment of the debts when established, a process resembling, to some extent, the letters of inhibition and arrestment which, as I understand, may be issued in a proper case in Scotland. It may well be that credit has been given to a debtor by creditors within a foreign jurisdiction in reliance upon the former's known possession of assets, movable or immovable, capable of being attached. It does not seem to me to be in consonance with the principles of equity to restrain one or more of such creditors who happen, perhaps by accident, to be subject to the jurisdiction of this court, from exercising the rights given to them in the country where they reside and carry on business, as against a company which also carried on business there and was thus subject to the foreign law. Further, it is to be remembered that an encumbrancer of immovable property situate in a foreign country will not be restrained by injunction from prosecuting proceedings to enforce his security in that country, even though the mortgagor is a company in the course of liquidation—see *Moor* v. *Anglo-Italian Bank* (8)—and even though the incumbrancer is a British subject or a corporation resident in this country. Some at least of the reasons given by SIR GEORGE JESSEL, M.R., in deciding that case, appear to me to be applicable to movable as well as immovable property; for it seems that a creditor who has obtained in a foreign country security on personal property ought not in equity to be deprived of his rights because of a supervening statutable trust for creditors of a debtor.

Next, it should be observed that questions of evidence, of priority of statutes of limitation, and of set-off, must depend on the lex fori, which may well differ from the law of this country, and it would not appear to be fair or just to deprive foreign creditors of any rights which they may have in the foreign country against a company which has carried on business there merely because a summons can properly be served upon them here.

Finally, it must be remembered that there may be winding-up orders made in the foreign country where the company has carried on business and possesses assets. The view of this court is that the principal winding-up should be in the principal domicil of the corporation, and that any other winding-up order should be ancillary to the principal winding-up: see orders and cases referred to in Palmer's Company Precedents, 13th Edn., Part II, Winding-up, chap. IX, pp. 150, 151, and see *Re Commercial Bank of South Australia* (3). The effect of one winding-up being ancillary to the principal winding-up has not, I think, been much considered in our courts. This court, no doubt, holds that in the winding-up here, all creditors, whether British or foreign, who can prove their debts have equal rights; but it would seem that foreign courts do not always take the same view: see *Employers' Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.* (4), where the liquidation of the company in Russia was treated as valid in the House of Lords, though no provision had been made for English claims. If there are two winding-up orders, one here and one abroad, it would seem to be impossible to contend that a foreign creditor is not to be allowed to prove his debt abroad and, if the lex fori permits it, to bring an action abroad. In *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (5) the facts were that the defendants, a French company, had been the subject of a judgment of judicial liquidation pronounced by a French tribunal; yet the Court of Appeal held that a party to a contract made and to be performed in England could properly sue the French company—who had an office here—in England. This is, in a sense, the converse of the present case, and the judgments tend, I think, strongly to support the view that this court ought not to restrain a foreigner from securing in a foreign country such rights in respect of a contract made and to be performed there as the lex fori will give him. The case was cited with approval by Lord Davey in delivering the judgment of the Privy Council in *New Zealand Loan and Mercantile Agency Co.* v. *Morrison* (9).

Turning now to the authorities on the question whether the jurisdiction should be exercised, there is an important statement of Lord Cranworth, L.C., in *Carron Iron Co.* v. *Maclaren* (14). It was a case where there had been a decree for administration of the estate of one Henry Stainton, who died possessed of considerable real and personal property in both England and Scotland. He had been the London manager of the Carron Iron Co., and apparently owed them at the date of his death a very large sum, which they sought to obtain by proceedings in Scotland. The Carron Iron Co. had agencies and valuable assets in this country, and an application was made in England for an injunction to restrain the company from further proceeding in Scotland in their suit. The injunction was granted, but the company appealed to the House of Lords. Lord Cranworth, L.C., delivered the leading judgment, and, after showing that there was clear jurisdiction in the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign courts, he proceeded to consider whether such an injunction ought to be granted in the circumstances of that case. After mentioning the reported cases, he remarked as follows:

> "The result of the authorities is, that if the circumstances are such as would make it the duty of the court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court. But though they will justify such a course, yet they will not, as I apprehend, make it the duty of the court so to act, if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should be left to take their course."

He then considered the facts of that case, pointed out the difference in many respects between the foreign laws relating to creditors and those of this country, and came to the conclusion that the injunction ought to be dissolved and the foreign corporation allowed to prosecute its own remedy in its own jurisdiction as it might think fit. LORD BROUGHAM came to the same conclusion. LORD ST. LEONARDS, in his dissenting judgment, placed great reliance on the facts that the company was not only within the jurisdiction of the English court but was a Scottish corporation; and I do not read his judgment as indicating that he would have differed from LORD CRANWORTH if the corporation had been truly a foreign corporation.

In *Re International Pulp and Paper Co.* (6) the injunction, as I have said, was to stay proceedings in Ireland. In *Re North Carolina Estate Co.* (10) the injunction was against a British subject permanently residing in this country. In *Re Wanzer, Ltd.* (13) the only question was as to the validity of a sequestration in Scotland. In *Flack's Case* (2) the motion was against an English creditor residing in this country, and the order preserved for him such security as he had by the effect of the foreign judgment. In the Irish case, *Re Belfast Shipowners' Co.* (1), the persons restrained from proceeding in Massachusetts were not only British subjects resident in England, but they were actually petitioners upon whose application the winding-up was directed to be continued under supervision. I have been unable to find any case in which the court, in the exercise of its jurisdiction in personam, has restrained a foreigner or a foreign corporation from exercising his or its rights in a foreign court in relation to a contract to be performed abroad on the ground that there has been a winding-up in this country. I will add that the propositions contained in WESTLAKE'S PRIVATE INTERNATIONAL LAW, 7th Edn., p. 183, in ss. 142 and 143, seem to me to be substantially correct and to lend to the same conclusion, though the somewhat ancient cases cited are not, I think, wholly satisfactory as authorities for the propositions to their full extent; and it must be remembered, as pointed out in DICEY'S CONFLICT OF LAWS, 5th Edn., p. 376, that the principles applicable to the winding-up of a company differ materially from those affecting bankruptcy. I can find, however, no reason to doubt that a person domiciled abroad can sue in his own courts a company which, in carrying on business there, has incurred a debt or liability to him, whether or not that company is being wound-up in this country, to which he owes no allegiance and with the laws of which he is not acquainted; though, as pointed out in DICEY'S CONFLICT OF LAWS, p. 377, if he desires to benefit under the English winding-up, he must, generally speaking—for an exception see *Moor* v. *Anglo-Italian Bank* (8)—give up for the benefit of other creditors any advantage which he may have obtained for himself by the proceedings abroad. If these views be well founded, it is difficult to see why an English court should attempt to restrain such a creditor from enforcing his rights in his own country merely because it is possible to serve him with process here. To prevent a misconception, I should point out that I am not here dealing with a case of a British subject or a corporation established under our law, nor am I dealing with the case where the person sought to be restrained from proceedings abroad has made himself a party to the proceedings in the liquidation—for instance, by putting in a proof or in some other way.

For these reasons I think, in such a case, and on the hypothesis I am dealing with, the court ought primâ facie not to exercise the equitable jurisdiction which, as I have held, undoubtedly exists, for the reason that, in general, it will be more conducive, in such a case, to substantial justice that the foreign proceedings should be allowed to proceed. Then, does it make any difference that the bank in the present case is registered in England pursuant to s. 344 of the Companies Act, 1929, which takes the place of s. 274 of the Act of 1908? It has been settled that such a registration amounts to a submission to the jurisdiction of the courts in this country—*Employers' Liability Assurance Corpn., Ltd.* v. *Sedgwick, Collins & Co.* (4)—and, no doubt, the bank has a place of business in London and may properly be sued in this country. It does not seem to me to follow that a foreign corporation in this position ought to be treated differently from any other foreigner who can be properly served in this country, so far as concerns the exercise of the jurisdiction in personam which I am now asked to exercise. In considering this question, I must assume that the Supreme Court in Melbourne will properly deal with the matter, and will not disregard, so far as they may be material, the legal effects of the liquidation of the company and the trust for creditors which has been thereby established, and it should be noted that the injunction was granted by that court before the liquidation in this country. Moreover, although it is asserted on behalf of the applicant that the leaseholds of the company have been agreed to be sold, there is no evidence that the sale has been completed; and, further, it is possible that the proceeds of sale, so far as they can be reached, ought to be regarded in the circumstances as subject to the lex situs, just as if the sale had not taken place, and, to that extent at any rate, the decision in *Moor* v. *Anglo-Italian Bank* (8) would be an authority for allowing the bank to have its rights finally settled by the Melbourne court. So far as I can judge on the materials before me, that bank will have considerable difficulty in establishing its alleged rights, in view of the non-registration of the undertaking to give security and to other circumstances adumbrated in the affidavits; but I do not conceive that I have any sufficient ground for holding that the proceedings must necessarily fail, or are brought otherwise than in good faith. On the whole I have come to the conclusion that the court ought not to interfere, in the circumstances of this case, with either the debt action or the security action. The summonses by the Official Receiver must be dismissed, and leave must be given to the bank on the third summons to proceed with the actions in the Supreme Court in Melbourne.

Solicitors: *Lawrence Jones & Co.*; *Markby, Stewart, & Wadesons.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

VANDEPITTE *v.* PREFERRED ACCIDENT INSURANCE CORPN. OF NEW YORK

[PRIVY COUNCIL (Lord Tomlin, Lord Thankerton, Lord Macmillan, Lord Wright and Sir George Lowndes), July 25, 26, November 4, 1932]

[Reported [1933] A.C. 70; 102 L.J.P.C. 21; 148 L.T. 169; 49 T.L.R. 90; 76 Sol. Jo. 798]

Canada (British Columbia)—Motor insurance—Third-party risks—Indemnity to person driving car with permission of insured—Such person not "insured against liability"—Insurance Act, 1925 (*Stat. of B.C.* 1925, *c.* 20), *s.* 24.

By s. 24 of the British Columbia Insurance Act, 1925: "Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied." By a policy of insurance made between R.E.B., as assured, and the respondents, as insurers, the respondents agreed to indemnify R.E.B. against third-party risks resulting from his use of a motor car. The policy further provided that that indemnity "shall be available in the same manner and under the same conditions as it is available to the insured to any person . . . while . . . operating the automobile for private or pleasure purposes, with the permission of the insured . . ." On March 5, 1928, the plaintiff suffered injuries owing to a motor car in which she was a passenger being involved in a collision with a car driven by J.B., the daughter of R.E.B., who was driving the car with his permission. The plaintiff recovered judgment for a sum of damages against J.B. who failed to satisfy it and an execution against her was returned unsatisfied. In an action by the plaintiff to recover from the respondents the amount of the judgment against J.B.,

Held: there was no evidence that R.E.B. had had any intention to insure anyone but himself, and, even if he had so intended, he had no authority from J.B. to insure on her behalf and at no time did she purport to adopt or ratify any insurance made on her behalf; an intention by R.E.B. to constitute himself a trustee for J.B. and so confer on her a right to indemnity under the policy which was enforceable in equity could not be inferred from the general words of the policy; in any case, the provisions of s. 24 of the Act of 1925 could only be satisfied by a contract at law, enforceable directly against the insurers by J.B. in her own name; and, therefore, J.B. was not "insured against liability" within the meaning of s. 24 and the plaintiff could not recover against the respondents.

Per Curiam: This decision involves the conclusion that the provision in question in the policy gives no enforceable right to anyone. It constitutes merely a promissory representation or statement of an intention on the part of the insurers not binding in law or equity.

Notes. The Dominion statute dealt with in this case should be compared with the Road Traffic Act, 1930, s. 36 (1) (b), (4).

Followed: *Crown Bakery, Ltd.* v. *Preferred Accident Insurance Co.*, [1933] 2 W.W.R. 33. Distinguished: *Kelly* v. *Constitution Indemnity Co.*, [1933] O.R. 57. Followed: *Hornbrook* v. *Toronto Casualty Fire Insurance Co.*, [1934] 1 D.L.R. 350. Referred to: *Stenhouse* v. *General Casualty Insurance Co. of Paris*, [1934] 3 W.W.R. 564; *Cumming* v. *Homestead Fire Insurance Co.*, [1935] 2 D.L.R. 261; *Bennett* v. *General Assur. Co.* (1935), 3 Ins.L.R. 16; *Halle* v. *Canadian Indemnity Co.*, [1937] 3 D.L.R. 320; *Comer* v. *Russell*, [1940] 1 D.L.R. 97; *Spencer* v. *Continental Insurance Co.*, [1945] 3 W.W.R. 161; *Deckert* v. *Prudential Insurance Co.*, [1943] O.R. 448.

As to motor vehicle insurance under English law, see 22 Halsbury's Laws (3rd Edn.) 353 et seq., and for cases see 29 Digest 408. For Road Traffic Act, 1930, see 24 Halsbury's Statutes (2nd Edn.) 569.

Cases referred to:

(1) *Graham Joint Stock Shipping Co.* v. *Merchants' Marine Insurance Co., Ltd.*, [1924] A.C. 294; 93 L.J.K.B. 122; 130 L.T. 706; 40 T.L.R. 192; 68 Sol. Jo. 273; 16 Asp.M.L.C. 300; 29 Com. Cas. 107, H.L.; 29 Digest 207, *1664*.

(2) *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.*, [1906] A.C. 336; 75 L.J.K.B. 537; 94 L.T. 806; 54 W.R. 557; 22 T.L.R. 571; 10 Asp.M.L.C. 260; 11 Com. Cas. 196, H.L.; 29 Digest 90, *478*.

(3) *Yangtsze Insurance Association, Ltd.* v. *Lukmanjee*, [1918] A.C. 585; 87 L.J.P.C. 111; 118 L.T. 736; 34 T.L.R. 320; 14 Asp.M.L.C. 296, P.C.; 29 Digest 88, *463*.

(4) *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.*, [1915] A.C. 847; 84 L.J.K.B. 1680; 113 L.T. 386; 31 T.L.R. 399; 59 Sol. Jo. 439, H.L.; 12 Digest (Repl.) 234, *1754*.

(5) *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393; 30 L.J.Q.B. 265; 4 L.T. 468; 25 J.P. 517; 8 Jur.N.S. 332; 9 W.R. 781; 121 E.R. 762; 12 Digest (Repl.) 45, *227*.

(6) *Robertson* v. *Wait* (1853), 8 Exch. 299; 22 L.J.Ex. 209; 1 W.R. 132; 12 Digest (Repl.) 51, *277*.

(7) *Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ltd.*, [1919] A.C. 801; 88 L.J.K.B. 861; 121 L.T. 393; 35 T.L.R. 542; 14 Asp.M.L.C. 451; 24 Com. Cas. 268, H.L.; 12 Digest (Repl.) 51, *278*.

(8) *Lloyds* v. *Harper* (1880), 16 Ch.D. 290; 50 L.J.Ch. 140; 43 L.T. 481; 29 W.R. 452, C.A.; 3 Digest 295, *932*.

A (9) *Irving* v. *Richardson* (1831), 2 B. & Ad. 193; 1 Mood. & R. 153; 9 L.J.O.S.K.B. 225; 109 E.R. 1115; 29 Digest 111, *661*.

(10) *Waters* v. *Monarch Life Assurance Co.* (1856), 5 E. & B. 870; 25 L.J.Q.B. 102; 26 L.T.O.S. 217; 2 Jur.N.S. 375; 4 W.R. 245; 119 E.R. 705; 29 Digest 311, *2568*.

(11) *Williams* v. *Baltic Insurance Association of London, Ltd.*, [1924] 2 K.B.
B 282; 93 L.J.K.B. 819; 131 L.T. 671; 40 T.L.R. 668; 68 Sol. Jo. 814; 29 Com. Cas. 305; 29 Digest 408, *3215*.

Appeal by plaintiff by special leave from a judgment of the Supreme Court of Canada (DUFF, NEWCOMBE, RINFRET, LAMONT and CANNON, JJ.), reversing a judgment of the Court of Appeal of British Columbia, which affirmed the judgment of the Supreme Court of that province.

C The facts, together with the relevant sections of the Insurance Act, 1925, of British Columbia, are set out in the advice of the Judicial Committee.

Pritt, K.C., and *Wilfrid Barton* for the appellant.

Tilley, K.C. (of the Canadian Bar), for the respondents, was not called upon.

Cur. adv. vult.

D Nov. 4. **LORD WRIGHT.**—The appellant, Alice Marie Vandepitte, sustained injuries on March 5, 1928, owing to the motor car, in which she was a passenger and which her husband was driving, being involved in a collision with a motor car driven by Jean Berry. Jean Berry was the daughter of R. E. Berry and was driving the car, which was her father's property, with his permission. As she was E a minor living with her father, he was civilly liable, under s. 12 of the Motor Vehicles Amendment Act, 1927, of British Columbia, for injuries sustained by the appellant due to his daughter's negligence, but in the case the appellant brought her action in the Supreme Court of British Columbia against Jean Berry, claiming that she was injured by Jean Berry's negligent driving. In the proceedings the appellant's husband, E. J. Vandepitte, was brought in as third party. On June 13, F 1928, judgment was given for the appellant for $4,600 and costs against Jean Berry and for Jean Berry against E. J. Vandepitte for $2,300 and costs on the basis that both drivers were negligent in the same degree. The appellant issued an execution against Jean Berry, but it was returned unsatisfied. Thereupon, on May 20, 1929, the appellant brought the present action in the Supreme Court of British Columbia, against the respondents, claiming to recover $5,648.71, the amount of the judgment and costs, in virtue of s. 24 of the Insurance Act of British Columbia (c. 20 G of 1925). The appellant succeeded in the Supreme Court and on appeal in the Court of Appeal of British Columbia, but in the Supreme Court of Canada the respondents' appeal was allowed, and the appellant's action was dismissed with costs throughout. From that judgment the matter comes on appeal by special leave before their Lordships.

H Section 24 of the Insurance Act (c. 20 of 1925) is in the following terms:

> "Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount I of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

Section 10 is as follows:

> "(1) Every contract by way of gaming or wagering is void. (2) A contract is deemed to be a gaming or wagering contract where the insured has no interest in the subject-matter of the contract."

Part VII of the Act contains special provisions relating to automobile insurance, among which is s. 152, which provides that no insurer shall make a contract for a period exceeding fourteen days without a written application therefor, signed by the applicant or his agent duly authorised in writing, and sets out the particulars required. Section 153 is in the following terms: A

> "Every policy shall contain the name and address of the insurer, the name, address, and occupation or business of the insured, the name of the person to whom the insurance money is payable, the premium or other consideration for the insurance, the subject-matter of the insurance, the indemnity for which the insurer may become liable, the event on the happening of which such liability is to accrue, and the term of the insurance." B

Section 154 contains statutory conditions which are to be deemed to be part of any contract in force in the province and to be printed on every policy, including para. 8, which reads as follows: C

> "(1) Upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, the insured shall promptly give written notice thereof to the insurer, with the fullest information obtainable at the time. The insured shall give like notice, with full particulars of any claim made on account of such accident, and every writ, letter, document, or advice received by the insured from or on behalf of any claimant shall be immediately forwarded to the insurer. (2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceeding, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal. (3) No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer, and no such action shall lie in either event unless brought within one year thereafter." D E F

The policy here in question was for a period from noon on April 14, 1927, to noon on April 14, 1928. It was issued on a form of application as required by the statute, signed by R. E. Berry as the insured. The policy was headed "Combination Automobile Policy No. A. 12498," and embodied contracts between the insured, R. E. Berry, and two separate insurance companies, the New Jersey Insurance Co. and the Preferred Accident Insurance Co., the respondents. It embodied the terms of the application by R. E. Berry and the statutory conditions. Sections A, B, and C defined the obligations of the former company in respect of damage to or loss of the insured automobile, and s. D defined the same company's obligation in respect of "legal liability for damage to property of others," which was expressed to be to indemnify the insured against loss by reason of the legal liability imposed by law upon the insured "in respect of damage done to property." Section E embodied the obligations of the respondents and was in the following terms: G H

> "Section E—Legal Liability for Bodily Injuries or Death.—(1) To indemnify the insured against loss from the liability imposed by law upon the insured for damages on account of bodily injuries (including death, at any time resulting therefrom) accidentally suffered or alleged to have been suffered by any person or persons . . . as a result of the ownership, maintenance or use of the automobile; provided that on account of bodily injuries to or the death of one person the insurer's liability under this section shall not exceed the sum of five thousand dollars ($5,000.00), and subject to the same limit for each person the insurer's liability on account of bodily injuries to or the death of more than one person as the result of one accident shall not exceed the sum of ten I

> thousand dollars ($10,000.00). (2) To serve the insured in the investigation of every accident covered by this policy and in the adjustment, or negotiations therefor, of any claim resulting therefrom. (3) To defend in the name and on behalf of the insured any civil actions which may at any time be brought against the insured on account of such injuries, including actions alleging such injuries and demanding damages therefor, although such actions are wholly groundless, false or fraudulent, unless the insurer shall elect to settle such actions. (4) To pay all costs taxed against the insured in any legal proceeding defended by the insurer; and all interest accruing after entry of judgment upon such part of same as is not in excess of the insurer's limit of liability, as hereinbefore expressed. (5) To reimburse the insured for the expense incurred in providing such immediate surgical relief as is imperative at the time such injuries are sustained."

The final clause of the policy was as follows:

> "The foregoing indemnity provided by ss. D and/or E shall be available in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first, to the protection of the named insured, and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the named insured shall in writing direct."

It was contended on behalf of the appellant that under the policy, and in the events which happened, Jean Berry was the insured within s. 24 of the Act, and hence that the respondents were liable to pay the appellant the amount of the loss. The contention was put in the alternative, either that Jean Berry was directly and in law a party to the contract being within the description of the persons other than R. E. Berry to whom the indemnity was available, or that, if not in law a party to the contract, she was a cestui que trust of the promise contained in the contract to extend the indemnity to such a person as herself, R. E. Berry having so stipulated as trustee. There is a further contention based on estoppel which may be considered separately and later.

The first mode of stating the appellant's case involves that R. E. Berry as his daughter's agent made a contract of insurance between her and the respondents. But a contract can only arise if there is the animus contrahendi between the parties: there is here no evidence that Jean Berry ever had any conception that she had entered into any contract of insurance. She certainly took no direct part in the conclusion of whatever contract there was: the policy was entirely arranged between R. E. Berry and the respondents and he alone filled in and signed in his own name and behalf the application required by s. 152 of the statute. It is said that the wide words defining the persons to whom the indemnity is available are sufficient to found the inference that R. E. Berry was intending to contract, not only on behalf of himself, but also on behalf of anyone who might come within the policy words

> "any person or persons while riding in or legally operating the automobile for private or pleasure purposes"

with the appropriate permission, and reliance in support of this contention was placed on the well-known rule in regard to marine policies in which only the name of the agents need be stated, and which are expressed to be made by them "as agents" or more frequently

> "as well in their own name as for and in the name or names of all and every person to whom the same doth may or shall appertain in whole or in part."

But even under these wide words no one can claim the benefit of the policy, even if answering the general description, unless it is established that the person who directed the insurance to be effected actually intended to cover that particular person, or at least someone who should answer the description. The mere generality of the language is not in itself sufficient. Thus, in *Graham Joint Stock Shipping Co., Ltd.* v. *Merchants' Marine Insurance Co., Ltd.* (1) it was held that the policy only protected the owner and not the mortgagees. The rule had been previously illustrated by many cases, including *Boston Fruit Co.* v. *British and Foreign Marine Insurance Co.* (2) and also by *Yangtsze Insurance Association, Ltd.* v. *Lukmanjee* (3).

In the present case there is no evidence that R. E. Berry had any intention to insure anyone but himself: even if in some cases the words of the policy taken with the surrounding circumstances might be held to found the necessary inference of intention, that inference would fail here by reason of the statutory application. But, even if he had so intended, he had no authority from Jean Berry to insure on her behalf and at no time did she purport to adopt or ratify any insurance even if made on her behalf. In these circumstances it is impossible to say that a contract existed between Jean Berry and the respondents, that is, it cannot be held that she was in law "insured" under the policy. This conclusion is arrived at quite apart from the provision of s. 153 of the statute, which requires the insured's name and other particulars to be inserted in the policy. It is also arrived at apart from the form of the policy, which throughout in referring to the insured, refers back as a matter of construction to the name insured, R. E. Berry, who filled in the statutory application form. The very clause on which the contention is based draws a pointed distinction merely as matter of words between "the insured" and "any person or persons riding, &c.," and between the name insured and "the other persons entitled to indemnity under the terms of this section." Furthermore, there was no consideration proceeding from Jean Berry.

It is, however, argued on behalf of the appellant that, even if their Lordships should hold, as they do, that Jean Berry was not a party in law to the insurance contract, she was a party in equity, and in that way was "insured" by the respondents within the meaning of s. 24. These two steps of the argument require separate consideration. The contention, first, is that R. E. Berry, as part of the bargain and for the consideration proceeding from him, stipulated that the respondents should indemnify his daughter, Jean Berry, as coming under the general words of description, in the same manner and under the same conditions as himself, that is, that he created a trust of that chose in action for her as beneficiary. It cannot be questioned that abstractly such a trusteeship is competent.

No doubt, at common law no one can sue on a contract except those who are contracting parties and (if the contract is not under seal) from and between whom consideration proceeds. The rule is stated by Lord Haldane in *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co., Ltd.* (4) ([1915] A.C. at p. 853):

> "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam."

In that case, as in *Tweddle* v. *Atkinson* (5), only questions of direct contractual rights in law were in issue, but Lord Haldane states the equitable principle which qualifies the legal rule, and which has received effect in many cases, as for instance, *Robertson* v. *Wait* (6), *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London), Ltd.* (7), *Lloyds* v. *Harper* (8), namely, that a party to a contract can constitute himself a trustee for a third party of a right under the contract and thus confer such rights enforceable in equity on the third party. The trustee then can take steps to enforce performance to the beneficiary by the other contracting party as in the case of other equitable rights. The action should be in the name of the trustee; if, however, he refuses to sue, the beneficiary can sue, joining the trustee

A as a defendant. But, though the general rule is clear, the present question is whether R. E. Berry can be held in this case to have constituted such a trust. Here again, however, the intention to constitute the trust must be affirmatively proved: the intention cannot necessarily be inferred from the mere general words of the policy. Thus, in *Irving* v. *Richardson* (9) a mortgagee effected in the usual form an insurance on the full value of the ship. He claimed to recover the full B amount, which was in excess of the mortgage debt, on the general principle, now embodied in s. 14 (2) of the Marine Insurance Act, 1906, that a mortgagee may insure on behalf and for the benefit of other persons interested as well as for his own benefit,

> "and recovering the whole, will hold the surplus beyond his own debt in trust for the mortgagor or other persons interested."

C It was held that the plaintiff was not entitled beyond the extent of his interest, that is, the mortgage debt, because he did not satisfy the jury of his actual intention in effecting the insurance to cover more than that.

In the present case, there are not only the difficulties arising from the statutory provisions quoted above, but there is no evidence that R. E. Berry had any intenD tion to create a beneficial interest for Jean Berry, either specifically or as a member of a described class. Indeed, at no time either when the policy was effected or before or after the accident is there any suggestion that R. E. Berry had any such idea. It is true that she was in the habit of driving the insured automobile, but if R. E. Berry read the clause or thought of the matter at all, he would naturally expect that if she did damage the claim would, under the Act quoted, be against E him, as she was a minor living in his family. There is a further difficulty in the appellant's way under this head: R. E. Berry is the contracting party in law, but he has no insurable interest in Jean Berry's personal liability, since natural love and affection does not give such an interest in law. Whenever she drove the car, if she was an insured person, she had an insurable interest in the chance that she might be held liable in damages for negligence, but on the assumption now being F considered, namely, that she was no more than a cestui que trust in regard to the insurance, the contracting party was R. E. Berry, who had no insurable interest: hence the policy, in respect of that particular risk, was void under the express words of s. 10 of the statute cited above. No doubt, it has been held as a special rule in certain cases that a person having a special property in goods can insure on behalf and for the benefit of other persons interested as well as for his own G benefit, as is illustrated by s. 14 (2) of the Marine Insurance Act, 1906, and *Waters* v. *Monarch Life and Fire Insurance Co.* (10), but here no question of a special property in goods was involved; R. E. Berry had no insurable interest in the possible liability of his daughter. But if it is to be said that the cestui que trust is to be treated as if in law the contracting party, then Jean Berry must have satisfied the requirements of the statute, as being the "insured," in particular ss. 152 and H 153, which it cannot be said that she did. There is a further objection to applying to her case the idea of her being the cestui que trust under the policy, since the doctrine of the equitable interest of a beneficiary under a contract of a third party relates to benefits under the contract, whereas in an insurance such as that contended for serious duties and obligations rest on any person claiming to be insured, which necessarily involve consent and privity of contract.

I Their Lordships are of opinion that no trusteeship is here made out, but in any case, they could not hold that the provisions of s. 24 were satisfied by any but a contract at law, enforceable directly against the insurers by the insured in her own name. That section must be read with the relevant sections of the Act, which have been quoted above, and also with the terms of the policy. In their Lordships' opinion, an equitable right in Jean Berry (even if it were constituted) enforceable only in the name of the statutory insured, R. E. Berry, would not satisfy s. 24, which involves an added burden on the insurance company, and must be strictly construed. A decision of ROCHE, J., in *Williams* v. *Baltic Insurance Association* *of London, Ltd.* (11) has been relied on by the appellants' counsel. The facts in that case and the contractual terms were, however, different from those in question here and the provisions of the relevant statutes were not the same; nor is it clear whether the learned judge treated the driver of the car as directly insured or as a cestui que trust. Their Lordships have not been able to derive from that case any principles helpful to the issue now before the board.

The decision their Lordships have arrived at involves the conclusion that the final paragraph of the policy gives no enforceable right to anyone. The clause constitutes, in their opinion, merely a promissory representation or statement of an intention on the part of the insurers not binding in law or equity. On the other hand, "honour policies" are common in insurance business, and any insurance company which failed to fulfil its "honourable obligations" would be liable to pay in loss of business reputation. The defence in the present case is, however, taken in somewhat unusual circumstances in a claim by strangers on a special statutory enactment; neither Jean Berry nor R. E. Berry is asserting any right. The appellant raised a further point that even if in fact she was not the insured within the meaning of s. 24, she became so by reason of an estoppel. But the only estoppel alleged was a matter between the respondents and Jean Berry; the respondents took up and conducted Jean Berry's defence in the claim for damages, and it was said that in doing so, they conclusively admitted she was the insured. Even, however, if that were so, that would not benefit the appellant, because she was no party to any such estoppel and further s. 24 is dealing with one who is insured in fact and by an actual contract. Their Lordships do not think, however, that any such estoppel is made out even as between Jean Berry and the respondents. This point also fails. In their Lordships' opinion the appeal should be dismissed with costs, and they will humbly so advise His Majesty.

Appeal dismissed.

Solicitors: *White & Leonard*; *Blake & Redden.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

REKSTIN *v.* SEVERO SIBIRSKO GOSUDARSTVERNNOE AKCIONERNOE OLSCHESTRO KOMSERVERPUTJ AND BANK OF RUSSIAN TRADE

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), June 23, 24, 1932]

[Reported [1933] 1 K.B. 47; 102 L.J.K.B. 16; 147 L.T. 231; 48 T.L.R 578; 76 Sol. Jo. 494]

Bank—Closing of current account—Direction to bank to close account and transfer it—Transaction entered in bank's books—Subsequent service of garnishee order nisi on bank attaching account—No notice to transferee—Effect.

Execution—Garnishee order—Banking account—Direction to bank to close and transfer current account—Transaction completed in bank books—No notice to transferee—Subsequent service of garnishee order nisi on bank attaching account—Effect.

Judgment debtors instructed their bank to transfer their account to the account of another body which had diplomatic privilege and to close their account, and that transaction was then entered in the books of the bank, but before any notice of the transfer had been given to the transferees the judgment creditor served a garnishee order nisi on the bank attaching the judgment debtors' account.

Held: the garnishee order should be made absolute because (i) after the bank received notice to close and transfer the account and the appropriate book entries had been made, the relation of banker and customer continued to exist until notice of the transfer had been given to the proposed transferees; (ii) the judgment debtors, therefore, still had power to revoke the direction to close and transfer their account at the time when the garnishee order was served: *Gibson* v. *Minet* (1) (1824), Ry. & M. 68, applied; (iii) the garnishee order, when served, operated in law as a revocation of the direction to transfer the account, and so at the material time the money in the account was due and owing to the judgment debtors from the bank.

Rogers v. *Whiteley* (2), [1892] A.C. 118, and *Joachimson* v. *Swiss Bank Corpn.* (3), [1921] 3 K.B. 110, applied.

Roberts v. *Jones* (4) (1892), 66 L.T. 617, overruled.

Notes. This decision is expressly applicable to current accounts only, but the distinction for purposes of attachment between current and deposit accounts has now been considerably lessened by the Administration of Justice Act, 1956, s. 38 (1) (36 HALSBURY'S STATUTES (2nd Edn.) 478), and R.S.C., Ord. 45, r. 10.

Referred to: *Bagley* v. *Winsome*, [1952] 1 All E.R. 637.

As to the effect of a customer's instructions to close his bank account, see 2 HALSBURY'S LAWS (3rd Edn.) 173, para. 323, text and notes (l) and (m); as to attachment of money on current account at a bank, see ibid. 170, para. 319, and 16 ibid. 81–82, para. 122, text and note (h); and as to assignment of a debt before its attachment, see ibid. 83, para. 124, text and notes (e) (f), and for cases on these subjects see 3 DIGEST 175 et seq., *309* et seq.

Cases referred to:

(1) *Gibson* v. *Minet* (1824), 2 Bing. 7; 9 Moore, C.P. 31; 2 L.J.O.S.C.P. 99; 130 E.R. 206; Ry. & M. 68; 1 C. & P. 247; 3 Digest 230, *626*.

(2) *Rogers* v. *Whiteley* (1889), 23 Q.B. 236; 58 L.J.Q.B. 416; 37 W.R. 611; affirmed, [1892] A.C. 118; 61 L.J.Q.B. 512; 66 L.T. 303; 8 T.L.R. 418, H.L.; 3 Digest 176, *317*.

(3) *Joachimson* v. *Swiss Bank Corpn.*, [1921] 3 K.B. 110; 90 L.J.K.B. 973; 125 L.T. 338; 37 T.L.R. 534; 65 Sol. Jo. 434; 26 Com. Cas. 196, C.A.; 21 Digest 639, *2188*.

(4) *Roberts* v. *Jones* (1892), 61 L.J.Q.B. 523; 66 L.T. 617; 40 W.R. 573, D.C.; 21 Digest 631, *2140*.

(5) *Williams* v. *Everett* (1811), 14 East. 581; 104 E.R. 725; 3 Digest 249, *735*.

(6) *Morrell* v. *Wootten* (1852), 16 Beav. 197; 51 E.R. 753; 3 Digest 175, *311*.

(7) *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (1903), 51 W.R. 541; 19 T.L.R. 427; 47 Sol. Jo. 472; 8 Com. Cas. 277; affirmed (1904), 90 L.T. 474; 52 W.R. 489; 20 T.L.R. 403; 48 Sol. Jo. 383; 9 Com. Cas. 240, C.A.; 3 Digest 179, *332*.

(8) *Lyte* v. *Peny* (1541), 1 Dyer, 49a; 73 E.R. 108, sub nom. *Anon.*, Cary, 9; 12 Digest (Repl.) 196, *1355*.

(9) *Brind* v. *Hampshire* (1836), 1 M. & W. 365; 2 Gale 33; Tyr. & Gr. 790; 5 L.J.Ex. 197; 150 E.R. 475; 1 Digest 677, *2877*.

(10) *Hutt* v. *Shaw* (1887), 3 T.L.R. 354, C.A.; 21 Digest 623, *2099*.

Appeal by the garnishees, the Bank of Russian Trade, from a decision of the Divisional Court on April 25, 1932.

The facts are shortly stated in the headnote and more fully set out in the judgment of MASTER BURNAND, which is included in the judgment of the Master of the Rolls.

D. B. Somervell, K.C., and *Harold Murphy* for the bank, the garnishees.

Van den Berg, K.C., and *R. F. Levy* for the judgment creditor.

The arguments fully appear from the judgments.

LORD HANWORTH, M.R.—This is an appeal from a decision of the Divisional Court as to the operation of a garnishee order nisi on the judgment debtor's banking account secured after the bank had been instructed to transfer the account to the account of the delegation.

On July 25, 1931, the judgment creditor recovered judgment against the judgment debtor for £2,500, and on Sept. 2, 1931, he obtained a garnishee order nisi ordering that debts owing from the bank to the judgment debtor should be attached to a sum not exceeding £2,510 to answer a judgment recovered for £2,500 damages and costs to be taxed. On Sept. 15, 1931, it was directed that an issue, in which the bank, the garnishees, were to be plaintiffs and the judgment creditor the defendant, should be tried of whether the bank had at any material time any account in the name of the judgment debtor. Subsequently an order was made varying the issue by substituting the question whether there were at the material time any debts due or accruing due from the bank to the judgment debtors.

The Master heard the case and went fully into the facts. Finally, on Nov. 27, 1931, he made an order discharging the garnishee order nisi. On Dec. 10, 1931, notice of appeal was given to the Divisional Court which asked for an order that the decree of the Master should be reversed and the garnishee order made absolute. On April 25, 1932, the Divisional Court heard the appeal and held that there was at the material time a debt owing from the bank to the bureau upon which the garnishee order could operate. The appeal from that decision is made to this court. The facts are admirably stated by MASTER BURNAND as follows:

"By a letter dated Aug. 21, 1930, an account was opened at the bank in the name of the judgment debtors, and that account was to be managed by the persons named in the letter. It appears that Mr. P. O. Orlovsky, the vice-chairman of the judgment debtors, was usually absent from London for a time about the month of September each year, and, having regard to the imminence of such absence in 1930, the bank was required in respect of the account so opened to honour the signature of a Mr. Potechin, whose specimen signature was supplied. It appears to me that thereafter the Mr. Bron or the Mr. Orlovsky named in the letter of Aug. 21, 1930, might properly require the bank to honour their signature or some other named person in matters concerned with the management of the account without reference to those persons who actually opened the account. By a letter dated Aug. 25, 1931, the same Mr. Orlovsky required the bank to honour the signature of Mr. R. R. Gezi in respect of the said management, and thereafter Mr. Gezi signed cheques drawn on the account, and, in so far as it is a question of fact, I find that he had authority for so doing. It follows that a refusal by the bank to honour Mr. Gezi's signature on a cheque drawn on the account or his instructions relating to the management of the account would have been a breach of their duty as bankers.

"The offices of the judgment debtors were in the same building as the bank, and during the week ending Sept. 2, 1931, cheques were drawn on the account by Mr. Gezi and were duly honoured by the bank without objection by the judgment debtors. Having regard to the proximity of the offices, their failure to take the opportunity that I find they had, to object to the bank honouring Mr. Gezi's signature was tantamount to the ratification of the instructions contained in the letter of Aug. 25, 1931, if any such ratification was required.

"On Sept. 2, 1931, a letter from the judgment debtors bearing that day's date and signed by Mr. Gezi was at about 1.45 p.m., and certainly before 2 p.m., handed by Mr. Gezi to Mr. Kours, the bank manager. That letter was an instruction to the bank to close the judgment debtors' account and to transfer the balance to the account then held by the bank in the name of the Trade Representation of the

U.S.S.R. in Great Britain, a body having diplomatic immunity. That instruction was accepted by Mr. Kours and acted upon in that Mr. Kerr, the bank's current accounts clerk, made the interdepartmental inquiries, interest calculations, and book entries necessary for the purpose of closing the judgment debtors' account, and, in addition, made out the slip showing the transfer of the calculated balance of £9,194 16s. 5d. to the account of the Trade Representation of the U.S.S.R. in Great Britain. Mr. Kerr completed that whole process by about 2.45 p.m., and definitely before 3 p.m., on Sept. 2, 1931. The judgment debtors never revoked that instruction.

"The garnishee order nisi dated Sept. 2, 1931, was served on the bank on that same day. The evidence tendered differed as to the exact time when service was effected, but I am satisfied that service was not effected before 3 p.m. and not later than 3.15 p.m.

"Within a few minutes of the service of the order nisi Mr. Kerr drew a line under the last entry in the book containing the judgment debtors' account.

"Later in the afternoon entries were made in the bank's books containing the account of the Trade Representation of the U.S.S.R. in Great Britain, including a credit of £9,194 16s. 5d., being the transfer from the judgment debtors' account.

"Certain periodical payments which before that date had been made by cheques drawn on the judgment debtors' account were thereafter made by cheques drawn on the account of the Trade Representation of the U.S.S.R. in Great Britain.

"No evidence was tendered to prove that on Sept. 2, 1931, the judgment debtors were under any liability to pay to the Trade Representation of the U.S.S.R. in Great Britain the sum of £9,194 16s. 5d. or any sum. On the contrary, Mr. Kerr gave evidence, and I accept it, to the effect that, so far as he could judge, there was nothing which would justify such payment.

"It has been submitted by counsel for the judgment creditor that the letter of instruction dated Sept. 2, 1931, signed by Mr. Gezi, lacked the authority of those responsible for the judgment debtors' account, and that, therefore, the transfer of any balance standing to the credit of the judgment debtors made in pursuance of such letter was of no effect and could not properly be made without confirmation by other persons. I am unable to accept that proposition, and am of opinion that the authority of Mr. Gezi was one on which the bank were bound to act.

"It is necessary to consider what was the position of the bank when Mr. Kours, their manager, received that letter of instruction. The letter contained a notice to the bank of an intention to close the account and also an instruction calling upon the bank to transfer the balance to the credit of the account then held by them in the name of the Trade Representation of the U.S.S.R. in Great Britain."

Then the Master holds as follows:

"In my opinion that notice brought to an end the relation of banker and customer and further the bank were under a duty to transfer the balance in accordance with the instruction. The notice of either banker or customer of an intention to close an account is sufficient to bring to an end the relation of banker and customer and after closing an account a banker is the agent of the customer to deal with the balance. In so acting a banker is bound to follow the usual course of business and in case of neglect to do so is responsible for any loss attributable to his omission.

"It appears to me that the procedure adopted by the bank as to entries, &c., as carried out by Mr. Kerr was merely their internal machinery for recording the fact that the account was closed by reason of the acceptance of the notice.

"In my opinion the notice was revocable by the judgment debtors until such time as the Trade Representation of the U.S.S.R. in Great Britain might be informed of and assent to the moneys being placed to the credit of their account. The same sort of position arose in *Williams* v. *Everett* (5), LORD ELLENBOROUGH stating (14 East. at p. 597):

> 'It is entire to the remitter to give, and countermand . . . as often as he pleases . . . until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing.'

"So in *Morrell* v. *Wootten* (6) it was laid down that where A, having money in the hands of B, directs B to pay it to C, and B consents so to do, and the direction is communicated to C, a third party, the transaction is complete. It is said in the present case that there was no communication to the Trade Representation, and, therefore, that, as the transaction was not completed, it is of no effect. It is, however, to be borne in mind that in *Morrell* v. *Wootten* (6), as was pointed out by the Master of the Rolls (16 Beav. at p. 203), the court was concerned with the rights of C, the third party, to enforce the payment to him by B and not as in the present case with the duty of the bank to make the transfer.

"Again, in *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort* (7), where the rights of the plaintiffs as against their bankers were being considered, it is shown that an order for payment is revocable in the circumstances there applicable and resembling for this purpose the facts of the present case.

"The question then arises as to whether as the judgment debtors' mandate to the bank is revocable by them the service of a garnishee order nisi upon the bank operates as a revocation and so has the effect of overriding that mandate. I do not think that an order nisi can have any such effect.

"See *Roberts* v. *Jones* (4). In my opinion, therefore, there were not at the material time any debts owing or accruing due from the bank to the judgment debtors. It follows that the garnishee order nisi should be discharged with costs against the judgment creditor."

When the matter came before the Divisional Court on appeal from that judgment, it was held that the mere closing of the account by a book entry did not put an end to the relation of banker and customer when the transferees had no notice of the transfer of the account and had never assented to it.

Three questions arise upon the appeal to this court: (i) Is mere notice to transfer an account sufficient to bring to an end the relation of banker and customer? (ii) Is the mandate revocable? (iii) Was it in fact revoked?

In regard to the first of these questions, Talbot, J., in giving judgment in the Divisional Court, said:

> "It is plain that a mere closing of an account does not discharge or cancel the bank's debt to the customer; the bank owe him the balance until they have paid it either to him or by his order to someone else."

This seems to me to be clearly right. I also agree with what was said by Bigham, J., in *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (7) (8 Com. Cas. at p. 483):

> "The mere entry by a clerk in the books can make no difference; such an act can neither give any rights to the defendants, nor until communicated can it give any right to Kramrisch & Co."

In the light of these cases I ask myself what is the position of the bank in this case after they had received notice to transfer the judgment debtor's account to the account of the delegation and had made the appropriate book entries; and I come without hesitation to the conclusion that to close the judgment debtor's account is not sufficient to bring to an end the relationship between them and the judgment debtor as bankers and customer.

The second question is whether the direction to transfer the account was revocable; but I propose before considering that to say that it does not seem possible to question the authority of the gentleman who gave the direction to transfer the judgment debtor's account. Then is the direction revocable?

In *Gibson* v. *Minet* (1) it was held, when A gave B an order on his bankers directing them "to hold over from his private account £400 to the disposal of B," and the bankers accepted the order, that such order was revocable and might be countermanded before payment made to B or appropriation to his credit. If that be applied to the present case, it appears that whatever was done on Sept. 2 before three o'clock was the mere making of book entries to give effect to the transfer of the judgment debtor's account and did not amount to a payment to the delegation or an appropriation to their credit. In that case there was an appeal, and BEST, C.J., said (Ry. & M. at p. 71):

> "I perfectly accede to the case cited [*Williams* v. *Everett* (5)], but I see no pretence for disturbing this verdict";

and the reporter calls attention in a note to an earlier case, *Lyte* v. *Peny* (8), and says:

> "In the case of *Lyte* v. *Peny* (8) it was held that if a man bail money to another, to the use of a third, and to be delivered on a day of marriage, he may countermand it at any time before delivering over."

In another report of *Gibson* v. *Minet* (1) there is a note at the end of the case (1 C. & P. at p. 250) on *Williams* v. *Everett* (5), where it is stated:

> "The court held that under these circumstances the plaintiff could not maintain any action for money had and received against the defendants, there being no priority of contract, express or implied, between them; LORD ELLENBOROUGH saying:
>
> > 'By the act of receiving the bill, the defendants agree to hold its contents, when paid, for the remitter. The remitter may give and countermand his direction as often as he pleases, and the persons to whom it was remitted may hold the bill, or its amount, for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person. After such a circumstance they cannot retract the consent they have once given.' "

In *Morrell* v. *Wootten* (6) there are observations to the same effect. There SIR JOHN ROMILLY, M.R., said:

> "There is nothing more in the case than this: An order is given by a man to a banker to pay over a sum to a third person, the banker does not do it, and the order is countermanded. Can the third party insist on the banker paying him the money?"

And he holds that there was a mere naked authority to pay which could be revoked.

In *Brind* v. *Hampshire* (9) the sidenote is:

> "A, resident abroad, remitted a bill to B, his agent in England, drawn by A and specially endorsed by him to C, with whom his children were at school, in payment of C's account for their board and education. B got the bill accepted by the drawees and sent a letter by post to C, stating that he had received a commission from A to pay him some money on account of his children, and desired to be informed when and how it should be delivered. While the bill remained in B's hands he received directions from A to keep it and the proceeds in his hands."

B having retained the bill, it is held that C could not recover it in trover. Then PARKE, B., said (1 M. & W. at p. 372):

> "With regard to the communication made by the defendant to the plaintiff, even supposing it to have been that he held the bill itself for his use, that would not have the effect of transferring the property; the direction remains countermandable by the remitter until it is executed, either by the actual delivery of the chattel or money to the remittee, or by some binding engagement entered into between the agent and the remittee, which gives the latter a right of action against the former."

I need not refer to the other judgments in that case, but the cases I have referred to show that *Gibson* v. *Minet* (1) is good law, and that in a case like the present the power to revoke the direction to transfer the account was still in existence when the garnishee order was served.

The third question then is: Was there any revocation?

In *Rogers* v. *Whiteley* (2), a case where a garnishee order was served on a banker attaching his debts to a customer, Lindley, L.J., said (23 Q.B.D. at p. 238):

> "No doubt in one sense the attachment is only a security for the payment of money, but the question is what effect the order has on the person on whom it is served. It seems to me that effect cannot be given to the words of the order unless by saying that it prohibits the person affected by it from parting with the money attached so long as the order is in force."

That case went to the House of Lords, and Lord Halsbury said ([1892] A.C. at p. 121):

> "The order appears to me to have been in such terms that it would have been a disobedience to the order on his part if he had paid anything after it had been served upon him. That being so it disposes of that part of the case which raised the question whether he was bound to pay while that order was in force. I think he was not."

That judgment clearly shows that the garnishee order must have cancelled the effect of the order to transfer. In the same case Lord Watson says ([1892] A.C. at p. 122):

> "The effect of an order attaching 'all debts' owing or accruing due by him to the judgment debtor is to make the garnishee custodier for the court of the whole funds attached; and he cannot, except at his own peril, part with any of those funds without the sanction of the court."

That is a direct authority that the garnishee order attaches the fund in the hand of the banker and acts as a revocation of any direction given by the judgment debtor in regard to the disposition of the fund.

In *Joachimson* v. *Swiss Bank Corpn.* (3) observations are made which accord with the decision in *Rogers* v. *Whiteley* (2). *Joachimson* v. *Swiss Bank Corpn.* (3) decided that when money is standing to the credit of a customer on current account with a banker a demand by the customer was a necessary ingredient in the cause of action against the banker for money lent. Bankes, L.J., said ([1921] 1 K.B. at p. 121):

> "It has been suggested that a decision to this effect would run counter to a line of authorities which have recognised and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account upon the ground that such amounts were debts capable of being attached. I do not agree with that suggestion. The effect of the service of a garnishee order nisi is, according to Lord Watson in *Rogers* v. *Whiteley* (2), to make the garnishee 'custodier for the court of the whole funds attached.' The service of such an order is, in my opinion, a sufficient demand by operation of law."

In other words, the garnishee order nisi has operation in law and revokes any direction given in regard to the fund which has not been carried out. In the same case Warrington, L.J., said ([1921] 3 K.B. at p. 126):

> "It may be suggested that the view we take is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand."

It appears to me that the House of Lords have definitely held that a garnishee order nisi revokes any order to transfer which has not been fully carried out.

I only wish to add a word about *Roberts* v. *Jones* (4). There the defendant, a judgment debtor, had previous to judgment assigned to a third party a sum of money under a deed of arrangement under which the third party was to retain from the sum so assigned rent due to himself, and to hold the balance for the benefit of

A the defendant's creditors. The arrangement was communicated to the defendant's local creditors, but not to the plaintiff, the judgment creditor. The plaintiff sought under a garnishee order to attach the sum so held by the third party. The Divisional Court (consisting of MATHEW and COLLINS, JJ.) held that the mandate to the third party was revocable, but that no revocation having been made by the debtor, there was no debt, legal or equitable, which could be the subject of attachment. Then B COLLINS, J., said (61 L.J.Q.B. at p. 525):

> "The sum sought to be attached is in the hands of a person constituted a trustee of the creditors of the defendant under a mandate from the latter to employ the money in a particular way. The judgment creditor here is seeking to attach money which, but for his interference, would be distributed rateably among other creditors. This cannot be done unless we hold that a garnishee C order overrides the mandate of the debtor and has the effect of a revocation,"

and he goes on to hold that

> "the creditor cannot exercise the revocation against the debtor's expressed desire. Assuming the right, but that it has not been exercised by the debtor, I hold that no garnishee order can, ipso facto, revoke the authority of the debtor's agent."

D It is important to observe that *Rogers* v. *Whiteley* (2) was not brought to the attention of the court. *Hutt* v. *Shaw* (10), which is there referred to by COLLINS, J., as being directly in point, rested on the fact that there was never a debt owing from the garnishee, who was a stockbroker, to the judgment debtor. In my opinion the observations of COLLINS, J., do not hold good at the present time.

E I agree with the decision of the Divisional Court in the present case, and for the reasons I have stated I have come to the conclusion that this appeal must be dismissed.

SLESSER, L.J.—On Sept. 2, 1931, a garnishee order nisi was obtained by the judgment creditor, directing that debts owing by the bank to the judgment debtor should be attached to a sum not exceeding £2,510 to answer a sum recoverable by F the judgment creditor under a judgment of the King's Bench Division dated July 25, 1931, for £2,500 damages and costs. That order was served on the bank not earlier than 3 p.m. or later than 3.15 p.m. on the same day. An issue was subsequently directed to be tried whether there were at the material time any debts due or accruing due from the bank to the judgment debtors.

That issue has been decided by the Master, who held that while the judgment G debtor's direction to the bank to transfer its account was revocable by it, the service of the garnishee order nisi upon the bank did not operate as a revocation, with the result that at the material time there was no debt on which the garnishee order nisi could take effect. The Divisional Court took a contrary view.

The problem we have to decide is whether on the facts of the case there was still subsisting when the garnishee order nisi was served a debt due from the bank H to the judgment debtor on which the order could operate.

[His Lordship then stated the facts in regard to the letter directing the transfer of the judgment debtor's account to the delegation and continued:]

It is clear that the direction to the bank did not operate as a bill of exchange, for under s. 3 (2) of the Bills of Exchange Act, 1882, an instrument which orders any act to be done in addition to the payment of money is not a bill of exchange. I But at the same time cases relating to bills of exchange are of importance in connection with the first question.

According to the Master the position before three o'clock on Sept. 2, 1931, was that the process of transferring the business account and of closing this account with the bank had been completed. I have, however, come to the conclusion that between 3 p.m. and 3.15 p.m. the direction given to the bank was still revocable and that nothing had been done to prevent the debtors from revoking it. I do not, however, think it necessary to refer again to the cases establishing this which have been referred to by the Master of the Rolls.

It remains to consider whether the garnishee order nisi operated as a revocation of the direction, there having been no revocation of the direction by the judgment debtors themselves. It was decided in *Rogers* v. *Whiteley* (2) that a garnishee order nisi attaching a debt owing from a bank to its customer prevented the bank from parting with the money attached as long as the order was in force. The essential question here, however, is whether the order nisi by itself operated, when served, as a revocation of the direction to transfer the account.

That point was really a matter decided in *Joachimson* v. *Swiss Bank Corpn.* (3). In that case the problem was whether where money was standing to the credit of a customer on current account with a bank, a demand by the customer for payment was necessary before an action for money lent could be brought. The question had arisen in earlier cases in relation to the Statutes of Limitation. In the *Joachimson Case* (3) it was argued that if the contention that a demand for payment was necessary before an action could be brought for money lent it would be inconsistent with the decision that "a garnishee order may issue attaching money on current account as a debt owing to the customer."

It is true that the point was decided obiter, but BANKES, L.J., said ([1921] 3 K.B. at p. 121):

> "It has been suggested that a decision to this effect would run counter to a line of authorities which have recognised and allowed garnishee proceedings in reference to amounts standing to a customer's credit on his current account, upon the ground that such amounts were debts capable of being attached. I do not agree with this suggestion. The effect of the service of a garnishee order nisi is, according to LORD WATSON in *Rogers* v. *Whiteley* (2), to make the garnishee 'custodier for the court of the whole funds attached.' The service of such an order is, in my opinion, a sufficient demand by operation of law, to satisfy any right a banker may have as between himself and his customer to a demand before payment of moneys standing to the credit of a current account can be enforced";

and WARRINGTON, L.J., said ([1921] 3 K.B. at p. 126):

> "It may be suggested that the view he took is inconsistent with the operation of a garnishee order upon a banking account. I do not think so. In my opinion, the service of the order nisi would be a sufficient demand."

In the same way ATKIN, L.J., said ([1921] 3 K.B. at p. 131):

> "The service of the order nisi binds the debt in the hands of the garnishee—that is, creates a charge in favour of the judgment creditor. If the bank disputes that the amount is payable, there is ample power to provide for a demand being made before an order for payment is made. Possibly the order nisi in itself operates as such a demand."

This case shows clearly that a garnishee order will operate as a demand. Can it then operate as a revocation of the customer's direction to transfer his account? In my opinion it can. It may be said that this is inconsistent with *Roberts* v. *Jones* (4). I agree that in principle there is no difference between that case and the present one; but I think that that case was wrongly decided. In my view we may disregard that decision and hold that the order nisi in the present case operated to revoke the direction by the judgment debtor to transfer its account to the delegation. I agree then that the appeal must be dismissed.

ROMER, L.J.—I agree, and I have very little to add to what has already been said by the Master of the Rolls and SLESSER, L.J. At the time the letter was written to the bank instructing it to transfer the judgment debtor's account to the delegation and to close the judgment debtor's account, the garnishee order nisi would have been effectual to attach that account to answer the judgment debtor's debt to the judgment creditor. I will not refer to the authorities which establish this. If the order nisi was not effective it would never be possible to garnishee a debtor's current account. When the order nisi was received by the bank the position had not really very much altered. Assuming that the letter was a valid instruction to the bank to transfer the account, it operated as no more than a revocable mandate to the bank so that until it was acted upon it was open to the judgment debtor to revoke it. In fact, the judgment debtor did not itself revoke it, and the question is whether the service of the order nisi operated as a revocation. In my opinion it certainly did. The judgment of the Divisional Court was right on this point and the appeal must therefore be dismissed.

Appeal dismissed.

Solicitors: *Wynne-Baxter & Keeble*; *Warren & Warren.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re BLANCHARD. Ex parte BLANCHARD

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), May 27, 1932]

[Reported 101 L.J.Ch. 313; 147 L.T. 222; 48 T.L.R. 480;
76 Sol. Jo. 459]

Divorce—Alimony—Arrears—Order for payment by instalments.

A husband being in arrear with payments to his wife of permanent alimony under an order of the Divorce Court, the wife sought a committal order against him. CLAUSON, J., made an order for the payment of one year's arrears by instalments. On appeal,

Held: the matter was entirely within the discretion of the learned judge; he had power in a special case to make a committal order on a first application, though it was not the practice to do so; and, therefore, the court would not interfere with the order which he had made.

Notes. As to enforcement of orders for maintenance and alimony, see 12 HALSBURY'S LAWS (3rd Edn.) 471 et seq., and for cases see notes at 27 DIGEST (Repl.) 611, 634.

Cases referred to:

(1) *R.* v. *Brompton County Court Judge* (1886), 18 Q.B.D. 213; 51 J.P. 547; sub nom. *Reeves* v. *Fowle*, 56 L.J.Q.B. 49; 55 L.T. 663; 35 W.R. 130; 3 T.L.R. 143, C.A.; on appeal, sub nom. *Stonor* v. *Fowle* (1887), 13 App. Cas. 20; 57 L.J.Q.B. 387; 58 L.T. 1; 52 J.P. 228; 36 W.R. 742; 4 T.L.R. 109, H.L.; 5 Digest 1038, *8484*.

(2) *Linton* v. *Linton* (1885), 15 Q.B.D. 239; 54 L.J.Q.B. 529; 52 L.T. 782; 33 W.R. 714; sub nom. *Re Linton*, *Ex parte Linton*, 49 J.P. 597; 2 Moor. 179, C.A.; 5 Digest 1034, *8459*.

Appeal from an order of CLAUSON, J.

In January, 1926, a decree of judicial separation was granted to the judgment creditor against her husband, and on July 12, 1926, an order for the payment of permanent alimony by the husband of £5 a week free of income tax was made. There were two children of the marriage. The husband made certain payments, but eventually fell into arrears. Various judgment summonses in bankruptcy were taken out against him, and in April, 1932, the arrears amounted to £390 and the costs to £45. The husband had no property, but earned £10 a week. He had never paid more than about £3 10s. a week to his wife. A judgment summons was taken out by the wife for a committal order for non-compliance with the order of the Divorce Court to pay the £5 a week. CLAUSON, J., being satisfied that the husband could not pay more than £3 a week, said he had no jurisdiction to commit the husband, as no committal order could be made until an order for payment had not been complied with, though the husband's means showed that it ought to be complied with. Therefore, he made an order for the payment of £3 a week in respect of one year's arrears of alimony amounting to £252 from April, 1931, to April, 1932. The wife appealed.

J. Bowen Davies, K.C., and *Patrick Spicer* for the wife.

Victor Russell for the husband.

LORD HANWORTH, M.R.—In my view, this matter is one which lies purely within the discretion of the learned judge; he has rightly decided himself, and we ought to be slow to interfere with his decision. The order made in the Divorce Division for payment of £5 a week still stands, but the husband has, apparently, not been able to comply with that order. He paid for a time a sum which was in the neighbourhood of £3 a week, and last year he made payments which work out on the average at about £2 18s. 6d. a week. Since the order made by Clauson, J., he has complied, and has paid the £3 a week, which he was ordered to pay in respect of arrears. The order of Clauson, J., was made under s. 5 of the Debtors Act, 1869, which reads:

> "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court. Provided . . . that such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default, either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default and has refused or neglected or refuses or neglects to pay the same."

The present appeal is taken in respect of the order of the Divorce Division for payment of £5 a week, but in *R.* v. *Brompton County Court Judge* (1), Lord Esher said (18 Q.B.D. at p. 217):

> "When the summons came on to be heard before the judge, if he was satisfied that the debtor had means and he was defying the courts and the law, he might make an order for his immediate committal; I have known such orders made. But, instead of making an order for committal, the judge might make a substituted order for payment of the debt by instalments; and this, the power to make which seemed obviously given by s. 5 of the Act, was frequently made at chambers without the consent of the parties. Then came the question whether if the judge made an order for payment by instalments he could at the same time make an order for the committal of the debtor if any of the instalments were unpaid. That was what Willes, J., was asked to do, to make a prospective order contained in the order for payment by instalments. But that is what he decided he had no power to do, holding that he had no jurisdiction to commit in any case unless it was proved that the debtor could have obeyed the order for payment . . ."

Interpreting that, although, as Lord Esher said, in exceptional cases there could be an order for committal at once, yet that was not the practice which had been adopted, and rightly so, and, therefore, in the present case Clauson, J., declined to make the order for committal, and made an order for payment of £3 a week in respect of one year's arrears. There was no evidence of any capital sum out of which payment of the arrears could be enforced; the only means available were the wages earned by the husband, and it seems to me that it would be quite useless to put him in prison. The order made was one which Clauson, J., with all the facts before him, thought fairly represented what the husband could be asked to pay. It was urged that the court ought to have made an immediate order for committal, but Lord Esher has pointed out that that was only done in exceptional cases.

Looking into the cases to which our attention has been called, *Linton* v. *Linton* (2) and *Stonor* v. *Fowle* (1), the first case decided that the husband was liable to continue payments of alimony notwithstanding his bankruptcy and that arrears of alimony constituted a debt under s. 5 of the Debtors Act, 1869, and it was ordered that the husband should make certain payments and that upon making default in those payments he should be committed. In *Stonor* v. *Fowle* (1) the decision in *R.* v. *Brompton County Court Judge* (1) was reversed by the House of Lords, and it was held that an order for committal could be made under the Debtors Act, 1869, where it was in respect of a past default and not an anticipatory order in respect of possible defaults in the future. Speaking for myself, I do not think that, as contended, the decision in *Stonor* v. *Fowle* (1) overruled the decision in *Linton* v. *Linton* (2).

It seems to me that when an order for payment of alimony has not been complied with, a right time may come for the making of a committal order, but I agree with CLAUSON, J., that the right and satisfactory course would be for the legislature to take steps to enable the Divorce Court to enforce its own orders so that the matter should not be left to the discretion of another court.

LAWRENCE, L.J.—I agree.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Cedric Akastur*; *Maples, Teesdale & Co.*, for *Benning & Hoare*, Dunstable.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

SHEFFIELD MASONIC HALL, LTD. *v.* SHEFFIELD CORPORATION

[CHANCERY DIVISION (Maugham, J.), March 7, 8, 9, 10, 1932]

[Reported [1932] 2 Ch. 17; 101 L.J.Ch. 328; 147 L.T. 474; 48 T.L.R. 336]

Easement—Light—Building opposite plaintiffs' building interfering with light—Light from open space at side of plaintiffs' building—Limit of height of opposite building—Measurement of interference with light—Value of expert evidence.

The plaintiffs were the owners of a building on the south side of S. street and on the corner of S. and E. streets. At the opposite corner of S. and E. streets there was an open space. A room in the plaintiffs' building had four windows, two looking north and two looking on E. street towards the open space. The defendants claimed to be entitled to build to such a height on the north side of S. street as to interfere with the light to the room in the plaintiffs' building, contending that, in view of the open space on the opposite side of E. street, the room would still receive sufficient light for all the reasonable purposes of mankind.

Held: the defendants could only build to such a height as, with a similar building on the open space on E. street, would yet leave sufficient light for the plaintiffs' building.

Observations on the value of expert evidence in cases of alleged obstruction to light.

Notes. Referred to: *Smith* v. *Evangelization Society Incorporated Trust*, [1933] Ch. 515; *Fishenden* v. *Higgs and Hill, Ltd.*, [1935] All E.R. Rep. 435.

As to rights to light, see 12 HALSBURY'S LAWS (3rd Edn.) 582 et seq., and for cases see 19 DIGEST 123 et seq. For Prescription Act, 1832, see 6 HALSBURY'S STATUTES (2nd Edn.) 669.

Cases referred to:

(1) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A.C. 179; 73 L.J.Ch. 484; 90 L.T. 687; 53 W.R. 30; 20 T.L.R. 475, H.L.; 19 Digest 123, *830*.

(2) *Kelk* v. *Pearson* (1871), 6 Ch. App. 809; 24 L.T. 890; 36 J.P. 196; 19 W.R. 665, L.JJ.; 19 Digest 126, *842*.

(3) *Dent* v. *Auction Mart Co.*, *Pilgrim* v. *Auction Mart Co.*, *Mercers' Co.* v. *Auction Mart Co.* (1866), L.R. 2 Eq. 238; 35 L.J.Ch. 555; 14 L.T. 827; 30 J.P. 661; 12 Jur.N.S. 447; 14 W.R. 709; 19 Digest 140, *953*.

Action for injunction and damages.

The plaintiffs, the Sheffield Masonic Hall Co., were the owners in fee simple of the Masonic Hall, on the south side of, and fronting upon, Surrey Street, Sheffield, at the corner of Eyre Street. The hall was about 39 ft. high, the eastern part having been built in the year 1876, and the other parts in 1887. It was let out to freemasons for masonic purposes, the plaintiff company's average yearly receipts from the letting amounting to about £2,200. Surrey Street was 40 ft. wide or thereabouts. On its north side were the Central Lending Library, opposite the east end of the Masonic Hall; an open space 64 ft. wide or thereabouts; and, opposite the west end of the Masonic Hall, the Central Reference Library, which was about 64 ft. high. The Central Lending Library was approximately 40 ft. high save for its pediment, opposite Eyre Street, which was 54 ft. high or thereabouts. During the early part of 1931 the defendants, the Sheffield Corporation, began building operations along the whole of the north side of Surrey Street, comprising an art gallery and library intended to be 65 ft. high along its whole front, save that for 62 ft. in the centre the height was to be 70 ft. The windows of four rooms of the Masonic Hall which were ancient lights were thus to some extent obstructed. One of those rooms, which was on the ground floor, measured 50 ft. by 26 ft., and it was lighted by windows facing Surrey Street and also by windows which faced Eyre Street. The room was much used as a luncheon room and dining room, and all its windows were ancient lights at the date of this action. At the corner of Surrey Street, on the opposite side of Eyre Street, there was something in the nature of an open space, behind which there stood a low building. Those windows of the room which faced Eyre Street received a great amount of light which came over from the east end of Eyre Street.

On July 3, 1931, the plaintiff company issued a writ asking for an injunction to restrain the corporation from further erecting a certain building so as to cause a nuisance or illegal obstruction to the windows of four rooms in the Masonic Hall, or, alternatively, for damages. An injunction was not now sought, the court being invited by both parties, instead of granting an inquiry as to damages, to assess the damages on the material before the court.

Vaisey, K.C., and *Riviere* for the company.

Morton, K.C., and *Andrewes Uthwatt* for the corporation.

MAUGHAM, J. [after stating the facts, continued:] The point which seems to me to arise in this case is as to the claim of the defendant corporation that it may build as high as it will opposite the ground-floor room, provided that the room receives from the east over Eyre Street a light sufficient for all the reasonable purposes of mankind. I will test that claim, which raises a question of some importance, by assuming for clarity that the Masonic Hall has two windows on the north side and two windows on the east—I am deliberately taking two for the purpose which I have in mind. I shall assume that the windows to the north look over a close called Blackacre, and the windows to the east look over a close called Whiteacre; and for simplicity I shall assume that there is no building on either

A Blackacre or Whiteacre, and that each of them is an open space. The windows both to the north and to the east are, I will assume, ancient lights.

The question that arises is this: Can the owner of Blackacre build as high as he pleases while Whiteacre remains an open space, or is there any limit to his right? It is to be observed that if the owner of Blackacre chooses to build so as entirely to obstruct the north windows of the Masonic Hall while Whiteacre B remains an open space, the owner of Whiteacre will probably not be able to build at all. Counsel for the defendant corporation, in his clear argument on this point, said that the doctrine is "first come, first served." I think that he admitted that there would be a difficulty if the owner of Blackacre and the owner of Whiteacre were both to begin to build at once; and there would be a difficulty also if, the owner of Blackacre having begun to build, the owner of Whiteacre put up a screen C —it might be, of quite light construction—at the edge of his plot so as to obstruct the eastern windows of the Masonic Hall.

Clearly the proposition put forward by counsel for the defendant corporation leads to very great difficulty, and, in my view, to great injustice. I do not think it is sound. The proper way to test the matter, in my opinion, is to consider the nature of the right obtained in such a case. The Prescription Act, 1832, provides D by s. 3:

> "And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or E custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing."

This was a new method of obtaining an indefeasible right to light to and for a dwelling-house, workshop, or other building, and where the section is relied on there is, of course, no need for an implication of grant. But the nature of the F right acquired under the section is precisely the same as the nature of the right as acquired before the Act came into force. That has been laid down in a number of cases, and indeed is, in my view, the foundation of several of the speeches in the great case of *Colls* v. *Home and Colonial Stores, Ltd.* (1). In that respect the views expressed in *Kelk* v. *Pearson* (2) were followed, and for brevity I will refer only to one passage in the speech of LORD HALSBURY, L.C., who said ([1904] A.C. G at p. 183):

> "Singularly enough, there has been a complete uniformity of decision upon the construction of the statute that it has made no difference in the right conferred, but is only concerned with the mode of proof."

The right conferred is undoubtedly a right analogous to the right conferred by Roman law of a servitude of the character which, I think, was described as H ne facias. The dominant tenement is entitled to the benefit of a quasi-covenant by the owner of the servient tenement precluding him from building in the normal case in such a way as to obscure the plaintiff's rights to a degree which would interfere with his comfortable enjoyment of his premises, according to the habits and requirements of ordinary people, or, as the House of Lords or some members of that tribunal put it, would cause a nuisance to the plaintiff in the enjoyment of I his premises.

In the case which I am now considering, since the dominant tenement has windows both north and east and rights of light are acquired for those windows, the question arises what restriction is to be imposed by the quasi-covenants upon the owners of Blackacre and Whiteacre as soon as the right is acquired under s. 3 of the Prescription Act, 1832. If counsel for the defendant corporation is right, the obligation upon the owner of Blackacre, for instance, will be of this character, that he will not erect his building to such a height as will interfere with the northern windows of the Masonic Hall, and so that the extent of the restriction is to depend on whether at the time of the erection of the building the owner of Whiteacre has A built upon or has preserved an open space on Whiteacre; and similarly the owner of Whiteacre will be placed under an uncertain obligation with regard to building dependent upon the existence or non-existence of buildings on Blackacre. To my mind, that is an impossible conclusion. It is true that the court is dealing with a somewhat curious hypothesis as to the nature of the right in question; but, after all, the nature of the right should be founded on the common sense of the matter, B and I do not think that it is possible that these servitudes imposed as if by lost grants upon Blackacre and Whiteacre are servitudes the extent of which depends upon the actual condition of things existing on those respective premises at some future time. The alternative seems to me to be comparatively simple. At the moment when the right is acquired by the plaintiff company in respect of both of the two windows on the north and the two windows on the east, I think that the C nature of the restrictive obligation imposed upon people facing those two windows is that they will not so build as by their joint action to cause a nuisance to the plaintiff company within the meaning of that term as used by the House of Lords in *Colls* v. *Home and Colonial Stores, Ltd.* (1). In other words, I think that the proper view is that the owner of Blackacre can build to such a height as, with a similar building by the owner of Whiteacre, will yet leave sufficient light for the D Masonic Hall. The obligations of both owners are the same; neither has a greater obligation than the other in the simple case which I am considering. That seems to me to solve the problem with which I have to deal.

I think it is a mistake to suppose that having regard to the very large amount of light which is coming over Eyre Street to the eastern windows of the room, the defendant corporation is entitled to build as high as it pleases on the other side of E Surrey Street. I think that that proposition goes too far, and must be qualified so as to preserve the rights of the owners of the premises on the other side of Eyre Street to a reasonable utilisation of their land; and I see no reason to suppose that at some not distant date the owners of those premises will not desire to erect a substantial building right up to the corner of the building line. The result of that view is to qualify to some extent the evidence given on behalf of the defendant F corporation that a large part of the room will always be perfectly well lighted. It does not mean that the whole of its evidence goes, but I think that it does tend to qualify that evidence, and it leads me to the conclusion that I ought to accept the evidence on behalf of the plaintiff company that the room will be obscured to such an extent by the defendant corporation's new building as to justify the view that, if the qualification that I have made with regard to the light coming from the east G is taken into account, that room will not be left with enough light for the ordinary purposes of its user, either as at present for luncheons and dinners, or for the other purposes for which it may be used in the future.

There is one other thing which I think it my duty to say, and that is with reference to the value of expert evidence in cases of this kind. I do not desire to minimise the value of that evidence, or to intimate a doubt that the lines on which H it has recently been given are more useful to the court than they used to be before Mr. Waldram, the expert witness for the defendant corporation and, I think, some other experts, devised a new method of measuring the amount of obscuration of light caused by a new building. But I do think I ought to say that, in my opinion, it is possible to exaggerate that evidence in a particular case. The question to be solved by the court is not really a question which can always be fairly decided by I the amount of direct sky which will reach a hypothetical table 2 ft. 9 in. high in a particular room. I think it is safer to rely upon the view expressed in *Colls* v. *Home and Colonial Stores, Ltd.* (1), and to consider whether, as a matter of common sense, there is such a deprivation of light as to render the occupation of the house uncomfortable in accordance with the ordinary ideas of mankind. I think that the hypothetical table 2 ft. 9 in. high is a test which may not always be satisfactory. It gives, I think, too much importance to the height of the window above the floor. I had not long ago a case of a cottage with very low windows, in which

A I thought that the test was wholly unsound. I would add that I think Mr. Waldram was quite right in taking into account reflected light coming from floor, walls and ceiling, and I would add that, in my opinion, such reflected light as that may often be of great importance. Accordingly, I do not agree that the injury done may in all cases fairly be tested by considering only the amount of visible skylight to be perceived by an eye situate 2 ft. 9 in. high. It is manifest, among B other things, that that will attribute the same result to a building 10 ft. away, cutting off, say, 50 per cent. of the light, as would be attributed to a building 60 ft. away cutting off a similar number of degrees of light, and yet it is obvious to anybody who has ever considered the matter for five minutes that the effect as regards the occupation of a house and its comfort would be very much greater in the former case than in the latter. I will add, also, that to my mind it must be C quite wrong to disregard reflected or diffused light coming to a room from outside as well as the effect of such light inside a room. The doctrine of *Dent* v. *Auction Mart Co.* (3), that reflected light offered or promised by the owner of the defendants' premises ought, for the reasons given by the learned judge in that case, to be disregarded, has nothing akin to the suggested proposition that, in considering whether there has been such a deprivation of light as to render the occupation of D the house uncomfortable according to ordinary ideas, reflected or diffused light coming into the premises under conditions that subsist is to be rejected, quite apart from the illegal act of the defendants. There are in my belief many rooms in ordinary buildings where the table test would give a wholly false view of the condition of things in the room. I may add that I have had cases before me which upon the evidence bear out that view.

E The damage was assessed by his Lordship at £750.

Judgment for plaintiffs.

Solicitors: *Indermaur & Brown*, for *Webster & Co.*, Sheffield; *Sharpe, Pritchard & Co.*, for *E. R. Gibson*, Town Clerk, Sheffield.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

F

G

Re GATESHEAD (BARN CLOSE) CLEARANCE ORDER, 1931

[KING'S BENCH DIVISION (Swift, J.), November 29, December 2, 1932]

[Reported [1933] 1 K.B. 429; 102 L.J.K.B. 82; 148 L.T. 264; 97 J.P. 1; 49 T.L.R. 101; 77 Sol. Jo. 12; 31 L.G.R. 52]

H *Housing—Clearance order—Provision of alternative accommodation—Business accommodation—Housing Act*, 1930 (20 & 21 *Geo.* 5, *c.* 39), *s.* 1 (1), *proviso* (*a*).

By a clearance order made in pursuance of s. 1 (1) of the Housing Act, 1930, certain shops, to one of which an "off" beer licence was attached, were included in an area to be cleared under the provisions of the order. The owner I of the premises applied to the court under s. 11 (3) of the Act for a declaration that the clearance order was invalid on the ground that, before passing the resolution declaring the area a clearance area, the local authority had failed to satisfy themselves, as required by proviso (a) to s. 1 (1), that suitable alternative accommodation either existed or could be provided for persons of the working classes who occupied business premises in the area, and who would be displaced by the clearance.

Held: the duty of the local authority to satisfy themselves that suitable accommodation either existed or could be provided for persons displaced by the clearance was limited to dwelling accommodation, and did not extend to business accommodation.

Notes. Section 1 of the Housing Act, 1930, has been replaced by s. 42 of the Housing Act, 1957, and s. 41 of the Act of 1930 (mentioned in the judgment) by s. 32 of the 1957 Act. Applications to quash clearance orders are now made under para. 2 of Sched. II to the 1957 Act.

As to clearance areas, see 19 Halsbury's Laws (3rd Edn.) 638 et seq., and for cases see Digest Supps., tit. Public Health, case 502g et seq. For Housing Act, 1957, see 57 Halsbury's Statutes (2nd Edn.) 314.

Application under s. 11 (3) of the Housing Act, 1930, by the owner of premises included in a clearance area.

The question involved was whether the local authority were bound to provide suitable business accommodation for persons displaced by a clearance scheme. On Sept. 5, 1931, the Minister of Health confirmed a clearance order made under the Act by the local authority for the borough of Gateshead. Included in the area were premises owned by the applicant, Mrs. E. A. Wilkinson. These premises consisted partly of two shops, to one of which an "off" beer licence was attached, and partly of living accommodation. Mrs. Wilkinson applied to the court, as a person aggrieved within s. 11 (3) of the Act, for an order that the clearance order might be declared to be invalid, on the ground that the requirements of the Act had not been complied with, inasmuch as the local authority had not, before passing the resolution declaring the area a clearance area, satisfied themselves that suitable accommodation for persons of the working classes who would be displaced by the clearance either existed or could be provided. Her contention was that the authority were bound before passing the resolution to satisfy themselves that suitable accommodation for persons who occupied licensed houses or other business premises in the area either existed or could be provided, and that dwelling-house accommodation unaccompanied by business accommodation was not suitable accommodation within the meaning of proviso (a) of s. 1 (1) of the Act. The Minister admitted that the authority had not satisfied themselves that business accommodation for the persons to be displaced either existed or could be provided, but he contended that they were not under any duty to do so. For the purposes of the application it was admitted that the occupiers of the premises in question were persons of the working classes.

Charlesworth for the applicant.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Bowstead* for the Minister of Health.

Cur. adv. vult.

Dec. 2. **SWIFT, J.,** read the following judgment.—On Sept. 5, 1931, the Minister of Health confirmed a clearance order, known as the County Borough of Gateshead (Barn Close) Clearance Order, 1931, purporting to be made under the Housing Acts, 1925 and 1930, and on Jan. 20, 1932, a copy of that order was served upon Mrs. Elizabeth Ann Wilkinson, the owner of a building comprised in the clearance area. On Oct. 27, 1932, Mrs. Wilkinson gave notice of appeal by way of application to the High Court under s. 11 of the Housing Act, 1930, as a person aggrieved by the order, alleging that the provisions of the Housing Acts had not been properly complied with. The appeal came on for hearing before me on Nov. 29, 1932, and it then appeared that the building which Mrs. Wilkinson owned was situated at the corner of Ellison Street and Victoria Street, in Gateshead, and consisted of two shops with cellars below them, two rooms behind them, and living rooms above them. One of the shops, numbered 24 and 26, Ellison Street, is a lock-up shop occupied by a Mrs. English, and the other, numbered 30 and 32, Victoria Street, was a shop to which an "off" beer licence is attached, and is occupied by a Mrs. Scott. Mrs. Scott also occupies the two rooms behind the shops on the ground floor, and one of the rooms above them, and the cellars below them; a Mrs. Cain occupies two of the rooms over Mrs. Scott's shop; and a Mrs. Jardine occupies the remaining room.

For the purposes of this case it was assumed by the Solicitor-General, who appeared for the Minister of Health, that all the occupants of the various tenements in the building were persons of the working class, and it was not in any way contested that Mrs. Wilkinson was a person aggrieved by the order so as to be entitled to make an application to this court under s. **11** of the Act of 1930. The only point upon which the applicant relied in seeking to have the order quashed either generally or in so far as it affects any of her property was that the requirements of the Act of 1930 had not been complied with in that the Gateshead Corporation had not, before passing the resolution declaring the area a clearance area, satisfied themselves that suitable accommodation for members of the working classes to be displaced by the demolition of the buildings either existed or could be provided. It was stated in her notice of application:

> "That before passing the said resolution the Gateshead Corporation did not satisfy themselves that accommodation available for persons of the working classes who occupied licensed houses or shops in the area contained in the clearance order either existed or could be provided by the Gateshead Corporation and that dwelling-house accommodation unaccompanied by accommodation for those persons of the working classes who occupied licensed houses or shops in the said area is not suitable accommodation within the meaning of proviso (a) in s. **1** (1) of the Housing Act, 1930."

It was agreed before me that the sole question that I had to decide was whether upon the proper construction of the Housing Acts, 1925 and 1930, the local authority must, before making a clearance order, satisfy themselves that suitable accommodation for business purposes as well as for residential purposes will be provided for any persons of the working classes displaced in consequence of the order.

It is quite clear that, if this order stands, Mrs. English will be deprived of her shop and Mrs. Scott will be deprived of her off-licence, and the applicant's contention is that the order is not valid unless before making it the local authority satisfied themselves that other accommodation for their businesses would be provided for them. It was admitted on behalf of the Minister that no evidence of such suitable accommodation had been produced before the inquiry which was held under the Housing Act, 1930, and it was further admitted that the local authority had never considered such a question, but it was contended that the local authority was under no obligation to do so, and that the order was valid notwithstanding the fact that they had not done so.

The matter falls to be decided entirely upon the construction which has to be given to the words of the statute of 1930. It is important to remember that that is an Act to make further and better provision with respect to the clearance or improvement of unhealthy areas, the repair or demolition of insanitary houses and the housing of persons of the working classes. Section **1** (1) provides:

> "Where a local authority, upon consideration of an official representation or other information in their possession, are satisfied as respects any area in their district—(i) that the dwelling-houses in that area are by reason of disrepair or sanitary defects unfit for human habitation, or are by reason of their bad arrangement, or the narrowness or bad arrangement of the streets dangerous or injurious to the health of the inhabitants of the area, and that the other buildings, if any, in the area are for a like reason dangerous or injurious to the health of the said inhabitants; and (ii) that the most satisfactory method of dealing with the conditions in the area is the demolition of all the buildings in the area, the authority shall cause that area to be defined on a map in such manner as to exclude from the area any building which is not unfit for human habitation or dangerous or injurious to health and shall pass a resolution declaring the area so defined to be a clearance area, that is to say, an area to be

> cleared of all buildings in accordance with the provisions hereinafter contained: Provided that, before passing any such resolution, the authority shall satisfy themselves (a) that in so far as suitable accommodation available for the persons of the working classes who will be displaced by the clearance of the area does not already exist, the authority can provide, or secure the provision of, such accommodation in advance of the displacements which will from time to time become necessary as the demolition of buildings in the area, or in different parts thereof, proceeds; and (b) that the resources of the authority are sufficient for the purpose of carrying the resolution into effect. (2) A local authority shall forthwith transmit to the Minister a copy of any resolution passed by them under this section, together with a statement of the number of persons of the working classes who on a day specified in the statement were occupying the buildings comprised in the clearance area. (3) So soon as may be after a local authority have declared any area to be a clearance area, they shall, in accordance with the appropriate provisions hereafter in this Act contained, proceed to secure the clearance of the area in one or other of the following ways, or partly in one of those ways and partly in the other of them, that is to say: (i) by ordering the demolition of the buildings in the area; or (ii) by purchasing the land comprised in the area and themselves undertaking, or otherwise securing, the demolition of the buildings thereon."

The contention here is that in so far as the local authority have not considered accommodation for the businesses carried on by Mrs. English and Mrs. Scott, they have failed to comply with the conditions of the proviso, and, therefore, the scheme is void. I do not accept this view. In my opinion, the proviso has nothing to do with business premises and deals only with the provision of dwelling-houses. Section 9 provides:

> "A local authority who have passed a resolution declaring any area to be a clearance area or an improvement area shall, before taking any action under that resolution which will necessitate the displacement of any persons of the working classes, undertake to carry out or to secure the carrying out of such re-housing operations, if any, within such period as the Minister may consider to be reasonably necessary."

I think light is thrown on the matter by ss. 25, 26, and 27, and s. 27 (1) (a) is, I think, particularly helpful. That section provides:

> "Subject to the provisions of sub-s. (2) of this section, the special conditions for compliance with which a local authority are required by the last preceding section to give an undertaking are as follows: (a) That the houses shall be let for occupation to tenants who intend to reside therein."

Section 41 appears to me to put the matter beyond doubt. By the latter part of that section it is provided:

> "To any person carrying on any trade or business in any such dwelling-house or other building, they [the local authority] may pay also such reasonable allowance as they think fit towards the loss which, in their opinion, he will sustain by reason of the disturbance of his trade or business consequent on his having to quit the house or building, and in estimating that loss, they shall have regard to the period for which the premises occupied by him might reasonably have been expected to be available for the purpose of his trade or business and the availability of other premises suitable for that purpose."

If the contention of the applicant was correct I think the last line, "the availability of other premises suitable for that purpose," would be utterly useless, as if alternative accommodation for business had to be provided by the local authority there could be no consideration as to the availability of business premises in assessing the amount to be paid to the person to be dispossessed. It seems to me that this section is in conformity with the whole scheme of the Act, which is to provide dwelling-houses for people who are displaced in the clearance area, and except for

A the possibility of giving compensation by this section to business people who are displaced, it, I think, makes no provision for their benefit. Section 62 also, I think, confirms this view. By sub-s. (2) it is provided:

> "For the purposes of any provisions of this Act relating to the provision of housing accommodation, the expressions 'house' or 'dwelling-house' includes, B unless the context otherwise requires, any part of a building which is occupied as a separate dwelling."

If the contention of the applicant were to be held right, there would be no clearance scheme for any area in which licensed premises were situated. This is quite inconsistent with s. 47 of the Housing Act, 1925. It is, I think, impossible to believe that the legislature intended to put upon the local authority the necessity C of erecting another building on the site which would be suitable for licensed premises and of obtaining from the licensing justices a transfer of the licence to that new building before they could require the demolition of Mrs. Scott's dwelling. I hold, therefore, that the appellant fails, and this appeal is dismissed with costs.

Solicitors: *King, Wigg, & Brightman*, for *F. J. Lambert*, Gateshead; *Solicitor to Ministry of Health.*

D

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

E

JACKSON *v.* JACKSON

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Finlay, J.), F January 13, 1932]

[Reported 146 L.T. 406; 96 J.P. 97; 48 T.L.R. 206; 76 Sol. Jo. 129; 30 L.G.R. 106; 29 Cox, C.C. 433]

Justices—Husband and wife—Desertion—Constructive desertion—Conduct equivalent to expulsion of wife—Provision by husband of house near his mother's—Housekeeping by husband with mother's help.

G A husband required his wife to live with him in a house which he had furnished without consulting her and which was next to the house occupied by his mother. He also said that he would do the housekeeping as, previously, without his knowledge, his wife had given to her mother some of his money. The husband's mother did not live in the house or control the household, but she helped him with the housekeeping and did the cooking, sometimes in his H house and sometimes in hers. The wife left the house and sought from justices an order for maintenance against the husband, alleging constructive desertion on his part and wilful neglect to maintain her.

Held: the husband had not put his wife under his mother's domination, and, therefore, in taking a house next to that of his mother and in doing the housekeeping, despite the irritation which that was likely to cause, he was not guilty I of such conduct as justified the wife in leaving his house; she had withdrawn from the house without reasonable cause; and, therefore, her claim for maintenance must fail.

Millichamp v. *Millichamp* (1) (1931), 146 L.T. 96, distinguished.

Notes. Applied: *McGowan* v. *McGowan*, [1948] 2 All E.R. 1032. Referred to: *Holborn* v. *Holborn*, [1947] 1 All E.R. 32.

As to just cause for separation of spouses, see 12 HALSBURY'S LAWS (3rd Edn.) 256 et seq., and for cases see 27 DIGEST (Repl.) 701 et seq.

Case referred to:

(1) *Millichamp* v. *Millichamp* (1931), 146 L.T. 96; 95 J.P. 207; 75 Sol. Jo. 814; 29 L.G.R. 671; 29 Cox, C.C. 391; 27 Digest (Repl.) 701, *6710*.

Appeal by husband against an order made by Bolton borough magistrates directing that he should pay the wife 30s. a week for the maintenance of herself and the child of the marriage.

By her summons the wife alleged desertion and wilful neglect to maintain, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925. In her evidence she said that the marriage took place on April 4, 1931. She was now aged twenty-three years and her husband twenty-four. After the marriage she and her husband lived at her mother's. Out of his wages of £4 a week he gave her (the wife) £2 15s. a week. A child was born, and some weeks after her husband told her he had got a house for her. She told him she was not going to it, if it was near his mother's. On Oct. 17, 1931, he went to the house or to his mother's house, which was next door. The wife did not join him at his house for a fortnight. She found that the house was furnished, though she had never been asked about it and had nothing to do with it. There were no cooking utensils. He said his mother was doing the washing. His mother supplied what meals they had. He said he had got the house to suit his own ends, and that she "would not see the colour of his money." The only money she had was her unemployment pay, which she spent on the baby. She was willing to live anywhere with him if she could have a free and independent house, away from his mother. He refused to sign an application form which she obtained for a council house. On Dec. 3 they had a struggle over the child, and after some abuse from him she left him, with the child. In cross-examination the wife said that her husband's mother had interfered too much.

The husband in his evidence said that his wages were £3 13s. a week. In view of what he paid while at his wife's mother's house for housekeeping, he was dissatisfied with the conditions. He was ignored. He received only one cooked meal a week. When he talked about a home of their own, the wife said she did not intend to leave her mother. When he took his wife to see the house he had furnished for her, she said she was sticking to her mother, but at that time said no word against living next door to his mother. When after a fortnight she came to the house she said that she didn't intend to stop, and she wanted him to hit her or push her out. She neglected her duties while she was at the house with him, and after a quarrel she left him of her own accord on Dec. 3. His mother had not interfered with the control of the house, and had only helped them both. Cross-examined, the husband said that he furnished the house to give his wife a surprise. He had definitely made up his mind he would not live anywhere else. Re-examined, he said that, if he could find a house suitable to his means at some future time, he would take it.

The magistrates held that the husband had been guilty of wilful neglect to provide reasonable maintenance, granted the wife the custody of the child, and made an order against the husband for 30s. a week. They gave their reasons as follows: Having heard the evidence of the wife in the witness-box they were of opinion that she had bona fide tried to carry out the wishes of her husband in living in the house next door to that of his mother, but the conditions imposed there were quite unbearable for her and would be so for any wife. She expressed her willingness to reside with her husband at any other place. The husband in the witness-box, in answer to a question whether he would provide another house, replied: "No." The magistrates, bearing in mind the principle in *Millichamp* v. *Millichamp* (1), made an order for maintenance. The husband appealed on the ground that there was no evidence to support the finding of wilful neglect or that it was against the weight of evidence.

Noel Middleton for the husband.

Bush James for the wife.

LORD MERRIVALE.—This is a conspicuously difficult case. Here are two people married just on eight months ago. They are the parents of a little boy born last autumn. They lived with the wife's mother for a time, but the husband found it very unsatisfactory and got a house of his own. He called on his wife to live with him there. He took and furnished the house without husbandly consultation with her. She said: "I'm not going," and consulted a solicitor on whether she was entitled to maintenance. He, apparently, advised that she was not, so she went to her husband. She was deeply aggrieved because his mother lived next door and because he decided to control his own housekeeping. From October to December they were living under one roof with the child, with the mother living next door, to the wife's disgust, and the husband controlling the housekeeping arrangements. The wife was very dissatisfied. After a disturbance on Dec. 3 she went with the child, and on Dec. 7 issued a summons before the Bolton magistrates. They took great pains with the case. I should not be surprised if I were told by the magistrates that a young man of his age who took a house without consulting his wife and took charge of the housekeeping had gone to the extreme limits of foolishness. After all, married people must give and take and not push things to extremes. The magistrates found against the allegation of desertion. They did not find that the husband had driven the wife from home, but they made a careful finding on the question of maintenance. The crucial matter was the living next door to the husband's mother. The husband's means were between £3 and £4 a week, and the order was for 30s. a week. The magistrates were not a body of lawyers framing a legal statement. They were stating a body of facts.

Is it right to say that the conditions imposed on the wife were unbearable for her or any other wife, conditions which it was not competent for a reasonable husband to set up? Were they such conditions that a reasonable wife, being so treated by an unreasonable husband, could not be expected to proceed with the conjugal life? The husband took a house next his mother's. The wife resolved not to be in contact with his mother if she could avoid it. It could not be said that taking the house next the mother's was an abuse of the husband's marital duties, despite the irritation it was likely to cause. I am not able to say that the taking of the house next the mother's, if he did not put his wife under his mother's domination, was necessarily a wrong. Then it is said he conducted the housekeeping. The wife has exaggerated the position. Having been discontented, because a proportion of his wages had gone to the wife's mother without his knowledge, he said he would do the housekeeping. His mother did not live in his house or control his household, but she helped him get the family supplies, and do the cooking sometimes in his house, sometimes in hers. Does that give rise to a right to refuse cohabitation? There are some foolish men who conduct their own housekeeping. There are some wives who acquiesce in it. But it cannot be said that it is necessarily a wrong inflicted on the wife which goes to destroy the conjugal felicity.

It is said that the wife was subjected all the time to the interference of her mother-in-law. *Millichamp* v. *Millichamp* (1) was cited, where a man made the conjugal home at his mother's, and it was held that he had not discharged his duties to his wife. That case was not on all fours with this. When I look at all the various grounds of complaint I see behind them the major ground of complaint, the dominating cause of trouble, namely, that the wife without her consent had been required to live in a house next door to his mother. Looking at the technical aspect of the magistrates' order, and their reliance on a case of a different nature to support their conclusions, I find that the wife has not made out her complaint of wilful neglect to provide reasonable maintenance. She had withdrawn from her home without sufficient cause. The appeal succeeds, and the order will be discharged.

I am only too conscious that that does not dispose of the matter between these parties. The husband must bear in mind that there is a vista of trouble before a husband who does not maintain his wife when she is willing to come and be maintained as a wife. It would be a lamentable thing if these two young people with an infant child should not see the way to solve this difficulty by coming together and making a new start, and not by means of solicitors' letters.

FINLAY, J.—The case is rather near the line, but I concur in the judgment.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co.*, for *Pickstone & King*, Radcliffe; *Gregory, Rowcliffe & Co.*, for *Adam F. Greenhalgh*, Bolton.

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

Re JOHN. JONES *v.* JOHN

[Chancery Division (Farwell, J.), November 11, 23, 1932]

[Reported [1933] Ch. 370; 102 L.J.Ch. 72; 148 L.T. 450]

Administration of Estates—Order of application of assets—Payment of debts and liabilities—Property subject to mortgage—Property subject to payment of legacies—Administration of Estates Act, 1925 (15 *Geo.* 5, *c.* 23), *Sched. I, Part II, para.* 6.

Part II of Sched. I to the Administration of Estates Act, 1925, provides for the order in which the assets of a solvent estate of a deceased should be applied in the payment of debts, &c. No. 6 of the classification of assets is: "Property specifically devised or bequeathed rateably according to value." A testator, after providing for certain pecuniary legacies and dealing with his residuary real and personal estate, devised to D.J. certain property subject to a mortgage created by the testator, and to J.J. another property subject to the payment of certain legacies. At the testator's death his personal estate was insufficient to meet the pecuniary legacies, debts, and expenses.

Held: that the "value" of property for the purposes of para. 6 of the schedule was the value of the property to the testator, and that, therefore, the amount of the mortgage must be deducted from the value of the mortgaged property, but there should be no deduction from the value of the property devised subject to the payment of the legacies.

Notes. As to the order of the application of assets in an administration, see 16 Halsbury's Laws (3rd Edn.) 344 et seq., and for cases see 23 Digest (Repl.) 539 et seq. For Administration of Estates Act, 1925, see 9 Halsbury's Statutes (2nd Edn.) 718.

Adjourned Summons.

A testator, by his will, dated Aug. 1, 1930, after providing for certain pecuniary legacies, and after devising and bequeathing his residuary real and personal estate to his trustees upon various trusts, devised to David John a certain property subject to a mortgage created by the testator, and he then next devised to Jenkin Thomas John a certain other property subject to the payment of certain legacies. The testator died on March 17, 1931. The personal estate of the testator being insufficient to meet all the pecuniary legacies, debts, and expenses, a summons was taken out to determine whether the amount of the mortgage and the amount of the legacies should be deducted from the properties devised subject to the mortgage and legacies respectively.

C. E. Harman for the plaintiff, the trustee of the will.

R. Gwyn Rees for the two devisees.—The expression "property" includes any interest in property: see s. 55 (1) (xvii) of the Administration of Estates Act, 1925. Therefore, only the value of the interest in the properties to be acquired by the respective devisees should be deducted.

Stafford Crossman for the Attorney-General.

P. J. Sykes and *Leonard Stone* for other parties.

FARWELL, J.—The question I have now to determine arises upon Sched. 1 to the Administration of Estates Act, 1925, Part II, para. 6. The testator has specifically devised certain properties to certain persons, and the question is how as between them the legacies and expenses are to be borne. Part II provides the various ways in which the property is to be applied for that purpose, and para. 6 says that property which is specifically devised or bequeathed is to be applied rateably according to value. The testator had certain property which he devised subject to a mortgage created in his lifetime. It is said with regard to the property so devised that the word "value" in para. 6 means the value of the property as unincumbered property and not the value of the property in the hands of the testator. The testator had, in fact, in respect of these properties, only an equity of redemption, and that is the value which, in my judgment, must be taken for this purpose. The "value" cannot mean the actual price which the property would fetch in the open market free from incumbrance; it must mean the value to the testator, and since all he had was the equity of redemption, that is the value which must be taken. Also, it seems to me that it is impossible to read the word "value" in para. 6 as meaning the interest the beneficiary takes. It must mean the value of the property to the testator. Where the testator imposes on a legatee an obligation to make certain payments thereout as legacies, I cannot read "value" as meaning what the beneficiary is ultimately going to receive from the property. There will, therefore, be a declaration that there be deducted from the probate values the amount of the mortgage on the properties so charged, and that there be no deduction from the value of the properties devised to the defendant, J. T. John, in respect of the several legacies which under the will he is bound to pay.

Solicitors: *E. C. Rawlings, Butt, & Bowyer*, for *Randall & Co.*, Bridgend; *Jacques & Co.*, for *W. M. Thomas*, Bridgend; *Helder, Roberts, Giles & Co.*, for *B. Edward Howe*, Port Talbot; *Treasury Solicitor.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

CUNARD AND ANOTHER *v.* ANTIFYRE, LTD.

[King's Bench Division (Acton and Talbot, JJ.), December 20, 1932]

[Reported [1933] 1 K.B. 551; 103 L.J.K.B. 321; 148 L.T. 287; 49 T.L.R. 184]

Negligence—Overhanging object—Duty to prevent fall—Guttering—Injury to person in another tenement of same building.

Negligence may be defined as the absence of the care which a prudent and reasonable man would take in the circumstances. The duty to take care to avoid doing injury is owed to all who are likely to suffer injury if the duty is neglected, whatever form the injury takes. Anyone in occupation and control of something hung over a place in which people may be expected lawfully to be is bound to take reasonable care that it does not fall and injure them, and, if anyone is injured, it is immaterial whether he is lawfully on the highway or in the exercise of any other legal right.

The plaintiffs were husband and wife, the husband being the sub-tenant of a tenant of the defendants of part of a building, of which the roof remained in the occupation of the defendants, the lessors of the whole building. There was no privity of contract between the plaintiffs and defendants. The plaintiffs sustained damage owing to some broken guttering falling from the roof of the building, which roof was in the occupation of the defendants, into a kitchen occupied by them.

Held: (i) the plaintiffs' action was for negligence, and not for nuisance; (ii) the guttering was in the occupation and control of the defendants who were solely responsible for taking care that it should not become dangerous, and they had full means of knowing, even if they did not actually know, that it was dangerous before it fell; (iii) if they had directed themselves to the matter, they must have had reasonably in contemplation the safety of persons lawfully in the plaintiffs' kitchen; and therefore, they were liable to the plaintiffs in damages.

Notes. Considered: *Shirvell* v. *Hackwood Estates Co.*, [1938] 2 All E.R. 1. Followed: *Taylor* v. *Liverpool Corpn.*, [1939] 3 All E.R. 329. Considered: *Spicer* v. *Smee*, [1946] 1 All E.R. 489. Referred to: *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E.R. 349; *Bank View Mill, Ltd.* v. *Nelson Corpn. and Fryer & Co.* (*Nelson*), *Ltd.*, [1942] 2 All E.R. 477.

As to duty to prevent damage to neighbours, see 23 Halsbury's Laws (2nd Edn.) 614–617, and for cases see 31 Digest (Repl.) 380 et seq. and 36 Digest (Repl.) 281, 282.

Cases referred to:

(1) *Malone* v. *Laskey*, [1907] 2 K.B. 141; 76 L.J.K.B. 1134; 97 L.T. 324; 23 T.L.R. 399; 51 Sol. Jo. 356, C.A.; 36 Digest (Repl.) 14, *56*.

(2) *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229; 78 L.J.P.C. 76; 100 L.T. 626; 25 T.L.R. 375; 53 Sol. Jo. 319, H.L.; 36 Digest (Repl.) 118, *590*.

(3) *Donoghue* v. *Stevenson*, ante, p. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 28; 48 T.L.R. 494; 76 Sol. Jo. 396; 37 Com. Cas. 850, H.L.; 36 Digest (Repl.) 85, *458*.

(4) *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; 52 L.J.Q.B. 702; 49 L.T. 357; 47 J.P. 709; 27 Sol. Jo. 667, C.A.; 36 Digest (Repl.) 7, *10*.

(5) *LeLievre* v. *Gould*, [1893] 1 Q.B. 491; 62 L.J.Q.B. 353; 68 L.T. 626; 57 J.P. 484; 41 W.R. 468; 37 Sol. Jo. 267; 4 R. 274; sub nom. *Dennes* v. *Gould*, 9 T.L.R. 243, C.A.; 36 Digest (Repl.) 9, *27*.

(6) *Blyth* v. *Birmingham Waterworks Co.* (1856), 11 Exch. 781; 25 L.J.Ex. 212; 26 L.T.O.S. 261; 20 J.P. 247; 2 Jur.N.S. 333; 4 W.R. 294; 156 E.R. 1047; 36 Digest (Repl.) 5, *1*.

(7) *Vaughan* v. *Taff Vale Rail. Co.* (1860), 5 H. & N. 679; 29 L.J.Ex. 247; 2 L.T. 394; 24 J.P. 453; 6 Jur.N.S. 899; 8 W.R. 549; 157 E.R. 1351, Ex. Ch.; 36 Digest (Repl.) 6, *8*.

(8) *Todd* v. *Flight* (1860), 9 C.B.N.S. 377; 30 L.J.C.P. 21; 3 L.T. 325; 7 Jur.N.S. 291; 9 W.R. 145; 142 E.R. 148; 31 Digest (Repl.) 381, *5094*.

(9) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L.T. 1; 92 J.P. 180; 44 T.L.R. 703; 26 L.G.R. 638, C.A.; 36 Digest (Repl.) 292, *391*.

(10) *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; 45 L.J.Q.B. 260; 34 L.T. 97; 40 J.P. 439; sub nom. *Terry* v. *Ashton*, 24 W.R. 581; 26 Digest 433, *1519*.

(11) *Byrne* v. *Boadle* (1863), 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 10 Jur.N.S. 1107; 12 W.R. 279; 159 E.R. 299; 36 Digest (Repl.) 73, *387*.

(12) *Scott* v. *London, &c., Docks Co.* (1865), 3 H. & C. 596; 5 New Rep. 420; 34 L.J.Ex. 220; 13 L.T. 148; 11 Jur.N.S. 204; 13 W.R. 410; 159 E.R. 665, Ex. Ch.; 36 Digest (Repl.) 145, *772*.

(13) *Degg* v. *Midland Rail. Co.* (1857), 1 H. & N. 773; 26 L.J.Ex. 171; 28 L.T.O.S. 357; 3 Jur.N.S. 395; 5 W.R. 364; 156 E.R. 1413; 36 Digest (Repl.) 8, *16*.

(14) *Vaughan* v. *Menlove* (1837), 3 Bing.N.C. 468; 3 Hodg. 51; 4 Scott, 244; 6 L.J.C.P. 92; 1 Jur. 215; 132 E.R. 490; 36 Digest (Repl.) 29, *126*.

(15) *Nunn* v. *Parkes & Co.* (1924), 59 L.Jo. 806; 36 Digest (Repl.) 309, *565*.

Appeal from Westminster County Court.

The male plaintiff occupied rooms on the third floor of a building, 14 Orange Street, Haymarket, London, and lived there with his wife, the other plaintiff. He occupied under a verbal monthly tenancy granted by one Mallinson, who was lessee of the rooms comprising the second, third, and fourth floors of the building, from the defendant company under a lease dated July 19, 1927, for twenty-one years less three days from Christmas, 1926. By the lease Mallinson covenanted during the term to keep the demised premises in good and substantial repair and condition internally and externally, drains and roof and damage by fire excepted. The defendant company covenanted to perform (so far as the lessee was not liable for such performance under his covenants) all the covenants of the defendant company contained in the head-lease. By a head-lease, made on Nov. 20, 1926, between the Carlton Hotel, Ltd., as lessors, and the defendant company, as lessees, of the premises for twenty-one years from Christmas, 1926, the defendant company covenanted during the term to keep the whole of the demised premises in good and substantial repair and condition internally and externally, damage by fire excepted. By an agreement made June 22, 1927, between the parties to the head-lease, the lessors, the Carlton Hotel, Ltd., permitted the lessees, the defendant company, to convert the second, third and fourth floors of the premises into residential chambers, and to sublet those floors to Mallinson.

The rooms on the third floor occupied by the plaintiffs at the time when the events which are the subject of this action happened included a kitchen covered by a glass roof, projecting beyond the back wall of the fourth floor, which was immediately under the main roof of the building. It was alleged by the plaintiffs and denied by the defendants that the effect of the relevant instruments was that the main roof and the guttering connected with it remained vested in the defendants as occupiers for the term of the lease, and was not included in the sub-lease to Mallinson. The plaintiffs relied principally on the language of the parcels in the lease from the defendants to Mallinson, "all those rooms comprising the whole of the second, third, and fourth floors of the premises," the defendants being themselves clearly lessees of the whole building. On this question of construction, their Lordships held that the plaintiffs' contention was correct. On Dec. 4, 1931, Mrs. Cunard was in the kitchen before mentioned when a heavy piece of the guttering from the main roof of the building fell through the glass roof of the kitchen, causing part of the broken glass to strike and cut her and damage her clothes. For this she claimed damages against the defendant company. Her husband joined in the action, claiming £8 3s. for damage to chattels in the kitchen, doctor's fees, and the expenses of cleaning his wife's clothes incurred by him, and damage for loss of the use of the kitchen while the defendants were repairing its roof. The defendants also put up new guttering at the top of the building. There was evidence in the county court that the guttering which fell on the kitchen had never been properly supported, that the want of proper support was obvious to anyone who looked at it, that it had leaked for some time owing to decay of the screws by which it had been attached to a wooden fascia behind it, and that it could not have been expected to last without repair more than about ten years from the time when it was put up.

At the close of the plaintiffs' case, the question of the amount of damages having been postponed, counsel for the defendants submitted that the plaintiffs had proved no case. After argument, the judge gave judgment as follows:

> "On the oral and documentary evidence given in support of the plaintiffs' case, I hold there was no duty owing by the defendants to either of the plaintiffs who are making the claim against the defendants to take steps to prevent the guttering becoming a nuisance, or to take reasonable care to see that it was reasonably safe. I give this decision with some diffidence and some reluctance."

According to the judge's note, the argument for the defendants before him was chiefly directed to the point that, for want of any licence by the defendants to Mallinson to sublet, the plaintiffs were trespassers and complete strangers, and that, therefore, the only duty of the defendants to them was not to harm them wilfully. This contention was abandoned during the appeal. The defendants called no evidence. The plaintiffs appealed.

A. de W. Mulligan for the plaintiffs.

Geoffrey Howard for the defendants.

Cur. adv. vult.

Dec. 20. **TALBOT, J.,** read the judgment of the court in which he stated the facts and continued: The question of substance in the case is whether in the circumstances the occupier of the guttering was under a duty to either or both of the plaintiffs to take reasonable care that it did not get into such a state that it was likely to fall on the roof of the kitchen and do damage. Neither of the plaintiffs is in any contractual relation to the defendants, and any right of action, therefore, which they may have must be in tort. We think that some confusion has been caused by the use by the plaintiffs, both in their particulars of claim and in their notice of appeal, of the word "nuisance." We think that "nuisance" (we are speaking of private nuisance only) is correctly confined to injuries to property, whether to easements, such as the obstruction of light or of rights of way, or the diversion of watercourses, or the withdrawal of support from a house; or to other kinds of property, as by noise, noxious vapours, smoke, or the like: see Bullen and Leake, Precedents of Pleadings (3rd Edn.), p. 377. In all such cases the plaintiff in order to maintain an action must show some title to the thing to which the nuisance is alleged to be: Comyn's Digest, action upon the case for a nuisance, E. 1, vol. 1, p. 235 of the folio edition, 1762; and this follows from the nature of such actions. Private nuisances, at least in the vast majority of cases, are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring property; and it would manifestly be inconvenient and unreasonable if the right to complain of such interferences extended beyond the occupier, or (in case of injury to the reversion) the owner, of such neighbouring property: see per Moulton, L.J., in *Malone* v. *Laskey* (1) ([1907] 2 K.B. at p. 153). We think, therefore, that the use of the word "nuisance" to describe what is complained of in this case is incorrect, and that the plaintiffs' true cause of action (if they have one) is for negligence, for failure by an occupier of property to take reasonable care that his property does not get into such a state

A as to be dangerous to adjoining property or persons lawfully thereon. The male plaintiff was, as we hold, the occupier of the kitchen on which this guttering fell; and his wife was there as his wife and by his permission, though, in our opinion, for the purposes of this case it is immaterial in what capacity she was there so long as she was there lawfully. If the right or the duty alleged by the plaintiffs exists, they are the right of, and the duty to, anyone lawfully in the kitchen, and of and B to the occupier of it, and the owner of the chattels in it. By way of an analogy, though the case is in no sense an authority for the present, we may refer to the judgment of LORD ATKINSON in *Cooke* v. *Midland Great Western Railway of Ireland* (2) ([1909] A.C. at p. 238). The question there was as to the liability of an occupier of land who kept a dangerous thing on it for injury resulting to a child. After quoting authorities, LORD ATKINSON says:

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> "I omit the words public place or thoroughfare from the immediately preceding sentence, because I think the principle of these decisions applies to any place to which boys or children have a legal right to go and may reasonably be expected to be not unlikely to frequent. The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, D is, in my view, irrelevant":

see also per LORD MACNAGHTEN ([1909] A.C. at p. 233). Nor, in our opinion, does it make any difference that the kitchen was a part of the same building of which the defendants occupied the main roof. The mutual rights and duties material to this case would be exactly the same if part of an adjacent building had been in the E same position as was this kitchen relatively to the guttering which fell—a position, that is, in which it was certain that the guttering, if it did fall, would fall on it.

As we have said, we think that the use of the word "nuisance" is incorrect, but that can make no difference to the decision of the appeal. It is our duty to see whether the facts, so far as they have been ascertained, give the plaintiffs or either of them a cause of action, whatever may be its appropriate description. It may F be, perhaps, worth while to add that under the old system of pleading actions for nuisance and for negligence were alike forms of action on the case. No doubt a nuisance may be caused by negligence, and there may be cases in which the same act or omission would support an action of either kind, but, generally speaking, these two classes of actions on the case are distinct, and the evidence necessary to support them is different. The law as to actionable negligence, depending on G breach of duty owed by defendant to plaintiff, has always been stated in broad terms, and it is of its essence that it is applicable to an infinite variety of facts. We venture to adopt the language of LORD MACMILLAN in *Donoghue* v. *Stevenson* (3) (ante, p. 19; [1932] A.C. at pp. 618 and 619):

> "The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where H failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What, then, are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable I man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in conse-

> quence of a breach of that duty. Where there is room for diversity of view, it is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care, and on the other side to a right to have care taken."

What, then, is the law of actionable negligence—a law which it is important to remember is to be found only in the statement of it by judges?: see per Lord Atkin in *Donoghue* v. *Stevenson* (3). The same learned Lord states the law in the same case as follows (ante, p. 11; [1932] A.C. at p. 580):

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be, persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

This appears to me to be the doctrine of *Heaven* v. *Pender* (4) as laid down by Lord Esher (then Sir Baliol Brett, M.R.), when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith, L.J., in *LeLievre* v. *Gould* (5). Lord Esher says ([1893] 1 Q.B. at pp. 497, 504):

> "That case established that, under certain circumstances, one man may owe a duty to another, even though there is no contract between them. If one man is near to another, or is near to the property of another, a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property."

And A. L. Smith, L.J., said:

> "The decision of *Heaven* v. *Pender* (4) was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by the one to the other!"

Apply this to the present case. It seems clear that the persons having the control of this guttering, if they had directed themselves to the omission, of which they have been accused, to take reasonable care that it should not fall, must have had the occupier of the kitchen, and any person lawfully in the kitchen, on which if it did fall it must fall "reasonably in contemplation" as closely and directly affected by the omission.

There are, of course, many other definitions or descriptions of "negligence" in the books. We will quote one or two which have commonly been received:

> "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do":

per Alderson, B., in *Blyth* v. *Birmingham Waterworks Co.* (6) (11 Exch. at p. 784). "The definition of negligence is the absence of care according to the circumstances": per Willes, J., in *Vaughan* v. *Taff Vale Rail. Co.* (7) (5 H. & N. at p. 688). These utterances of great judges illustrate what we have said as to the breadth and elasticity of the conception of actionable negligence in our law. Perhaps they might fairly be combined as "the absence of the care which a prudent and reasonable man would take in the circumstances." It would be difficult to call a man prudent or reasonable who, being possessed of a heavy piece of metal suspended over the glass roof of a dwelling-house, would not consider it to be his duty to take care that the support was sufficient to prevent it from falling.

We have referred to statements as to what negligence is generally. Let us now consider the application of the law to cases resembling the present. There is no doubt that if this guttering and the roof on which it fell had been parts of adjoining, but distinct, buildings, and if by negligent omission to keep the guttering and its support in proper repair it had fallen on the roof, the owner or occupier or both would have had an action for damage to the building: *Todd* v. *Flight* (8); *St. Anne's Well Brewery Co.* v. *Roberts* (9). In *Todd* v. *Flight* (8) the only matter in debate was whether in the circumstances the action lay against owner or occupier. It can make no difference that the two tenements here are parts of the same structure, any more than it could make a difference whether two adjoining houses were detached or separated only by a party wall. Again, on what principle can the owner or occupier of the adjoining tenement have an action of tort (contract being out of the case) for the injury to his house caused by the wrongful non-repair of his neighbour's house—see the end of the judgment in *Todd* v. *Flight* (8) —but he or another person in the same house have no remedy for personal injury done by the same means at the same time? It is because injury may be expected to result if the thing becomes out of repair that there is a duty to take care to keep it in repair, and it is plain that the injury which may be expected may be either to the house itself or to the person of anyone who may happen to be using it, or both. It seems to follow that the duty to take care to avoid doing injury is owed to all who are likely to suffer injury if the duty is neglected, whatever form the injury takes. Apply another test: if the defendants had (as they ought to have done and now have done) replaced the dangerous guttering by new guttering properly supported, and in the course of the work their workman had negligently dropped part of the old guttering on the roof of the kitchen with the same results as ensued on the fall of the guttering in the present case, could it be doubted that both plaintiffs would have had a cause of action in which the damages would have been the same as in this case? We understand counsel for the defendants to admit that they would. Again, there is no doubt that if this guttering had overhung the street in the condition proved in the case before us, and had fallen on someone passing below and injured him, that person would have had an action against the defendants on the principle of *Tarry* v. *Ashton* (10). What is that principle? It is, in our opinion, that anyone in occupation and control of something hung over a place in which people may be expected lawfully to be is bound to take reasonable care that it does not fall and injure them. This seems to us to be both law and justice; and, as we have clearly said, it is, in our opinion, immaterial whether in such a case the plaintiff is in the place where he is injured as one of the King's subjects entitled to use the highway, or in the exercise of any other legal right. A closely similar principle applies to work done or chattels kept or moved in the like dangerous situations: see such cases as *Byrne* v. *Boadle* (11) (and it makes no difference whether the plaintiff was in the highway, as in that case, or in any other place where he had a right to be, and where people might be expected to be) and *Scott* v. *London, &c., Docks Co.* (12). Compare the judgment of the court, delivered by BRAMWELL, B., in *Degg* v. *Midland Rail. Co.* (13) (1 H. & N. at pp. 779 et seq.).

Counsel for the defendants strongly pressed upon us (what is certainly remarkable) that there appears to be no reported case previously in point, and it was chiefly for that reason that we took time to consider our judgment. Consideration has confirmed us in the belief that the judgment below cannot be reconciled with established principles of law; and, if that is so, it would obviously be wrong not to apply those principles merely because it cannot be shown that they have been applied before to facts exactly like these. This, of course, needs no authority, but we may notice an instance in which the same principles which govern the case before us were applied admittedly to a case of first impression. In *Vaughan* v. *Menlove* (14) damages were recovered against the defendant for negligently allowing a stack on his land to heat and take fire, thereby burning some buildings of his own, from which the fire spread to the plaintiff's cottages. TYNDALL, C.J., said (3 Bing.N.C. at p. 474):

> "I agree that this is a case primæ impressionis; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind."

The defendants relied on *Malone* v. *Laskey* (1) as a definite authority in their A
favour. The facts in that case were somewhat peculiar. The defendants, as trustees for a building society, owned the freehold of a house which they had let to a tenant. The tenant sublet to a company. The plaintiff was the wife of the company's manager, and lived with her husband and their family in the house. The defendants were under no liability to repair the house. The defendants also owned, and apparently occupied, premises adjoining the house, and put up in those B
premises an engine in connection with electric light. There having been complaints by the plaintiff and her husband to their employers' immediate landlord of vibration caused by the engine, and also that the tank of a lavatory in the house was unsafe, and these complaints having been communicated to the defendants, the defendants sent plumbers, their servants, to make the tank safe. The plumbers put up a bracket to support it, but a few months after they had done so it fell and C
injured the plaintiff. The jury found that the vibration from the engine was a nuisance, that it caused the fall of the bracket, and that the plumbers' work was negligent and left the lavatory in a state dangerous to anyone using it. Judgment having been entered accordingly for the plaintiff, the Court of Appeal entered judgment for the defendants. The grounds of the decision were: (i) That the plaintiff, not having any legal interest in the house, could not maintain an action for D
nuisance by vibration; (ii) that there was no contractual relation between the plaintiff and the defendants, no possession or occupation of the house by the defendants, no obligation on the defendants to do any work there, no invitation or licence by the defendants to the plaintiff to be in the house, no knowledge by the defendants that the lavatory was dangerous after the work was done there, and therefore no duty on the defendants to the plaintiff such as to support her action against E
them for negligence. KENNEDY, L.J., in concurring, expressed considerable doubt as to the second ground. We have stated the facts and the effect of the judgment somewhat fully in order to make it clear that it is no authority in the present case. Here, the thing, the defective condition of which caused the injuries complained of, was in the occupation and control of the defendants; they were solely responsible for taking care that it should not become dangerous, and they had full means of F
knowing, even if they did not actually know, that it was dangerous before it fell.

We were also referred to *Nunn* v. *Parkes & Co.* (15). It was a case of nuisance by stopping up ditches on the defendants' land and thereby causing water to escape which damaged chattels of the plaintiff on premises in which he had an estate or interest. So far as appears, there was no question of negligence. This court gave judgment for the defendants, holding, in accordance with *Malone* v. *Laskey* (1) G
and other cases, that no action for private nuisance lies except for injury to some land or easement in which the plaintiff has a legal interest. In our opinion, neither of these cases creates any difficulty in deciding, as we do, for the reasons we have indicated, in favour of the plaintiffs. We are of opinion that the judgment of the county court must be set aside.

The question remains whether judgment should be entered for the plaintiffs for H
damages to be assessed, or whether a new trial should be ordered, the case going back to the county court for that purpose with our opinion on the law. We are not quite sure what is the attitude of the parties as to this. As we understand, when at the close of the plaintiffs' evidence it was submitted that there was no case, the judge said: "The case must proceed." We should take that to mean that the defendants had then to make their whole case by evidence or argument, I
or both. They were, of course, entitled to call no evidence, relying on the contention that even on the plaintiffs' evidence they were entitled to judgment, but we do not see how it can be said that the judge in any way relieved them of the duty of producing this evidence then and there if they wished to contradict the plaintiffs' evidence on matters of fact. Subject, therefore, to any further argument, it appears to us, holding, as we do, that the judge's decision is erroneous in law on the evidence then before him, to be the proper course to remit the case to the county court for assessment of damages only, directing that judgment should

be entered for the plaintiffs for the amount found due. In other words, the only question remaining for decision will be the amount of damages, unless of course the parties can agree them.

Solicitors: *Castle & Co.*; *Windsor & Brown.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

R. *v.* MANLEY

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Branson, JJ.), December 12, 1932]

[Reported [1933] 1 K.B. 529; 102 L.J.K.B. 323; 148 L.T. 335; 97 J.P. 6; 49 T.L.R. 130; 77 Sol. Jo. 65; 31 L.G.R. 81; 24 Cr. App. Rep. 25; 29 Cox, C.C. 574]

Criminal Law—Public mischief—Effecting—Statement to police concerning bogus robbery—Description of alleged assailant.

The common law misdemeanour of effecting a public mischief, defined in *R.* v. *Higgins* (1), 2 East at p. 21, as including "all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community" still exists.

A person who makes a false statement to the police concerning a bogus robbery, with a description of the imaginary assailant, is guilty of this offence.

R. v. *Higgins* (1) (1801), 2 East 5; *R.* v. *Brailsford* (2), [1905] 2 K.B. 730; and *R.* v. *Porter* (3), [1910] 1 K.B. 369, applied.

Notes. Criticised: *R.* v. *Newland*, [1953] 2 All E.R. 1067.

As to acts tending to the public mischief, see 10 HALSBURY'S LAWS (3rd Edn.) 678, 679, and for cases see 15 DIGEST (Repl.) 913.

Cases referred to:

(1) *R.* v. *Higgins* (1801), 2 East, 5; 102 E.R. 269; 14 Digest (Repl.) 119, *822.*

(2) *R.* v. *Brailsford*, [1905] 2 K.B. 730; 75 L.J.K.B. 64; 93 L.T. 401; 69 J.P. 370; 54 W.R. 283; 21 T.L.R. 727; 49 Sol. Jo. 701; 21 Cox, C.C. 16, D.C.; 14 Digest (Repl.) 129, *909.*

(3) *R.* v. *Porter*, [1910] 1 K.B. 369; 79 L.J.K.B. 241; 102 L.T. 255; 74 J.P. 159; 26 T.L.R. 200; 22 Cox, C.C. 295; 3 Cr. App. Rep. 237, C.C.A.; 14 Digest (Repl.) 129, *908.*

(4) *R.* v. *de Berenger* (1814), 3 M. & S. 67; 105 E.R. 536; 15 Digest (Repl.) 915, *8802.*

Appeal against conviction.

The appellant was indicted at the Central Criminal Court on an indictment containing two counts. The first count alleged that she

> "on the 10th day of September, 1932, in the county borough of Croydon, did by means of certain false statements, to wit, that on that day a man, whose description she then gave, had hit her with his fist and taken from her handbag six 10s. notes, nine £1 notes, 15s, in silver, and a receipt, cause officers of the Metropolitan Police, maintained at public expense for the public benefit, to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the service of the said public officers, and rendering liege subjects of the King liable to suspicion, accusation, and arrest, and in doing so did unlawfully effect a public mischief."

The second count charged her with a precisely similar offence, except that there were variations in date, in the amount of the money supposed to have been taken, and in the method of the alleged attack. The appellant admitted the facts alleged, but it was contended on her behalf that they did not constitute any offence known to the law. The Recorder of London ruled that the acts, if proved, constituted the common law misdemeanour of effecting a public mischief, and left it to the jury to say whether the appellant had committed the acts with which she was charged. The jury found the appellant Guilty. Sentence was postponed, and a certificate for appeal granted. After the appeal had been dismissed, the appellant was brought up for sentence, and the recorder ordered her to be bound over for two years in her own recognisances in the sum of £5.

L. Vine, for the appellant, referred to *R.* v. *Brailsford* (2) and *R.* v. *Higgins* (1), and STEPHEN'S HISTORY OF THE CRIMINAL LAW, vol. 3, p. 359.

L. A. Byrne, for the Crown, referred to *R.* v. *de Berenger* (4) (3 M. & S. at p. 75), *R.* v. *Porter* (3) and *R.* v. *Higgins* (1).

The judgment of the court was delivered by

LORD HEWART, C.J.—The appellant was indicted at the Central Criminal Court for effecting a public mischief in that she

> "on the 10th day of September, 1932, did by means of certain false statements, to wit, that on that day a man, whose description she then gave, had hit her with his fist and taken from her handbag six 10s. notes, nine £1 notes, 15s. in silver and a receipt, cause officers of the Metropolitan Police, maintained at public expense for the public benefit, to devote their time and services to the investigation of false allegations, thereby temporarily depriving the public of the service of the said public officers and rendering liege subjects of the King liable to suspicion, accusation and arrest, and in so doing did unlawfully effect a public mischief."

There was a second count which differed from the first in two respects only, one as to the date, and the other as to the amount supposed to have been taken. The appellant was convicted and was bound over to appear at the Central Criminal Court when served with notice to do so after the point of law raised had been decided.

It was submitted on her behalf then, as now, that no offence had been committed, and that proposition consists of two parts. One is the question whether it is true to-day to say that there is a misdemeanour of committing an act tending to public mischief. In our opinion, that question is to be answered in the affirmative. We think the law still remains as stated by LAWRENCE, J., in *R.* v. *Higgins* (1) (2 East at p. 21):

> "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community are indictable."

That case was referred to with approval in a much more recent case, *R.* v. *Brailsford* (2) ([1905] 2 K.B. at p. 745), and in a still more recent case, *R.* v. *Porter* (3) ([1910] 1 K.B. at p. 374), where LORD ALVERSTONE, C.J., in delivering the judgment of the court, said:

> "We are of opinion that it is for the court to direct the jury as to whether such an act may tend to the public mischief, and it is not in such a case an issue of fact on which evidence can be given."

The second point is whether the facts proved in this case constituted a public mischief. The facts here were not in dispute; it was admitted that what was alleged to have been done by the appellant had been done. We think that the conviction was right. The indictment aptly describes two at least of the ingredients of public mischief or prejudice to the community involved; the first, that officers of the Metropolitan Police were caused by false statements to devote their time to the investigation of idle charges; the second, that members of the public—

at any rate, those members who answered or were thought to answer a certain detailed description—were put in peril.

For these reasons we think that this conviction ought to stand and that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Copley Singleton, Croydon*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

CELLULOSE ACETATE SILK CO., LTD. *v.* WIDNES FOUNDRY (1925), LTD.

[HOUSE OF LORDS (Lord Atkin, Lord Warrington of Clyffe, Lord Tomlin, Lord Thankerton and Lord Macmillan), May 26, 27, June 28, 1932]

[Reported [1933] A.C. 20; 101 L.J.K.B. 694; 147 L.T. 401; 48 T.L.R. 595; 38 Com. Cas. 61]

Contract—Breach—Damages—Measure—Weekly sum payable on default as penalty—Actual loss not recoverable.

In March, 1929, the respondents contracted to supply and install an acetone recovery plant for the appellants. By the contract it was provided that the work would be completed within eighteen weeks, failing which the respondents would pay the appellants "by way of penalty the sum of £20 per working week for every week" exceeding the eighteen weeks. The respondents did not complete the work until thirty weeks after the agreed date. In an action by the respondents against the appellants for the contract price, the appellants counter-claimed for the actual loss they had suffered through the respondents' delays, which was assessed at £5,850.

Held: the appellants were only entitled to recover £20 a week as agreed damages, and, therefore, the respondents were liable for £600 and no more.

Notes. As to distinguishing liquidated damages and penalty in a contract, see 11 HALSBURY'S LAWS (3rd Edn.) 298–302, paras. 487–490; and for cases on the subject, see 17 DIGEST (Repl.) 148–150, *487–494*.

Appeal by Cellulose Acetate Silk Co., Ltd. from the decision of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), [1931] 2 K.B. 393, varying a judgment of WRIGHT, J., dated March 20, 1931, on a counter-claim by the appellants in an action by the respondents, Widnes Foundry (1925), Ltd., against the appellants for the price agreed to be paid by the appellants for the installation of an acetone recovery plant supplied by the respondents. The facts appear in the opinion of LORD ATKIN.

Serjeant Sullivan, K.C., and *G. J. Paull* for the appellants.

F. K. Archer, K.C., and *Henry O'Hagan* for the respondents were not called on.

The House took time for consideration.

June 28. **LORD ATKIN** read the following opinion.—The question in this case arises on a counter-claim by the appellants in an action in which they were sued by the respondents for the price agreed to be paid by the appellants for the installation of an acetone recovery plant supplied by the respondents. The appellants claim that the contract specified delivery and erection within eighteen weeks of the approval by them of the respondents' drawings; that the time expired on July 27, 1929, and the plant was not delivered and erected until Feb. 10, and they claim

A substantial damages for delay The learned judge at the trial found that the respondents had broken the contract; that it was not completed until Jan. 3, 1930; and he assessed the damages at £5,850. The respondents relied on two clauses in the contract, which provided:

> "(ix) You to deliver and erect in eighteen working weeks from receipt of final approval of your drawings. (x) If this period of eighteen working weeks is B exceeded you to pay by way of penalty the sum of £20 per working week for every week you exceed the eighteen weeks, subject to the usual strike, lock-out, and general conditions beyond your control."

This clause, they say, fixed the damages for delay, and they paid into court £600 to cover thirty weeks' delay. The Court of Appeal held that this clause was a clause liquidating the damages, and that the appellants could not recover more than £20 C a week over this period of delay.

The appellants, whom I will call the Silk company, were in 1929 erecting a large plant for producing artificial silk. By this process the silk is produced from acetate, an important ingredient in which is acetone. The acetone in the process of manufacture is substantially all evaporated, and, if nothing is done for its recovery, there is a very substantial money loss, for acetone at this time costs about £76 a D ton, and it takes three tons of acetone to produce one ton of silk. The respondents, whom I will call the Foundry company, were the manufacturers of a recovery plant which, they claimed, and apparently with reason, was capable of recovering about 90 per cent. of acetone evaporated. At the beginning of 1929 the Silk company began negotiations with the Foundry company for the erection of a recovery plant in connection with the Silk company's spinning plant. The Silk company in- E tended to begin production in August; it was commercially important to produce samples of their products in October for use the next spring. If they began spinning in August without their recovery plant it was obvious that they would be losing the cost of their acetone, as above described. It is plain that, early in the negotiations, they explained their position to the Foundry company, who thoroughly understood it. It is necessary now to discuss the documents which eventually F constituted the contract, for a correct appreciation of these appears to make the solution of the question reasonably simple. On Feb. 16 the Foundry company sent the Silk company a quotation for an acetone plant for the recovery of six tons of acetone per day of twenty-four hours. There was an elaborate specification. The price quoted for the plant delivered and erected on the Silk company's foundations at Lancaster was £15,250. For a nine-ton plant they quoted £18,000, and G for a twelve-ton plant £19,500. The quotation was apparently on a form which on the face had "For conditions see back," and on the back were printed a number of general conditions, of which it is only necessary to set out (ix) and (x).

> "(ix) Delivery. With regard to delivery: Every effort will be made within our power to complete the work in the time specified in our tender from receipt of order with full and final particulars to enable the work to be put in hand. H Delays due to force majeure or other causes beyond our control always excepted, such as fires, floods, strikes, riots, lock-outs, accidents in our works, or in those furnishing us with material, and delays in transport. (x) Completion and penalty for delay.—The time given for delivery and completion are to date from receipt by us of a written order to proceed and of all the necessary information and approval of drawings to enable us to put the work in hand. I We will use our best endeavours to keep to the dates given, but will accept no liability for failure to do so."

There are further provisions for matters usually dealt with in such contracts, liability for accidents and dangers, guarantee, patents, arbitration, and so forth.

The original quotation made no reference to time of delivery. A conversation followed in which the representatives of the Foundry company suggested nine months from approval of the drawings; the representatives of the Silk company pointed out their position, and that they could not give the order unless they could

A get delivery in August. The Foundry company said that, if so, they must ask for a further £500 as they would have to put on a night shift. The parties had already agreed that the plant should be a twelve-ton plant for £19,250, so that the price would become £19,750. The Silk company agreed to this, but said they must ask for a penalty of £20 per week, to which the Foundry company agreed. Eventually, after correspondence and interviews, the Foundry company write on B March 5:

> "Acetone recovery plant, twelve tons per day of twenty-four hours. Confirming interview of Saturday last at your works in reference to the above plant, we hereby accept your order on the following conditions."

Then are set out a number of numbered terms which include terms (ix) and (x), C which I have already mentioned, for delivery in eighteen weeks, and for a £20 penalty. The letter is written on the tender form, which has the original conditions printed on the back, and a reference to them on the face. So far, there does not appear to have been a definite order given by the Silk company. After a query by the Silk company as to terms of payment, the Foundry company, on March 6, 1929, write:

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> "Our Ref. R.W.H./D.H. Further to our letter of the 5th, we beg to make the following comments."

They then deal with the terms of payment and conclude: "We look forward to receiving your official order to proceed with the work." On March 8 the Silk company send the official order. It is written on four sheets numbered consecutively of the Silk company's ordinary order form and begins:

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> "Please supply the following goods in accordance with your quotation No. R.W.H./D.H. dated March 6, 1929. One acetone recovery plant with a capacity of 12 tons per day of twenty-four hours. . . . Subject to the following price, conditions, and guarantee."

It then sets out the numbered conditions as in the Foundry company's letter of F March 5, except that the actual amounts of each payment are set out, and of the price £1,200 is expressed to be for erection. It contains no reference to general conditions, or to any document which contains a specification of the plant ordered. However, on March 12 the Foundry company reply:

> "We beg to acknowledge receipt of your order of the 8th instant for acetone recovery plant, for which we thank you. Same to be in accordance with our G tender and specification and terms set forth therein."

It appears reasonably clear that the contract is to be found in the documents I have referred to, and that part of the terms consist of the printed conditions, modified, of course, by the stipulation expressly agreed to by the parties in writing. What, then, is the effect of cl. (x)?

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> "If this period of eighteen weeks is exceeded you to pay by way of penalty the sum of £20 per working week for every week you exceed the eighteen weeks."

I entertain no doubt that what the parties meant was that, in the event of delay, the damages, and the only damages, were to be £20 a week, no less and no more. It has to be remembered that the Foundry company's business in this respect was to supply an accessory to a large business plant for which they had no responsibility. I The extent of the purchasers' business might be enormous, their expenses were beyond the sellers' control, and it would be a very ordinary business precaution for the sellers in such a case to say: "We will name a date for delivery but we will accept no liability to pay damages for not observing the date, for if we were by our default to stop the whole of your business the damages might be overwhelming in relation to our possible profit out of the transaction. We won't incur any such risk." This precaution the prospective sellers, the Foundry company, took in their printed condition (x). They definitely negative any liability for delay. The purchasers, the Silk company, have ample notice of this in the first quotation form sent to them on Feb. 16. The purchasers press for an earlier date; they got it, and getting it without more they would still only have a business firm's assurance of delivery by that date: they would still be unable to claim damages from him for breach. The sellers ask for an addition to the price in order to enable them to give the earlier delivery; the buyers ask for some compensation if they do not get the delivery they want. It is agreed at £20 per week of delay. It appears to me that such sum is provided as compensation in place of the no compensation at all which would otherwise have been the result. Except that it is called a penalty, which on the cases is far from conclusive, it appears to be an amount of compensation measured by the period of delay. I agree that it is not a pre-estimate of actual damage. I think it must have been obvious to both the parties that the actual damage would be much more than £20 a week, but it was intended to go towards the damage, and it was all that the sellers were prepared to pay. I find it impossible to believe that the sellers, who were quoting for delivery at nine months without any liability, undertook delivery at eighteen weeks, and in so doing, when they engaged to pay £20 a week, in fact made themselves liable to pay full compensation for all loss.

For these reasons, I think the Silk company are only entitled to recover £20 a week as agreed damages, and that the decision of the Court of Appeal was correct and should be affirmed. In these circumstances, I find it unnecessary to consider what would be the position if this were a penalty. It was argued by the Silk company that, if this were a penalty, they would have an option either to sue for the penalty or for damages for breach of the promise as to time of delivery. I desire to leave open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages. In the present case, the only result of ignoring the penalty might be that the Silk company would find themselves confronted with a contract which, by condition (x), deprived them of any compensation at all.

An attempt was made to contend that in any case the Silk company were entitled to sue for breach of a collateral contract by the Foundry company to work a night shift on this job. The learned judge appears to have negatived such a collateral contract. In this, in my judgment, he was plainly right. The negotiation as to working at night was part of the negotiation for the main contract. The alleged consideration for it, £500, is expressed in the main contract as part of the whole consideration, and there is no corresponding promise to be found in that contract. It seems impossible to find that any collateral contract existed.

In my opinion the appeal should be dismissed with costs.

LORD WARRINGTON OF CLYFFE.—My Lords, I have read and considered the opinion of my noble and learned friend, LORD ATKIN, and I concur therein.

LORD THANKERTON.—My Lords, I also concur in that opinion.

LORD TOMLIN.—My Lords, I am asked to state that my noble and learned friend, **LORD MACMILLAN**, concurs in the opinion which has been read, and I myself also concur therein.

Appeal dismissed.

Solicitors: *Gedge, Fiske & Co.*; *Hall, Brydon, & Chapman.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

LAZARD BROS. & CO. *v.* MIDLAND BANK, LTD.

[House of Lords (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Russell and Lord Wright), October 20, 21, 24, 25, 27, November 28, 1932]

[Reported [1933] A.C. 289; 102 L.J.K.B. 191; 148 L.T. 242; 49 T.L.R. 94; 76 Sol. Jo. 888]

Practice—Setting aside judgment—Judgment against dissolved foreign corporation—Order for substituted service obtained on misleading affidavit—Duty of court—R.S.C., Ord. 11, *r.* 8, *Order* 9, *r.* 2.

Conflict of Laws—Foreign law—Recognition—Proof—Dissolution of foreign corporation.

In October, 1917, at the time of the Russian Bolshevik revolution, a Russian bank, which was a corporation formed under Russian law and which had no branches or shareholders in England, was indebted to an English creditor, a firm, and was at the same time itself the creditor of an English bank in a sum exceeding its debt to the English creditor. Both debts were English debts, payable in England and governed by English law. The Russian bank was nationalised in October, 1917, by various Soviet laws, and its nationalisation was complete by Aug. 3, 1921, at the latest, so that it had ceased to exist both de facto and by Soviet law. The English government later recognised the Soviet government both de facto and de jure, this recognition was retrospective to October, 1917, and the procedure for service out of the jurisdiction under R.S.C., Ord. 11, r. 8, which had been applied to Czarist Russia by Order of the Lord Chancellor dated March 21, 1906, accordingly became applicable to Soviet Russia, and had in fact been applied effectively in several cases.

On Oct. 29, 1930, the English creditor issued an English writ for its debt against the Russian bank. The English creditor obtained leave under R.S.C., Ord. 9, r. 2, to issue this writ, and for its substituted service by sending notice of the writ by registered post to Moscow, on an affidavit, dated Oct. 24, 1930, and made by a partner in the firm, which stated that the Russian bank "are" a company registered in Moscow and "are" domiciled in Russia "and I am advised and believe that there is now no way of effecting personal service in Russia, and neither I nor any member of my firm or my firm's solicitors know of anyone who could undertake an attempt to effect such service." The registered letter containing the notice of the writ was returned marked "inconnu," "parti," the Russian bank "has been liquidated," but an affidavit of service was sworn stating that the Russian bank "is a corporate body according to the law of Russia." On these affidavits the creditor on Nov. 24, 1930, obtained judgment in default for £364,471 17s. 2d. against the Russian bank. On Dec. 12, 1930, the creditor obtained a garnishee order nisi against the English bank in respect of the sum of £335,230 14s. 7d., being part of a sum of £542,730 14s. 7d. which was found to be owing by the English bank to the Russian bank.

Held: the writ, the judgment, and the garnishee proceedings should all be set aside because

(i) the court must treat the entire proceedings as a nullity as (a) a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of writ and subsequently non-existent: principle stated by Lord Parker in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (1), [1916] 2 A.C. at p. 337, applied. (b) English law recognises the dissolution of a foreign corporation by the act of the State which created it. (c) on the evidence the Russian bank was not an existing juristic person on Oct. 27, 1930, because it had been dissolved long before then by Soviet law: *Russian*

Commercial and Industrial Bank v. *Comptoir d'Escompte de Mulhouse* (2), [1925] A.C. 112, and *Sedgwick, Collins & Co., Ltd.* v. *Rossia Insurance Co. of Petrograd* (3), [1927] A.C. 95, explained and distinguished.

(ii) in any event, the discretion of the court to set aside an order made ex parte when the applicant had failed to make sufficient or candid disclosure should be exercised in this case because the affidavit of Oct. 24, 1930, was most misleading in that (a) the statement that the Russian bank "are" domiciled in Russia suggested the existence of a "domicil," i.e., an address where, but for other difficulties, personal service could be effected, and that the method of service proposed might fairly be expected to bring to the proposed defendants the notice of the writ, but it must have been known that even if the Russian bank existed it did so as a mere shell, incapable of action or of being affected with notice, and (b) it made no reference to the procedure under Order 11, r. 8, and the applicants' failure to discover that this procedure was applicable was a failure in their duty to the court to inquire carefully.

(iii) at the material time (although not at the date of the House of Lords hearing) Order 11, r. 8, was mandatory, where it applied, and not merely permissive, and so the order for substituted service, not being made thereunder, was made by an incompetent procedure and both it and the judgment based on it were therefore nullities.

Notes. Referred to: *Burr* v. *Anglo-French Banking Corpn., Ltd.* (1933), 49 T.L.R. 405; *Re Russian Bank for Foreign Trade*, [1933] All E.R.Rep. 754; *MacCarthy* v. *Agard*, [1933] All E.R.Rep. 991; *Russian and English Bank* v. *Baring Bros. & Co.*, [1935] Ch. 120; *Deutsche Bank and Disconto Gesellschaft* v. *Banque des Marchands de Moscou* (1938), 107 L.J.K.B. 386; *Gaekwar Baroda State Railway* v. *Habib-Ul-Haq* (1938), 107 L.J.P.C. 46; *Dairen Kisen Kabushiki Kaisha* v. *Shiang Kee*, [1941] A.C. 373; *Banque des Marchands de Moscou (Koupetschesky)* v. *Kindersley*, [1950] 2 All E.R. 105; *Boguslawski* v. *Gdynia Ameryka Linie*, [1950] 2 All E.R. 355; *Jabbour* v. *Custodian of Israeli Absentee Property*, [1954] 1 All E.R. 145.

As to English recognition of the dissolution of foreign corporations, see 7 HALSBURY'S LAWS (3rd Edn.) 12–13, paras. 20, 22; as to proof of foreign law, see 15 ibid. 328–329, paras. 598–600; as to judicial notice thereof, see ibid 335–336, para. 610; and as to the effect of previous judicial decisions as to foreign law, see 22 ibid. 796, para. 1682, note (r). For cases on these subjects see 22 DIGEST (Repl.) 612–615, *7065–7098*. As to setting aside a judgment against a dissolved company, see 22 HALSBURY'S LAWS (3rd Edn.) 784, para. 1664 and 785, note (d); as to recognition of rights acquired under foreign law, see 26 ibid. (2nd Edn.) 249, para. 558, note (e); as to recognition of Russian revolutionary banking legislation, see ibid. 254, para. 568, note (r) (3); and as to the requirements for obtaining an order for substituted service out of the jurisdiction, see ibid. 30, para. 43.

Cases referred to:

(1) *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307, 346; 85 L.J.K.B. 1333; 114 L.T. 1049; 32 T.L.R. 624; 60 Sol. Jo. 602; 22 Com. Cas. 32, H.L.; Digest, Practice 283, *174*.

(2) *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*, [1923] 2 K.B. 630, 647; 92 L.J.K.B. 1053; 129 L.T. 706; 39 T.L.R. 561; 68 Sol. Jo. 12, C.A.; on appeal, [1925] A.C. 112; 93 L.J.K.B. 1098; 132 L.T. 99; 40 T.L.R. 837; 69 Sol. Jo. 792, H.L.; Digest, Practice 91, *773*.

(3) *Employers' Liability Assurance Corpn.* v. *Sedgwick, Collins & Co.*, [1927] A.C. 95; 95 L.J.K.B. 1015; 42 T.L.R. 749; sub nom. *Sedgwick, Collins & Co., Ltd.* v. *Rossia Insurance Co. of Petrograd*, 136 L.T. 72, H.L.; Digest, Practice 324, *455*.

(4) *Porter* v. *Freudenberg, Kreglinger* v. *S. Samuel and Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 84 L.J.K.B. 1001; 112 L.T. 313; 31 T.L.R.

162; 59 Sol. Jo. 216; 20 Com. Cas. 189; 32 R.P.C. 109, C.A.; Digest, Practice 329, *481.*

(5) *Dutch West India Co.* v. *Henriques Van Moses* (1728), 1 Stra. 612; 93 E.R. 733, H.L.; subsequent proceedings, sub nom. *Henriques* v. *General Privileged Dutch Co. Trading to West Indies*, 2 Ld. Raym. 1532; 13 Digest 279, *95*.

(6) *Aksionairnoye Obschestvo Dlia Mechanischest Keoi Obrabotky Diereva, A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K.B. 532; 90 L.J.K.B. 1202; 125 L.T. 705; 37 T.L.R. 777; 65 Sol. Jo. 604, C.A.; Digest, Practice 785, *3479*.

(7) *De Bode's Case* (1844), 8 Q.B. 208; 115 E.R. 854; sub nom. *De Bode* v. *Reginam*, 10 Jur. 217; 22 Digest (Repl.) 619, *7133*.

(8) *Sussex Peerage Case* (1844), 11 Cl. & Fin. 85; 6 State Tr. N.S. 79; 8 Jur. 793; 8 E.R. 1034, H.L.; 22 Digest (Repl.) 96, *746*.

Appeal from a decision of the Court of Appeal (SCRUTTON, GREER and SLESSER, L.JJ.), reported [1932] 1 K.B. 617, setting aside a decision of ROCHE, J., making absolute a rule nisi for a garnishee order obtained by Lazard Bros. & Co. (the judgment creditors) against the Midland Bank (the garnishee) in respect of a sum of £335,230 14s. 7d., part of a debt of £542,730 14s. 7d. found to be owing by the garnishee to the Moscow Industrial Bank (the judgment debtor). The garnishee order was based on a judgment obtained by the judgment creditors against the judgment debtor, in default of appearance, on Nov. 24, 1930, the writ being dated Oct. 29, 1930. The garnishee was a creditor of some pre-revolution Russian banks, and a debtor to others. On balance they were creditors. The judgment creditors, in serving notice of writ on the judgment debtor, did not proceed under Order 11, r. 8, which had been applied to Russia by order of the Lord Chancellor, dated March 21, 1906. They proceeded under Order 9, r. 2. A partner in the firm swore an affidavit that the Moscow Industrial Bank (the judgment debtor) "are" (October, 1930) a company registered in Russia and "are" domiciled in Russia,

> "and I am advised and believe that there is no way of effecting personal service in Russia, and neither I nor any member of my firm or my firm's solicitors know of any person who could undertake an attempt to effect such service."

On this affidavit, BRANSON, J., gave leave to issue a writ against the intended defendant, the judgment debtor, and for the intended plaintiffs to serve notice of the writ by sending it by registered post to Moscow (substituted service). The registered letter containing the notice was returned from Russia marked "inconnu" "parti," "Industrial Bank has been liquidated." A solicitor's clerk swore the affidavit of service in which he said that the Moscow Industrial Bank "is a corporate body according to the law of Russia." On these affidavits judgment against the judgment debtor was entered in default of appearance.

On appeal by the garnishee, the Court of Appeal held (i) that having regard to the evidence of the decrees of the Russian Soviet Republic and the Russian Civil Code and to the oral testimony of Russian lawyers, the Moscow Industrial Bank (the judgment debtor) had, on Oct. 29, 1930, ceased to exist as a juristic person and that accordingly the judgment in default against that bank should be set aside as being a nullity, as should also the order making the garnishee order nisi absolute; and (ii) that Order 11 constituted a complete code relating to service out of the jurisdiction in a foreign country, and r. 8 thereof had been applied to Russia by the Lord Chancellor, whereas Order 9, r. 2, under which substituted service of the writ against the judgment debtor had been obtained, had no relation to service out of the jurisdiction (*Porter* v. *Freudenberg* (4)); and (iii) that, as substituted service of the notice of the writ against the judgment debtor had been obtained under Order 9, r. 2, the judge was wrong in exercising his discretion in making the garnishee order absolute, and the order should be set aside on this ground also.

The judgment creditors appealed.

By Order 10 of the Rules of the Supreme Court, which is headed "Service of Writ of Summons": A

> "(2) When service is required the writ shall, wherever it is practicable, be served in the manner in which personal service is now made, but if it be made to appear to the court or a judge that the plaintiff is from any cause unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution for service of notice, by advertisement or otherwise, as may seem just." B

By Order 11, which is headed "Service out of the Jurisdiction":

> "Rule 8.—Where leave is given to serve notice of a writ of summons in any foreign country to which this rule may by order of the Lord Chancellor from time to time be applied, the following procedure shall be adopted: C
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> "(1) The notice to be served shall be sealed with the seal of the Supreme Court for use out of the jurisdiction and shall be transmitted to His Majesty's Principal Secretary of State for Foreign Affairs by the President of the Division, together with a copy thereof translated into the language of the country in which service is to be effected, and with a request for the further transmission of the same to the Government of the country in which leave to serve notice of the writ has been given. . . . D
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> "(3) An official certificate, or declaration upon oath, or otherwise, transmitted through the diplomatic channel by the government or court of a foreign country to which this rule applies, to the English court shall, provided that it certifies or declares the notice of the writ to have been personally served, or to have been duly served upon the defendant in accordance with the law of such foreign country, or words to that effect, be deemed to be sufficient proof of such service, and shall be filed of record as, and be equivalent to, an affidavit of service within the requirements of these rules in that behalf. E
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> "(4) Where an official certificate or declaration transmitted to the English court, in manner provided in the last preceding section of this rule, certifies or declares that efforts to serve a notice of writ have been without effect, the court or a judge may, upon the ex parte application of the plaintiff, order that the plaintiff be at liberty to bespeak a request for substituted service of such notice. . . . F
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> "(5) A request for substituted service of a notice of writ under this rule may be bespoken by the plaintiff at the department where writs of summons are issued, upon filing a præcipe in Form numbered II in the schedule to these rules, and the notice of writ, and copy of the same, and the order shall be sealed and transmitted to the Foreign Office in manner aforesaid, together with a request in Form numbered III in the schedule. . . ." G

Stuart Bevan, *K.C.*, and *August Cohn* for the appellants, the judgment creditors.

Wilfrid Greene, *K.C.*, *D. B. Somervell*, *K.C.*, and *F. J. Tucker* for the respondents, the garnishees. H

The House took time for consideration.

Nov. 28. **LORD WRIGHT** read the following opinion.—The present appeal is from an order of the Court of Appeal reversing an order of ROCHE, J., who had made absolute a garnishee order nisi against the respondent garnishee, and had held that the garnishees were indebted to the judgment debtors, Banque Industrielle de Moscou, to the extent of £542,730 14s. 7d., and ordered that the garnishees pay to the judgment creditors £335,230 14s. 7d. in part satisfaction of their judgment debt and costs. The Court of Appeal decided that the appeal be allowed and the judgment and order together with the order nisi and the judgment signed in default of appearance should be set aside, with costs; they also dismissed a cross-appeal by the judgment creditors. I

The Banque Industrielle de Moscou (hereinafter called the judgment debtor) was at the time of the second or Bolshevist Revolution in Russia indebted to the judgment creditors in large sums; it was at the same time also a creditor of the

A garnishees in sums exceeding their debts to the judgment creditors. Both these debts were English debts, payable in England and governed by English law. The judgment debtor was a corporation carrying on business at Moscow as its domicil and head office, with branches at Petrograd and other places in Russia; it had no branches or shareholders outside Russia; the evidence in the action as to its formation was somewhat deficient, but it is clear that in 1916, having then B assumed the name of the Moscow Industrial Bank in place of its previous name of J. W. Junker & Co., it was formed under articles of which extracts were produced by a law or statute of the Czarist government. The Bolshevist Revolution took place in October, 1917; on Dec. 27, 1917, following the decree of Dec. 14, 1917, to be more fully referred to later, possession was taken of the judgment debtors' Moscow office, its cash, securities and books, by a representative of the Govern- C ment, accompanied by soldiers. The directors fled to the south of Russia, then outside the limits of Soviet domination, and in April, 1919, four directors were at Rostof on Don, which was not occupied by the Bolshevists till December, 1919. Before that happened, and before the four directors left Rostof on Don, they gave a power of attorney dated Dec. 16, 1919, to one of their number named Alexander Chambers. In 1920 and 1921 letters were addressed to the garnishees signed by D Chambers and one or more of his colleagues on the board with reference to the debts of the garnishees to the judgment debtor; on July 30, 1924, a letter was sent to the garnishees on behalf of the Soviet Government stating that the Soviet Government claimed all sums standing in the garnishees' books to the credit of former Russian banking and other nationalised companies—a claim which the garnishees declined to admit. On Oct. 29, 1930, a writ was issued in the High E Court of Justice, King's Bench Division by the judgment creditors against the judgment debtor, claiming a sum of £362,396 15s. as debt and interest; an affidavit was sworn on behalf of the judgment creditors, the terms of which will need consideration later; on that affidavit an order was made to serve notice of the writ by registered post on the Industrial Bank at Moscow. The notice of writ was accordingly sent by registered post addressed simply to the Banque Industrielle F de Moscou at Moscow on Oct. 29, 1930. On Nov. 24, 1930, judgment was entered for the judgment creditors against the judgment debtor for £364,471 17s. 2d. and costs in default of appearance. On Nov. 28, 1930, the judgment creditors received a letter from the Soviet Embassy dated Nov. 27, 1930, returning the notices of the writ and stating that they could not be delivered in view of the fact that the Banque Industrielle de Moscou went out of existence during the 1917 October G Revolution, and that the document had been delivered by mistake at the office of the Commercial and Industrial Bank of the Soviet Republic, which bank had only been formed in 1924 and had no connection with the former bank. On Dec. 12, 1930, the judgment creditors obtained a garnishee order nisi against the garnishees; a copy of this was sent by the judgment creditors to the judgment debtor on the same date, but was returned by post marked "Unknown." By an order of Jan. 20, H 1931, an issue was directed between the appellants as judgment creditors and the respondents as garnishees. The issue came on for hearing before ROCHE, J., in April, 1931. The learned judge dealt with three main questions:

(i) Whether the garnishees' liability was barred by the Statute of Limitations, since more than six years before the garnishee order nisi demands had been made for payment by or on behalf of the judgment debtor. The garnishees in support of I this plea relied on the letters of 1920 and 1921 referred to above as being valid demands made on behalf of the judgment debtor by its directors; alternatively they relied on the notice from the Soviet Government of 1924, as a valid demand if it should be held that that Government had before that date succeeded to the rights of the judgment debtor. ROCHE, J., decided against that contention; the matter was not the subject of decision in the Court of Appeal, it has not been argued before this House, and I express no opinion about it.

(ii) Whether the order nisi should not be set aside on the ground that the judgment was a nullity, having been signed against a non-existent defendant, since the judgment debtor had ceased to exist as a juristic person before the date of the writ.

(iii) Whether the order nisi should not further or alternatively be set aside on the ground that there was no proper service on the defendant even if existent.

Roche, J., decided questions (ii) and (iii) in favour of the judgment creditors, the Court of Appeal decided both points against them, hence this appeal.

I shall deal first with question (ii), which is most important and is decisive, since it is clear law, scarcely needing any express authority that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non-existent; such a case is a fortiori than the case which Lord Parker referred to in *Daimler Co., Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain), Ltd.* (1). There the directors being all alien enemies could not give a retainer. Lord Parker said ([1916] 2 A.C. at p. 337):

> "But when the court in the course of an action becomes aware that the plaintiff is incapable of giving any retainer at all, it ought not to allow the action to proceed."

In such a case the plaintiff cannot be before the court. In the present case if the defendants cannot be before the court because there is in law no such person, I think by parity of reasoning the court must refuse to treat these proceedings as other than a nullity.

English courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. Such recognition is said to be by the comity of nations. Thus in *Henriques* v. *Dutch West Indies Co.* (2 Ld. Raym. at p. 1535), the Dutch company were permitted to sue in the King's Bench on evidence being given

> "of the proper instruments whereby by the law of Holland they were effectually created a corporation there."

But as the creation depends on the act of the foreign state which created them, the annulment of the act of creation by the same power will involve the dissolution and non-existence of the corporation in the eyes of English law. The will of the sovereign authority which created it can also destroy it. English law will equally recognise the one, as the other, fact. The judgment debtor was a corporation established by an Act of the Czar; but the governing authority in Russia as recognised in the English courts is now, and has been since October, 1917, the Soviet State: Soviet Law is accordingly the governing law from the same date in virtue of the recognition de facto in 1921 and de jure in 1924 by this country of the Soviet State as the Sovereign power in Russia. The effect of such recognition is retroactive and dates back to the original establishment of Soviet rule, which was in the 1917 October Revolution, as was held by the Court of Appeal in *Aksionairnoye Obschestvo Dlia Mechanischest Keoi Obrabotky Diereva, A. M. Luther* v. *Sagor & Co.* (6).

The question, therefore, is whether by Soviet Law the judgment debtor was at the date of the issue of the writ in this action, that is on Oct. 27, 1930, an existing juristic person. What the Russian Soviet law is in that respect is a question of fact, of which the English court cannot take judicial cognisance, even though the foreign law has already been proved before it in another case. The court must act on the evidence before it in the actual case. The recent enactment (s. 102 of the Supreme Court of Judicature (Consolidation) Act, 1925), which provides that this question of fact must be decided by the judge alone instead of by the jury, if there be a jury, expressly treats the question as depending on the evidence given with respect to the foreign law. No earlier decision of the court can relieve the judge of the duty of deciding the question on the actual evidence given in the particular case. On what evidence of the foreign law a court can act has been often discussed. The evidence it is clear must be that of qualified experts in the foreign law. If

A the law is contained in a code or written form, the question is not as to the language of the written law, but what the law is as shown by its exposition, interpretation, and adjudication; so in effect it was laid down by COLERIDGE, J., in *Baron de Bode's Case* (7) (8 Q.B. at p. 250); in the *Sussex Peerage Case* (8) (11 Cl. & Fin. at p. 115). LORD DENMAN stated his opinion to the same effect as he had done in *Baron de Bode's Case*. He said that if there be a conflict of evidence B of the experts

> "you (the judge) must decide as well as you can on the conflicting testimony; but you must take the evidence from the witnesses."

Hence the court is not entitled to construe a foreign code itself:

> C "it has not organs to know and to deal with the text of that law (as was said by LORD BROUGHAM in the *Sussex Peerage Case* (8)). The text of the foreign law if put in evidence by the experts may be considered, if at all, only as part of the evidence and as a help to decide between conflicting expert testimony."

Hence in the present case it is necessary to consider the testimony of the two principal legal witnesses in the matter in order to ascertain the Soviet Law. The D one is Mr. Samuel Dobrin, who had been a member of the Russia Bar in Czarist days, but remained in Russia till 1925, practising as a lawyer in Soviet Russia and since then acting in this country as legal adviser on Soviet Law to various Soviet institutions; he was called by the garnishees. The other is Mr. S. L. Konkevitch, called by the judgment creditors, who also had practised as a barrister in the Czarist courts, but had remained in Russia till 1919 practising in Soviet law, and E as legal adviser to Soviet institutions. The garnishees also called Mr. Alexander Hoelfern, who had practised as a lawyer in Russia in Czarist times, but had left Russia in December, 1918. I do not attach the same weight to his evidence, because though his qualifications and standing as a Czarist lawyer are very high, he has not had, in my judgment, the same practical experience in regard to Soviet law. Before I examine the evidence of Mr. Dobrin and Mr. Konkevitch in detail F I wish to advert to two matters taken by the judgment creditors by way of objection. One was that the question of the existence or non-existence of the judgment debtor was not raised specifically either on what corresponded in the case to pleadings or before ROCHE, J. ROCHE, J., did, however, consider it, and in any case the question was put in the forefront in the Court of Appeal, without any application being made by the judgment creditors for an amended pleading or for G an adjournment to call further evidence. I am satisfied that each of these two witnesses gave full evidence on the question. The judgment creditors further relied on a decision of this House in the *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (2) (hereinafter called the *Mulhouse Case*), in which it was decided that a Russian bank had not been dissolved by the Soviet legislation; but the question in that case was whether the dissolution of the bank H had taken place at the date of the writ in that action, which was Jan. 23, 1920. Apart, therefore, from the consideration that the question was one of fact to be decided by each court on the evidence before it, the question in that case was quite different since the issue in the present case is whether the Industrial Bank had been dissolved by Oct. 29, 1930. The world has not stood still between 1920 and 1930, least of all in the revolutionary ferment of Soviet Russia.

I It is true that with certain exceptions the same decrees were put in evidence in the *Mulhouse Case* (2) as in the present case, though these additional decrees put in before your Lordships were not unimportant; but the evidence of the experts was different in most essential respects; the eminent Czarist lawyers who gave evidence in the *Mulhouse Case* (2) spoke from the standpoint of the law which they knew rather than that of the Soviet law of which they had no experience; indeed, Soviet law had not then developed as it has now. Hence the whole matter has now to be re-considered in the light of new evidence and of the historical evolution of ten years.

I think the same observations may be applied in connection with a further decision of this House—*Sedgwick, Collins & Co., Ltd.* v. *Rossia Insurance Co. of Petrograd, Employers' Liability Assurance Corpn., Ltd.* (*garnishees*) (3)—which dealt with Russian insurance companies as in 1923, and decided that such companies were not dissolved by Soviet legislation; in the same way certain other decisions of the High Court to the same effect in relation to Russian shipping and industrial companies may have to be re-considered if similar questions again come for decision.

In the present case Mr. Dobrin and Mr. Konkevitch, in giving evidence as to what Soviet law is, are, in my judgment, agreed on the essential fact that in October, 1930, the judgment debtor had ceased to exist in Russia by Soviet law. I shall quote a few short answers from each witness. I have carefully considered their evidence as a whole and find it in harmony with these brief extracts.

Mr. Dobrin, giving evidence on behalf of the garnishees, was asked in re-examination and answered as follows:

"(Q.) Can you as a Soviet lawyer conceive of the existence of any of these private banks now?—(A.) In so far as they have no branches abroad, no, I cannot.

"(Q.) In Russia would they admit the existence of any of the private banks?—(A.) I do not think so.

"(Q.) Since when has that been the case; when was the latest date, in your view, that Russia would have admitted the existence of the private banks?—(A.) Perhaps I am myself a good example of this. Until 1925 when I came to this country the question never occurred to me whether the banks existed.

"(Q.) You mean that it did not occur to you that they could exist; is that what you mean?—(A.) There was no occasion after the actual liquidation in 1921 when all traces disappeared of the bank in Russia. What could remain of the bank after that?"

Mr. Konkevitch, called by the judgment creditors, in cross-examination gave the following answers:

"(Q.) Then I want to know this. Did the bank continue to exist in Russia?—(A.) In what sense?

"(Q.) In the sense as a legal entity?—(A.) I think I answered that question that in Russia a court would not sustain an action by a bank. Did not I make that clear? If not, I shall be very glad to make myself more clear than I was.

"(Q.) You mean in other words the banks in Russia would not be held to have a legal existence?—(A.) Yes, that is my view.

"(Q.) And you know that has been the view put forward in the letters which I have read to-day from the Soviet authorities?—(A.) Yes . . .

"(Q.) Would you hold the view as a Soviet lawyer that the bank has been nationalised and has been non-existent both de jure and de facto since 1917?—(A.) In Russia?

"(Q.) Yes, that is what I am asking.—(A.) That is the interpretation of the Russian decrees as adopted by the Russian Courts."

Somewhat later the same witness said: "The company does not exist according to Russian law. I speak as a Russian lawyer." He adds when asked: "(Q.) The company does not exist?—(A.) As interpreted by Soviet courts. That is always the qualification I make." I understand the witness to be making some reservation as to what the English law might be in view of the decision of the *Mulhouse Case* (2). But that does not affect his evidence, since the question is what is the Soviet law?

I think this testimony, given from the witnesses on both sides, compels the conclusion of fact that the Industrial Bank (the judgment debtor) was by Soviet law, which is the material law, non-existent in Russia in 1930. Mr. Dobrin reserves the question in respect of Czarist banks which had branches or shareholders or assets outside Russia; but, as Mr. Konkevitch points out, what is there involved is a question of conflict of laws not of Russian law; it is, however, not easy to see how a non-existent person (since if a corporation exists at all it must be by the law

A of the country of its incorporation) can have anywhere a branch or assets or shareholders; no question is here involved of the extraterritorial effect of legislation, confiscatory or otherwise, since the dominant fact is the dissolution of the corporation, which depends on territorial enactments of the country of incorporation according to which either the existence or the non-existence of the corporation is recognised by the law of other countries. It is not, however, here necessary B further to pursue these questions; they do not arise in regard to the judgment debtor, which never had branches abroad, nor, so far as evidence goes, any shareholders outside Russia; nor do I think it necessary to express any opinion about the status of assets in England, a matter not in issue in these proceedings, but which no doubt will need full consideration in the future.

I ought, however, very briefly to state what I apprehend to be the evidence of C these two witnesses as to the written law, that is, the Soviet legislation dealing with the Czarist banks. Before ROCHE, J., there were in evidence the various decrees or orders which were in evidence in the *Mulhouse Case* (2) (and are printed in the report of that case in the Court of Appeal in [1923] 2 K.B. at p. 674). Both witnesses agree that the initial decree of Dec. 7, 1917 (which is clearly in their opinion to be recognised as a legislative act though a decree of the Central D Executive Committee), was more than a declaration of policy; they differ, however, in that Mr. Konkevitch regards it as a decree there and then dissolving the Czarist bank de facto and de jure, whereas Mr. Dobrin states his opinion to be that it was an order for the executive to begin the destruction of the old banks "by that national rule which was called nationalisation"; his opinion is that it was not until nationalisation was complete that the banks ceased to exist, and he finds in a E circular of Aug. 3, 1921, issued by the department of the Ministry of Finance official confirmation that the nationalisation of the old banks was then complete; hence he says, there was then an end of the banks. This circular, which was not before this house in the *Mulhouse Case* (2), referred to a date subsequent to the issue of the writ in that case. Mr. Dobrin draws a distinction in Soviet law between "nationalisation" and "liquidation." The latter term is technically used, F according to his testimony, not as English lawyers use it or as Czarist lawyers used it, that is as meaning a process of winding-up; it means, he says, destruction or dissolution, and indeed in that sense is applied not only to corporations and institutions, but even to individuals; thus a man or class obnoxious to the Government is said to be liquidated. Nationalisation, on the other hand, means the reduction of the affairs of the company into the possession of the Soviet State, a G process involving until it is completed, according to Mr. Dobrin, the prolongation of the company's existence. Mr. Konkevitch, while agreeing on the meaning of the words in Soviet law, puts the "liquidation" as complete on Dec. 17, 1917, and treats the "nationalisation"—which he agrees went on till April, 1921—as an operation subsequent to the dissolution of the company, as an administrative management and reorganisation of the assets and businesses which had belonged H to liquidated companies all over Russia, but had been brought within the State domain; this process, according to his evidence, did indeed as was natural take some years, but was a practical matter not relevant to the legal questions of the date when dissolution took place.

It is not necessary to decide between these conflicting views of theory, since as I have stated both witnesses are agreed in the view of the Soviet law that long I before 1930 all traces of the Czarist banks had vanished. Indeed, it would have been strange if, after the sweeping declarations in the decrees and orders of the Soviet Government put in evidence before the court of their intention and policy to abolish private banking, there had been a complete failure of that intention and policy. The Soviet Government even went further and by the decree of Jan. 19, 1920, abolished the People's Bank (formerly the State Bank) with and in which by the decree of Dec. 17, 1917, the joint stock banks were or were to be amalgamated and merged, and transferred all its assets and liabilities to a State department called the Central Budget and Accounts Administration. Later on it seems that the Soviet Government proceeded to establish national banks, since the writ in the action was delivered by mistake to a bank of the Soviet State called the Commercial and Industrial Bank which came into existence in 1924. The view that a corporation like the judgment debtor could only be dissolved by a specific decree (which was the opinion of some witnesses in the *Mulhouse Case* (2)) was rejected both by Mr. Dobrin and Mr. Konkevitch. They pointed to a decree of the All Russian Central Executive Committee of Nov. 30, 1918, forbidding reference in decisions and judgments to laws of overthrown, that is the Czarist or Kerensky, Governments, and also to the terms of the Civil Code of 1923 which forbade the Soviet judicial or other institutions to consider disputes over civil legal relations which arose before Nov. 7, 1917, and which also forbade interpretation of provisions of the Code on the basis of laws of overthrown governments and of practice of pre-revolutionary courts. Neither of these enactments was before the court in the *Mulhouse Case* (2). In the Court of Appeal, but not before Roche, J., there were also produced (without objection) further provisions of the Soviet Civil Code of 1923 which showed that juristic persons could only be recognised if their statutes were recognised, confirmed and in proper cases registered by the Soviet authorities. In the absence of testimony from Soviet lawyers as to these provisions, their meaning may seem ambiguous; the fair inference may be that they refer to new companies formed under Soviet rule, the Czarist companies having disappeared from legal ken. But in the absence of expert evidence I do not feel justified in attributing any particular effect to them.

I have not thought it necessary to pursue in detail the examination by the legal witnesses of the various decrees, nor to emphasise the various differences between their testimony and that before the court in the *Mulhouse Case* (2). I may mention the evidence as to the decree of Jan. 26, 1918, described as "confiscating the share capital of the former joint stock banks." The evidence now is that the declaration that all bank shares were declared null and void, refers to the shares in the sense of "choses in action," the property of shareholders. However, this very summary survey of the evidence in the present case is enough to show how very different that evidence is from that before this House in the *Mulhouse Case* (2), just as the issue to which it is directed, that is the legal position at the dates of the respective writs, is so very different. In my judgment the conclusion is now inevitable that the Soviet Embassy were substantially right in the statement which they made by their letter of Nov. 27, 1930, in returning the writ in this action that it

> "could not be delivered to the addressee in view of the fact that the Banque Industrielle de Moscou went out of existence during the course of the 1917 October Revolution."

At what precise period of that revolution the end came is no doubt the subject of diverse views on the part of the two legal witnesses, but that matter, though presumably of great theoretic interest to Soviet lawyers, appears to me to be immaterial for the decision of this case, since I am clearly of opinion that the dissolution or "liquidation" came long before October, 1930.

This conclusion is sufficient without more to carry with it the result that the writ, the judgment and the garnishee proceedings must be held of no effect and be set aside. But I desire to deal with the other question which has reference to the service of the writ. There is perhaps some artificiality in now discussing this question, since to do so there must be assumed that the Industrial Bank (the judgment debtor) had some sort of existence, that it was something which might well be called nominis umbra: it clearly had no address, no shareholders, no directors, no tangible or discernible existence. How such a disembodied spirit could be served might appear to present a serious problem. That problem was, however, grappled with in an affidavit sworn by Mr. R. H. Brand, on behalf of the judgment creditors, dated Oct. 24, 1930, in order to support an application for leave to serve notice of the writ on the judgment debtor "by sending the same by registered post to the intended defendants at Moscow." The affidavit did not venture to suggest that the intended defendants had any address in Moscow or that there was the slightest probability that such a letter would reach the judgment debtor, which was

> described as a "company registered in Russia." The affidavit did indeed say that the whereabouts of any directors or other persons who in 1917 had been entitled to sign for the judgment debtor were unknown, and that all of them, according to the deponents' information and belief "had been deprived of their powers of representing the intended defendants by decrees of the Russian Government."

No doubt the professional advisers who prepared the affidavit were influenced by the decisions of the courts that Russian banks had not been dissolved and perhaps were following precedents used in other such cases, but even so, in my judgment, the whole position ought to have been more candidly and fully explained: in particular the phrase that the judgment debtor was a company registered in Russia is singularly infelicitous. There is not the slightest suggestion of bad faith made, but I cannot acquit those concerned of falling short in regard to the obligations which rest on those seeking the order of the court for service out of the jurisdiction. That such an order is a serious matter is obvious, and it is one which only a judge of the High Court can make. The court has discretion to set aside an order made ex parte when the applicant has failed to make sufficient or candid disclosure. I think in this case there was sufficient ground to call in play the discretion of the court to set aside the order for service and justify the court in refusing in the exercise of its discretion to treat the judgment as a sufficient foundation for a garnishee order, as in the case suggested by LORD SUMNER in the *Sedgwick, Collins Case* (3) ([1927] A.C. at p. 112). In particular the words "the intended defendants are domiciled in Russia" may be most misleading, even if no intention existed to mislead. What is suggested is a "domicile"—an address where but for other difficulties personal service could be effected, and a suggestion is implied that the method of service might fairly be expected to bring to the proposed defendants the notice of the writ. Even if the bank existed, it must have been known that it existed as a mere shell, incapable of action or of being affected with notice.

However, there is an even more serious blot on the affidavit: it states "there is no way of effecting personal service in Russia" and on that basis asks for leave to serve notice of the writ "by sending the same by registered post to Moscow." No reference is made to the procedure under Order 11, r. 8, which, by order of the Lord Chancellor, dated March 21, 1906, was applied to the "Russian Empire": that order has never been cancelled: it originally referred to the territorial jurisdiction of what was up to 1917 the Russian Empire but is now the Union of Soviet Republics. This internal change in the system of government, once the new Government is recognised by this country, has no effect in the external status of Russia quoad this country as a personality in international law. The identity of the State remains the same for international purposes: the change from monarchy to republic does not, in general, abrogate treaties or conventions, any more than loss of or increase in territory. The order of the Lord Chancellor accordingly still applies to Russia and could and should have been availed of for the purpose of effecting service there. The order has in fact been frequently used in recent years, with full concurrence and co-operation of the Soviet Government, as appears in the evidence given before the judge and the Court of Appeal by Mr. Hinton, Official Process Server to the Supreme Court. The only excuse given on behalf of the judgment creditors for the statement in their affidavit is that they did not realise the applicability of Order 11, r. 8, but here again they failed in performing their duty to the court: they should have inquired more carefully. If the procedure under Order 11, r. 8, had been employed, there would, according to the usual course, have been an official certificate or declaration transmitted through the diplomatic channel by the Soviet Government to the English court, reporting the impossibility of service much to the same effect as was done in the letter from the Soviet Embassy of Nov. 28, 1930, and if on that a request was made for substituted service under Order 11, r. 8 (4) and (5), the judge would then have had the true position before him to enable him to decide how to act. But on this point the matter does not depend on the discretion of the judge: Order 11, r. 8, where it applies, was at the material time mandatory, not permissive—the words were before the change since made by the Rules Committee which substituted "may" for "shall," "the following procedure shall be adopted": this word "shall" is to be compared with the use of "may" in other parts of the order where a discretion was intended. The result is that, quite apart from the want of accuracy in the affidavit, the order for substituted service was made by an incompetent procedure and was a nullity. Hence the judgment in default of appearance, based on such service, was itself a nullity and with it all the garnishee proceedings fall to the ground. For that reason alone the appeal must fail: indeed, the garnishees were not called upon to rely on this part of the case. I have not adverted to some minor irregularities in the proceedings.

In my judgment the appeal should be dismissed with costs.

LORD BUCKMASTER, LORD BLANESBURGH, LORD WARRINGTON and **LORD RUSSELL** concurred.

Appeal dismissed.

Solicitors: *Linklaters & Paines*; *Coward, Chance & Co.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DONKIN *v.* DONKIN

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Bateson, J.), October 14, 1932]

[Reported [1933] P. 17; 102 L.J.P. 18; 148 L.T. 58; 96 J.P. 472; 49 T.L.R. 10; 76 Sol. Jo. 799; 30 L.G.R. 513; 29 Cox, C.C. 558]

Justices—Husband and wife—Cruelty—Evidence of acts of cruelty more than six months before complaint—Admissibility—Keeping wife in subjection by fear and threats—Appeal—Statement of further facts agreed by parties—Reception by Divisional Court—Summary Jurisdiction Act, 1848 (11 *&* 12 *Vict., c.* 43), *s.* 11—*Summary Jurisdiction* (*Married Women*) *Act*, 1895 (58 *&* 59 *Vict., c.* 39), *ss.* 4, 8—*Summary Jurisdiction* (*Separation and Maintenance*) *Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1.

On a summons by a married woman under the Separation and Maintenance Acts for an order on the ground of persistent cruelty, the magistrates (although the cause of complaint must have arisen within the six months before the complaint) are entitled to take cognisance of acts of cruelty committed more than six months before the complaint was made if cruelty shown to have taken place during the six months and such previous cruelty were part of a course of conduct, and not merely isolated acts.

It is proper for the parties to an appeal from the justices to agree a further statement of facts, which the Divisional Court will receive, so that the full facts may be before the court.

Per CURIAM: If a man keeps his wife in fear and subjection by threats he is guilty of cruelty.

Notes. The Summary Jurisdiction Act, 1848, s. 11, is now the Magistrates Courts Act, 1952, s. 104.

As to the limit of time for an application on the ground of persistent cruelty, see 12 HALSBURY'S LAWS (3rd Edn.) 495, para. 1093, as to the consideration of conduct before the six-month period, see ibid. 482, para. 1076, text and note (d), and for cases on the subject see 27 DIGEST (Repl.) 711, *6779–6785*; as to the meaning of persistent cruelty, see ibid. 481, para. 1076, and 469 et seq., para. 514 et seq., and as to evidence before the Divisional Court, see ibid. 510, para. 1118.

Cases referred to:

(1) *Cornall* v. *Cornall* (1910), 74 J.P. 379, D.C.; 27 Digest (Repl.) 700, *6697*.

(2) *Plowden* v. *Plowden* (1870), 23 L.T. 266; 18 W.R. 902; 27 Digest (Repl.) 296, *2412*.

(3) *Goodman* v. *Goodman* (1931), 95 J.P. 95; 29 L.G.R. 273, D.C.; 27 Digest (Repl.) 714, *6813*.

Appeal from a maintenance order made by the justices of Lanchester, Consett, and Stanley on Aug. 24, 1932, finding the appellant husband guilty of persistent cruelty to his wife and ordering him to pay £1 5s. a week for the maintenance of his wife and child.

The parties were married in June, 1924, at Craghead Parish Church, and there was one child, an infant son. The wife alleged that when her husband, a commercial traveller, was in drink on two occasions in 1928 and 1931, respectively, he struck her violently. On July 29, 1932, he threatened her with a knife, struck her on the mouth, and gave her a black eye. She left and complained to a police constable and went to her mother. She had not returned to her husband and was afraid to live with him. He earned £2 15s. a week, and had allowed her £2 10s. a week for housekeeping.

In cross-examination the wife said that her husband had been with his firm for twenty years. She had a lovely home. She was not excitable or bad-tempered. When one week-end she asked him if she could go to a dance, and he said "No," she did not go. She always went to dances with her sister, about once a fortnight. Evidence was given in corroboration by the wife's sister, a girl of seventeen.

The husband, in his evidence, said with regard to the incident of July 29, 1932, that his wife had told him she wanted to go to an all-night dance, but he said she had better stop at home as she had been to a dance the previous Tuesday. When he went home about 8.15 p.m. his wife was out. He went out and returned about 9.45 and remonstrated with her. There was a scuffle, but he did not strike her with a pepper-box. She struck him with a coal-rake. He had repeatedly asked her to come back and wanted her to return. He had learned a lesson and would undertake not to take any drink.

The magistrates, in their reasons for their decision, said that, the wife having made her complaint within six months of the act of cruelty of July 29, they were entitled to take cognisance of other acts of cruelty committed more than six months before the complaint was made to prove the persistent character of the cruelty.

The husband appealed on the grounds that the decision was against the weight of evidence, that the justices were wrong in law in holding him guilty of persistent cruelty within six months of laying the information, and that the amount of maintenance ordered was excessive.

Certain facts with regard to the differences between the parties which were not contained in the depositions but were before the magistrates were admitted by their Lordships, having been agreed between the solicitors on both sides.

Noel Middleton, for the appellant husband, cited *Cornall* v. *Cornall* (1), *Plowden* v. *Plowden* (2), and *Goodman* v. *Goodman* (3).

W. E. Batt, for the respondent wife, not called upon.

LORD MERRIVALE, P.—Counsel for the husband has presented quite clearly to us two points of definite importance. A man earning £2 15s. a week has been guilty of certain definite acts of cruelty to his wife, and the cause of this summons, which was dealt with by the magistrates in the order now appealed from, was an assault on July 29 of this present year. It was not a slight matter. The husband came home the worse for drink and was quarrelsome. He threatened his wife with a knife, he knocked her head, blacked her eye, and, she says, "burst my mouth." That, of course, means broke her lips. "He struck me on the top of the head with a metal castor and caught my head. I had the baby in my arms." That was a very grave matter and the magistrates believed that it took place. It did not stand alone. In 1928 there had been a violent assault, as the wife says, which had caused her to go home and leave him, but he persuaded her to go back, promising that he would behave himself, and she rejoined him. She also says he drank to excess, and he went on drinking. In March last year they had another quarrel. He struck her. That is corroborated. She then says that there was a promise of reformation and his mother intervened, and they made it up and she went back. Then comes this business in July, 1932, and thereupon there is a summons for persistent cruelty.

The Summary Jurisdiction (Married Women) Act, 1895, incorporates s. 11 of the Summary Jurisdiction Act, 1848, which provides that a complaint or information under that Act must be made within six calendar months from the time when the matter of such complaint or information arose. Counsel for the husband says—and it has an attractive sound about it—Here was one assault within six months, and there being no other assault shown within six months the wife has gone to the magistrates and charged persistent cruelty. Now this is a statute which creates or defines persistent cruelty and it must be strictly construed. There being that one piece of cruelty of which evidence is given within six months, it cannot be said that that was persistent cruelty within six months. That, of course, is a serious proposition. If the statute has that meaning, we have simply to obey it. I put to counsel a case to which he gave me a courageous answer, but I think it is a case which approaches the proposition closely. Assume a man to have been guilty of constant ill-usage of his wife from January to the end of June and then to have gone away to sea until the end of December and come back and resumed his course of conduct on Jan. 1, would that create isolated cruelty or would it be matter justiciable as persistent cruelty? I put one or two other cases to counsel. When a man who knows about the common law beats his wife on Jan. 1 and beats her on July 2, and systematically treats her in that way, would it be persistent cruelty? Counsel says "persistent" has a kind of rationalised meaning. I myself should have thought it was a little irrational for the protection of married women.

It seems to me that the real question is whether the cruelty which is shown to have taken place within the six months is part of a course of conduct—part of a course of cruelty. Was it part of a course of conduct on the part of the husband?

Now we know a little more than what appears in the depositions of what his mode of life was. Do not let it be supposed that I am speaking censoriously merely to expose this man. I have to examine what his course of conduct really had been. He was a man who drank to excess and whose drinking to excess got worse, and during the six months before this piece of cruelty in July, 1932, although no blows were aimed at or given by him to the wife or actual threats used, there were numerous unpleasant scenes in the course of which the husband used qualified threats, "I would like to give you a good hiding" and other similar expressions falling short of an actual threat. The wife did not in evidence allege that she was put in fear by such threats. A man might be guilty if he did no more than that. If a man keeps his wife in fear and subjection by threats he is guilty of cruelty.

I saw with great satisfaction that the solicitors in this case had desired to help in the administration of justice by having the whole facts before the court. I do not know any incident in the course of any appeal in this jurisdiction which has struck me as more satisfactory. It was a proper thing to do.

A The question really is whether these acts were isolated acts, or whether they were part of a course of conduct, and if they recurred and were linked up by the increasing subjection of the husband to the influence of intoxicating liquor. I have come to the conclusion that this cruelty on July 29 was part of a course of conduct, and that therefore it was part of persistent cruelty by the husband toward the wife. That being so, the main proposition on which the appeal depends fails.

B Counsel submitted a subordinate proposition and he said that you must, of course, consider the successive acts, and must not, because there was one grave act, say that that is persistent cruelty. I recognise that, but I think the whole thing was a grave matter. I think the course of conduct persisted and that the wife's peril from it increased. In that respect I think the magistrates were warranted in finding persistent cruelty.

C They have made an order for maintenance of £1 a week for the wife and 5s. for the child—25s. in all, out of £2 15s. which he earns. He gets 30s., having his day-to-day expenses and not having the child, and she gets 25s. having the child. Counsel says that she may be able to earn her livelihood. As soon as that possibility becomes realised it is quite easy to apply for reduction of the amount of this order.

D I was glad to find that the magistrates had not included in their order a separation order. There is a dangerous tendency to introduce automatically a separation order.

It seems to me that the truth about this case is that here was a man who drank to excess, who became more subject to drinking, who could not then perhaps control himself and became dangerous to his wife. She describes their home. She E says they had a splendid home, but she says: "I could not go back to it." Now it is said that the husband is ready to give up intoxicants. I cannot help thinking that if he took that course, and if, after a period during which he had become a steady man, he made approaches on the subject, it might be quite practicable for him to annul this order by reason of a reconciliation between the parties.

BATESON, J.—I agree.

F *Appeal dismissed.*

Solicitors: *Dangerfield, Blythe, & Co.*, for *Hugh L. Swinburne*, Durham; *Wrinch & Fisher*, for *H. R. Snowball*, Consett.

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

Re JOHN DRY STEAM TUGS, LTD.

[CHANCERY DIVISION (Eve, J.), February 16, 1932]

[Reported [1932] 1 Ch. 594; 101 L.J.Ch. 271; 147 L.T. 493; [1931] B. & C.R. 157]

Company—Winding-up—Surplus assets—Right of preference shareholders to share in distribution.

The company was incorporated in 1909, having a nominal capital of £25,000 divided into 1,250 preference shares of £10 and 1,250 ordinary of the like amount. In August, 1929, it was resolved to wind-up voluntarily, a liquidator was appointed, and after he had made all necessary payments £10,000 remained in his hands for distribution. Article 5 of the company's articles of association provided: "Subject as hereinafter provided, the rights following shall be attached to the preference shares: (i) The holders . . . shall be entitled to a fixed cumulative dividend at the rate of 5 per cent. per annum on the capital for the time being paid up on the said preference shares respectively, and after paying or providing for the payment of a dividend for such year at the same rate on the capital for the time being paid up on the ordinary shares to an additional ½ per cent. calculated on the same basis for each 1 per cent. in excess of 5 per cent. paid or declared on the amount paid up for the time being on the ordinary shares. (ii) The holders of the said preference shares shall in a winding-up have priority both as to the cumulative dividend aforesaid and return of capital over all other shares in the capital for the time being of the company . . ."

Held: on the true construction of art. 5, that article did not contain an exhaustive delimitation of the rights of the preference shareholders, and, therefore, they were entitled to participate in the surplus assets with the ordinary shareholders pari passu.

Notes. As to the distribution of surplus assets among shareholders, see 6 HALSBURY'S LAWS (3rd Edn.) 678 et seq., and for cases see 10 DIGEST (Repl.) 1065 et seq.

Cases referred to:

(1) *Collaroy Co., Ltd.* v. *Giffard*, [1928] Ch. 144; 97 L.J.Ch. 69; 138 L.T. 321; [1927] B. & C.R. 217; 10 Digest (Repl.) 1072, *7426*.

(2) *Anglo-French Music Co.* v. *Nicoll*, [1921] 1 Ch. 386; 90 L.J.Ch. 183; 124 L.T. 592; 10 Digest (Repl.) 1010, *6948*.

(3) *Re Espuela Land and Cattle Co.*, [1909] 2 Ch. 187; 78 L.J.Ch. 729; 101 L.T. 13; 16 Mans. 251; 10 Digest (Repl.) 1069, *7410*.

(4) *Re Fraser and Chalmers, Ltd.*, [1919] 2 Ch. 114; 88 L.J.Ch. 343; 121 L.T. 232; 35 T.L.R. 484; 63 Sol. Jo. 590; [1918–19] B. & C.R. 186; 10 Digest (Repl.) 1072, *7424*.

Summons for directions by the liquidator in the voluntary winding-up of the company.

The company was incorporated in 1909 with a nominal capital of £25,000, namely, 1,250 preference shares of £10 each and 1,250 ordinary shares of £10 each, of which 916 preference (£7 10s. paid up per share) and 1,050 ordinary (fifty fully paid and 1,000 of £7 10s. paid) had been issued. On Aug. 2, 1929, a resolution for voluntary winding-up was passed and a liquidator appointed. He, after paying or making provision for debts, collecting the assets and repaying to the preference and ordinary shareholders the capital paid up on their shares, had surplus assets available for distribution of about £10,000.

Article 5 of the articles of association was as follows:

> "Subject as hereinafter provided, the rights following shall be attached to the preference shares: (i) The holders of the said preference shares shall be

entitled to a fixed cumulative dividend at the rate of 5 per cent. per annum on the capital for the time being paid up on the said preference shares respectively, and after paying or providing for the payment of a dividend for such year at the same rate on the capital for the time being paid up on the ordinary shares to an additional one-half per cent. calculated on the same basis for each one per cent. in excess of five per cent. paid or declared on the amount paid up for the time being on the ordinary shares. (ii) The holders of the said preference shares shall in a winding-up have priority both as to the cumulative dividend aforesaid and return of capital over all other shares in the capital for the time being of the company. (iii) The rights hereby attached to the said preference shares shall not be modified otherwise than in accordance with the provisions contained in cll. 58 and 153 hereof."

By this summons it was asked whether, on the true construction of the memorandum and articles, the surplus assets (a) ought to be divided between the shareholders in proportion to the amount paid up on the shares respectively held by them, or in proportion to the number of shares respectively held by them, or in some other and what proportion; (b) ought to be distributed on the footing that the preference shareholders were entitled to participate with the ordinary shareholders in such distribution rateably, or in some other and what proportion, or upon the footing that the preference shareholders had no right to participate in such distribution. As to (a) it was agreed that they ought to be distributed in proportion to the amounts paid up on the shares.

D. Ll. Jenkins for the liquidator.

Gordon Brown for the preference shareholders.

Buckmaster for the ordinary shareholders.

EVE, J.—The question raised is purely one of construction. The company is in voluntary liquidation, and the question is whether art. 5 of the articles of association is exhaustive of the rights attached to the preference shares or whether it is expressive only of certain rights they are to enjoy over and above their rights as contributories. If it is exhaustive, the preference shareholders have no interests in the surplus assets to which this application relates; if, on the other hand, it is merely expressive of their exceptional rights, then they will come in to share pari passu with the ordinary shareholders in the distribution of the surplus.

The first two paragraphs of the article relate to different stages in the company's history—the one regards it as a going concern, the other as in the course of liquidation. Accordingly the one provides for the share of profits to be assigned to the preference shareholders during the profit earning period of the company's existence, and the other determines how the capital is to be repaid when the winding-up supervenes. Nothing is said as to the distribution of any assets still remaining for distribution after the capital has been repaid, but in the absence of any provision to the contrary these assets—the joint result produced by the employment of capital contributed by the two classes of shareholders—ought to be shared by all the contributories.

The same question as that with which I have to deal has been raised in several cases, and in many of them the provisions relating to the rights of the preference shares have been examined with meticulous care (*Collaroy Co., Ltd.* v. *Giffard* (1)); but, speaking generally, the question has resolved itself into one of construction, namely, whether the memorandum and articles contain an exhaustive delimitation of the rights of the preference shareholders. I do not think it would serve any good purpose were I to examine the cases with a view to extracting from them the various indicia which have been taken hold of as establishing the existence of that exhaustive delimitation. I shall, I think, do all that is necessary if I indicate the only features in this case which have been put forward in other cases as arguments against the claim of the preference shareholders to share in the surplus assets. The features I refer to are: (i) The right of the preference shareholders to participate in profits over and above their fixed cumulative dividend; and (ii) the right of priority in the repayment of capital. But there is authority for saying that neither of these features is sufficient to exclude the preference shareholder from participating in the ultimate surplus assets: *Anglo-French Music Co.* v. *Nicoll* (2); *Re Espuela Land and Cattle Co., Ltd.* (3); and *Re Fraser and Chalmers, Ltd.* (4); and, in the absence of any indication in the contract between the ordinary and preference shareholders that the latter were abandoning any of their rights as contributories, I am bound to hold that in this case the surplus assets must be distributed among all the shareholders.

Solicitors: *Linklaters & Paines*, for *W. Mark Pybus & Sons*, Newcastle-upon-Tyne.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re DUNCOMBE'S WILL TRUSTS. WRIXON-BECHER *v.* EARL OF FAVERSHAM

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), January 27, 28, 29, 1932]

[Reported [1932] 1 Ch. 662; 101 L.J.Ch. 280; 146 L.T. 412]

Will—Heirloom—To be enjoyed by "persons for time being in actual possession or entitled to receipt of rents and profits of mansion house"—Subsequent disentailing deed—Claim by persons entitled under limitations in disentailing deed and by person entitled under will—Title to heirlooms to be deduced through disentailing deed.

By his will dated May 22, 1879, a testator bequeathed his household chattels in his mansion houses at two named places upon trust to be enjoyed by "the persons who under and by virtue of [the will] shall for the time being be in the actual possession or entitled to the receipt of the rents and profits of the mansion and demesne of [W.]" settled by a re-settlement of Oct. 31, 1874. The testator died in December, 1879, and W.D., his eldest son, succeeded to the real estates. In 1917 W.D. barred the estates included in the re-settlement by a disentailing deed of the property in favour of his sister E.C., who, on W.D.'s death in 1917, succeeded to the estates as tenant for life and lived until May 4, 1930.

Held: the testator's intention, as expressed in the will, was that the chattels should be enjoyed by a person who was in actual possession of the mansion house; had there been no disentailing deed one B. would have become entitled to actual possession, but, in construing the will, effect must be given to the deed; and, therefore, in determining the devolution of the chattels, B. could not be treated as having been in actual possession of the mansion house so as to entitle his representatives to the chattels after his death.

Hogg v. *Jones* (1) (1863), 32 Beav. 45, overruled.

Notes. As to the settlement of personalty to devolve with realty, see 29 HALSBURY'S LAWS (2nd Edn.) 797 et seq., and for cases see 44 DIGEST 947–951.

Cases referred to:

(1) *Hogg* v. *Jones* (1863), 32 Beav. 45; 1 New Rep. 222; 32 L.J.Ch. 361; 8 L.T. 816; 9 Jur.N.S. 507; 55 E.R. 18; 44 Digest 948, *8022*.

(2) *Re Parker, Parker* v. *Parkin*, [1910] 1 Ch. 581; 79 L.J.Ch. 161; 101 L.T. 943; 44 Digest 949, *8028*.

A (3) *Re Petre's Settlement Trusts, Legh* v. *Petre*, [1910] 1 Ch. 290; 79 L.J.Ch. 145; 101 L.T. 847; 54 Sol. Jo. 199; 40 Digest 551, *934*.

(4) *Re Fothergill's Estate, Price-Fothergill* v. *Price*, [1903] 1 Ch. 149; 72 L.J.Ch. 164; 87 L.T. 677; 51 W.R. 203; 44 Digest 945, *8009*.

(5) *Foley* v. *Burnell* (1785), 4 Bro. Parl. Cas. 319; Rom. 1; 1 Bro.C.C. 274; 2 E.R. 216; 44 Digest 947, *8017*.

B (6) *Lord Scarsdale* v. *Curzon* (1860), 1 John. & H. 40; 29 L.J.Ch. 249; 3 L.T. 29; 6 Jur.N.S. 209; 70 E.R. 653; 44 Digest 944, *8003*.

(7) *Re Lord Chesham's Settlement, Viscount Valentia* v. *Lady Chesham*, [1909] 2 Ch. 329; 78 L.J.Ch. 692; 101 L.T.9; 25 T.L.R. 657, C.A.; 44 Digest 946, *8010*.

(8) *Lord Lilford* v. *A.-G.* (1867), L.R. 2 H.L. 63; 36 L.J.Ex. 116; 16 L.T. 184; C 15 W.R. 595, H.L.; 21 Digest 106, *780*.

(9) *Re Trevanion, Trevanion* v. *Lennox*, [1910] 2 Ch. 538; 80 L.J.Ch. 93; 103 L.T. 212; 54 Sol. Jo. 749; 43 Digest 791, *2287*.

Appeal from an order of LUXMOORE, J.

The facts are set out in the judgment of the Master of the Rolls.

D *F. D. Morton, K.C.*, and *Lindsay M. Jopling* for the appellant, entitled through disentailing deed.

Charles M. Harman for the respondents, representatives of B., now deceased.

LORD HANWORTH, M.R.—This appeal must be allowed. The case is one in which LUXMOORE, J., had to determine what was the devolution of certain personal property—the household goods, furniture, plate, linen, china, glass, drawings, and E so on, usually appropriated or belonging to mansion houses at Waresley and Westerdale. LUXMOORE, J., felt compelled to follow *Hogg* v. *Jones* (1). If he had not done so, he would have held in favour, as I understand, of the representatives of the residuary legatee, Walter Henry Octavius Duncombe, who died on Jan. 6, 1917. We have to re-consider the position, and we are not bound by the decision of *Hogg* v. *Jones* (1).

F Octavius Duncombe made his will on May 22, 1879, and he died on Dec. 3 of that year. There was, when he made his will, in existence a re-settlement of the estates dated May 31, 1874, and this provided for the devolution of the real estate. Octavius Duncombe had an elder son, Walter Henry Octavius, and he died, unmarried, on Jan. 6, 1917. His next brother, Henry Charles, had died before him, in 1903, and that left, on Walter Henry's death, three sisters, Emily Charlotte, G Blanche Elizabeth, and Maud Augusta Louisa, who was Lady Calthorpe. Upon the decease of Octavius (the father) Walter Henry Octavius succeeded to the estates, but on July 7 of the same year in which he died he executed a disentailing assurance of the property in favour of his sister, Emily Charlotte, with the result that, upon his death, his sister, Emily Charlotte, succeeded as tenant for life, and she lived until May 4, 1930. Incidentally, I may mention that Lady Calthorpe H had a son, who died in 1906 after he had attained the age of twenty-one. Upon the failure of the line of Octavius on the death of Emily Charlotte as tenant for life, the next branch that came into effect was the children of Augustus Duncombe, the dean of York, but the eldest son, who joined in the disentailing deed of July, 1917, died on Feb. 22, 1925, sine prole, and that brought in as possible successors, the descendants of Admiral Duncombe, Arthur, and his grandson, Basil Archibald I Charles, who in fact died on Sept. 22, 1930, but who left a son, Hubert Basil Elliott. I have explained that in order to show that by virtue of the re-settlement of 1874 and the disentailing assurance of 1917, there was a distinct break made from the course of the descent as it would have taken place if it had followed the line simply under the re-settlement of 1874.

The will of Octavius Duncombe we have to construe, and in it he says:

> "I bequeath all my household goods and furniture plate linen china glass books drawings pictures and prints in and about or usually appropriated or belonging to my mansion houses at Waresley and Westerdale respectively to my

> executors hereinafter named their executors administrators and assigns upon trust that they and the survivors or survivor of them and the executors administrators and assigns of such survivor shall permit the same to go along with and be used and enjoyed so far as the rules of law and equity will permit by the person or persons who under or by virtue of this my will shall for the time being be in the actual possession or entitled to the receipt of the rents and profits of the mansion and demesne of Waresley aforesaid included in and settled by the said indenture of re-settlement of the 31st day of October 1874."

It will be seen upon the facts that the claimants—and there are three whom we have to consider—were not in actual possession of Waresley. There are three persons who stand before us as possible claimants, that is, the representative of Emily Charlotte, who died, as I have said, on May 4, 1930; the second, Basil, who survived Emily Charlotte by a short time, some three months, and who, if there had been no disentailing deed, would have become entitled, on the death of his cousin Emily Charlotte; and, thirdly, the representative of Walter Henry Octavius, who is the residuary legatee under the will, and is the claimant who is put forward as firstly entitled to this personal property. The same counsel is briefed to represent the interests of Emily Charlotte, so that he stands in the position before us of asserting the claim of either Walter Henry Octavius or of Emily Charlotte; and both of those claims are opposed to the claim of Basil, in whose favour LUXMOORE, J., decided. We have, therefore, to determine whether LUXMOORE, J., was right in his decision in favour of Basil, or whether the decision ought to be in favour of Walter Henry Octavius or Emily Charlotte and their representatives, or one or other of them.

The reason why LUXMOORE, J., decided in favour of Basil was the decision of *Hogg* v. *Jones* (1), a decision in 1863, given by LORD ROMILLY, to which I must refer in a moment. Had he been unfettered, I gather that LUXMOORE, J., would have held that this property fall into residue and so passed, in that character, to Walter Henry Octavius and his representative, as the residuary legatee. PARKER, J., in *Re Parker, Parker* v. *Parkin* (2) said ([1910] 1 Ch. at p. 584):

> "It is, in my opinion, clear, both on principle and on authority, that, where chattels are simply directed to pass as heirlooms with real estate, the first person who under the limitations of the settlement becomes entitled to the real estate for a vested estate of inheritance, whether in possession or remainder, becomes absolutely entitled to the chattels, subject, of course, to his interest being defeated by any event which would defeat his estate in the realty"

and so on, and LUXMOORE, J., propounds the same principle. But it is not simply a question whether or not any of these persons became entitled to a vested estate of inheritance. We have to see whether or not any of them fulfil the terms and description which are given in the passage in the will which I have read. As a matter of fact, none of them was actually in possession or entitled to the receipt of the rents and profits. If these words connote possession, in fact none of the claimants can fulfil that qualification or characteristic, but it is said on behalf of Basil that he fulfils the terms because he would have been entitled to the actual possession and would have been entitled to the receipt of the rents and profits unless a supervening event had happened, namely, that by the disentailing assurance of 1917 his contingent interest had been deflected from coming to him, and it is said that he had the right to the actual possession, that he is entitled to the actual possession, and so, under *Hogg* v. *Jones* (1), he is the person who does fulfil all the qualifications or conditions imposed by this clause.

I want quite shortly to refer to one or two of the cases. In *Re Petre's Settlement Trusts, Legh* v. *Petre* (3) JOYCE, J., had to deal with the limitation which contained these words,

> "became entitled to actual possession of the P. estates under the limitations of the Petre settlement,"

and he made this observation ([1910] 1 Ch. at p. 296), quoting from Vaizey on Settlements:

> " 'In several cases tenants in tail in remainder were treated as persons entitled to the possession, so as also to entitle them to personalty, which was in one case to be enjoyed by the persons successively entitled to the possession of the settled realty,'
>
> &c.; and Mr. Vaizey suggests the addition of the word 'actual' and the use of the expression 'actual possession' with the idea of preventing any such result as that. Having regard to all this, and to what was said in the judgment in *Hogg* v. *Jones* (1), which was cited to me, upon the whole I think that 'entitled to the actual possession under the limitations' means here entitled to such possession, looking to the terms of the settlement, and not regarding anything else."

It is said by counsel for the respondents that that passage confirms *Hogg* v. *Jones* (1), and that by virtue of that and of *Re Petre's Settlement* (3) you ought not to have regard to the effect of the disentailing assurance of 1917; you ought to consider what was the devolution under the settlement of 1874. *Re Fothergill's Estate, Price-Fothergill* v. *Price* (4), although the point was not fully argued, gives an illustration of how in one case the gift of certain chattels may pass to one person and at the same time the residuary estate, not the chattels, may pass to another, following a decision in *Foley* v. *Burnell* (5). But the question and full effect of actual possession does not appear to have been fully argued there. Referring to *Foley* v. *Burnell* (5), it is important to note that the person who was held entitled to take the heirlooms took a vested estate of inheritance, and so was absolutely entitled, and his rights prevailed by reason of the fact that he had taken the vested estate of inheritance, but, as we have pointed out in the course of the arguments, the sidenote appears to be incomplete for the purpose of demonstrating that. Coming back to *Re Parker* (2), it was argued ([1910] 1 Ch. at p. 583):

> "Where, as in the present case, the chattels are only annexed to the house, they will, if settled in the same way as the real estate, vest absolutely in the first tenant in tail when he is born (*Foley* v. *Burnell* (5); *Lord Scarsdale* v. *Curzon* (6)), although the settlor may prevent the rule being applicable by a reference to 'actual' possession, in which case, if the tenant in tail in remainder dies in the lifetime of the tenant for life, the former will not take the heirloom."

Then certain cases are cited. Parker, J., in giving his judgment, says this ([1910] 1 Ch. at p. 585):

> "It is possible to introduce provisions defeating the interest of a tenant in tail who does not come into actual possession of the property; but words which are to have this effect must be reasonably clear and certain. Further, in considering whether the testator has manifested an intention contrary to the ordinary rule, the court ought not to be influenced by the actual events which have occurred."

He distinguished also *Re Chesham's Settlement, Valentia* v. *Chesham* (7), where the actual words were that the chattels were to be held and enjoyed with the mansion house. But when one is considering the effect of the disentailing assurance, whether or not that is to have any effect when one is considering the events which have occurred for the purpose of construing the provisions of this will of 1879, it is important, I think, to bear in mind the words which were quoted in *Lord Lilford* v. *Attorney-General* (8) (L.R. 2 H.L. at p. 70). In that case, it is true, it was a question upon succession duty, but the words of Lord Chelmsford are:

> "The disentailing deed did not operate to destroy the interest of which he was the successor, but enabled him, by the exercise of the power which that interest gave him, to render it perpetual."

If that reasoning be right—and it not only appears in the observations made in the speech in the House of Lords, but it is quoted again by JOYCE, J., in *Re Trevanion, Trevanion* v. *Lennox* (9)—the disentailing assurance was not something which was supervened unexpectedly or entirely outside the deed of re-settlement, but was one right which belonged to those persons who took successively, according to the deed of settlement, a right which they had to exercise by virtue of the interest which they took under the deed of re-settlement.

I turn now to *Hogg* v. *Jones* (1). I quite appreciate the argument presented to us that that case has stood from the year 1863, that it has been adverted to in a great number of cases, and that we should be careful before we extinguish a case of that antiquity. *Hogg* v. *Jones* (1) appears to have been used where it seems to be a doctrine supporting a judgment, but, on the other hand, it has in many books, and in some cases, been criticised to the extent that those who referred to it were quite unable fully to understand the reasoning upon which it is based. I will not go through it in full, but I call attention to the facts that the words that there had to be construed were

> "who for the time being shall be in the actual possession and enjoyment of my freehold estates under the limitations of my will."

The words there do not include the word "entitled." The Master of the Rolls had to determine whether or not the person in whose favour he decided could be deemed to be in possession, and he held that that person could be treated as being in actual possession because he would have been so if there had not been the disentailing assurance. His words are these (32 Beav. at p. 54):

> "I think that the words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, E. M. Lyte is clearly the person entitled to the plate. He is the person who, under the limitations contained in the will (regarding them, and them alone, undisturbed by any foreign cause), is entitled to such possession and enjoyment and which he would have obtained unless these limitations had been defeated by a foreign circumstance over which neither the testator nor the legatee had any control."

I find difficulty in accepting those words or agreeing that the disentailing assurance executed in the circumstances in which it was executed could be said to be a "foreign circumstance" as suggested by LORD ROMILLY. He goes on to say (32 Beav. at p. 55): "I think that my meaning may be illustrated by suggesting such a case as this." Then he suggests a case in which a cottage on the eastern coast has been, by the act of God, swept away by the inroad of the sea so as to render it impossible for anybody to be in actual possession and enjoyment of it. It does not seem to me that the act of God would have altered or destroyed the title, and the mere fact that the person entitled could not go into actual possession and enjoyment in those circumstances would surely not be taken to militate against a right of which he was otherwise in possession. I think the illustration which he gives shows that the sort of foreign cause of which he is speaking is one which is far different from the disentailing assurance which we have in the present case, and, if that be not so, I have reluctantly to say, with all due respect, that I cannot agree that the disentailing assurance is a foreign cause sufficient to justify its being neglected as of no effect when one comes to interpret this clause. It appears that not only has one to contemplate in the passage of time during which this will would operate, the deaths and succession of a number of persons who are referred to in the deed of re-settlement which was confirmed by the will and which is referred to in the words that I have read, but one has to contemplate the powers that those persons have successively over a period of time, and one of those powers would be the possibility of entering into a disentailing assurance. That has been done and by virtue of that it is impossible for Basil to obtain actual possession or become entitled to the receipt of rents and profits of the mansion house, and it, therefore, seems that his right is defeated unless we are compelled to hold, following *Hogg* v. *Jones* (1) that he has a right.

I decline to feel bound by *Hogg* v. *Jones* (1) for that purpose, and I, therefore, come to the conclusion that the decision ought not to be in favour of Basil. That being so, the right is left to fall between the representatives of Walter Henry Octavius and the representatives of his sister, Emily Charlotte. It is not necessary for us to-day to decide between those persons; it is sufficient for us to say that the appeal must be allowed and the claim of Basil must be barred, and the order, therefore, of LUXMOORE, J., is discharged.

LAWRENCE, L.J.—I agree. But for the authorities to which our attention has been directed by counsel and especially but for *Hogg* v. *Jones* (1), I am of opinion that the construction of the bequest in question presents no difficulties. It appears from the judgment of LUXMOORE, J., that he was of the same opinion, but he felt himself bound by *Hogg* v. *Jones* (1) to place a construction upon the clause with which he did not himself agree, and which, in my opinion, is contrary to the true construction.

Before dealing with the main point on this appeal, there are two minor points of construction on the bequest which require consideration. In the first place, I think that there is an obvious mistake in the will in the expression "under or by virtue of this my will," the mistake being that the word "will" ought to be "re-settlement." I think it is plain that the bequest in question ought to be read as if the word "re-settlement" had been substituted for the words "this my will." The second point is that in the expression "in the actual possession or entitled to the receipt of the rents and profits of the mansion house," and so on, the words "entitled to the receipt of the rents and profits" mean, in my opinion, actually entitled to the actual receipt of the rents and profits. In other words, that the receipt there means an actual receipt and not merely entitlement to the receipt of the rents.

Passing to the main point, the question which has been raised, and the only one with which this court is concerned, is whether the learned judge was right in deciding that the representatives of Basil are persons who by virtue of their position can take under this bequest. It is plain that Basil never became or never was in actual possession of the property, nor was he ever entitled to possession of the property. The estates under the re-settlement had been barred by the tenant in tail in remainder and that tenant in tail in remainder had conveyed the property to Emily Charlotte. Emily Charlotte died in 1930, and at that time, if there had been no disentailing deed, Basil would have become entitled as tenant in tail in possession, and I think he would then have fulfilled the description in the bequest and become entitled to the chattels. But in the events which have happened, I myself cannot see that he fulfils the description of being in the actual possession or entitled to the receipt of the rents and profits. It seems to me that he necessarily fails, unless those words ought to be given some artificial construction, which, in my opinion, they do not really bear. That in turn depends upon whether the construction of this clause is governed by the decision in *Hogg* v. *Jones* (1), and whether, if it is, we ought to follow *Hogg* v. *Jones* (1) and decide this case on the authority of that case.

In my judgment, the bequest in *Hogg* v. *Jones* (1) is very near the words in this case. It is true that it is not precisely similar, but the learned judge there had to deal with a case in which the gift of the chattels was to the person in the actual possession and enjoyment of the freehold estates under the limitations of the will. I agree that the distinction between "under and by virtue of the will" and the words "under the limitations of the will" is too fine a one to create any impression on my mind. So we have in this case at all events a case in which the words were "in actual possession and enjoyment under the limitations of the will." It is, to my mind, important to bear in mind that neither in the present case nor in *Hogg* v. *Jones* (1) were the words "entitled to the possession" or "entitled to the actual possession" used. In the present case we have the words "in the actual possession" as there were in *Hogg* v. *Jones* (1). I think that on the whole LUXMOORE, J., was right in saying that in substance he could not distinguish *Hogg* v. *Jones* (1) from the present case; but, to my mind, *Hogg* v. *Jones* (1), if it is to govern the present case, was wrongly decided. The whole of the arguments used in the judgment until the conclusion seem to me to point to the fact that the learned Master of the Rolls in that case ought to have decided the other way. But the real ground, as my Lord has stated in his decision, appears to have been that because the limitations under the will were defeated by a disentailing deed and because that disentailing deed was a foreign circumstance over which the testator had no control, therefore the will ought to be construed in a different way, and the words "in actual possession of the property" ought to be given a meaning which on the face of them they do not bear. The part of the judgment which I confess I do not fully appreciate and which, in my opinion, is wrong, is where he says (32 Beav. at p. 55):

> "Where the failure of the actual possession was occasioned by reason of some foreign disturbing causes having destroyed the further operation of the limitations upon the estate devised"

—meaning thereby that the limitations of the estates devised have come to an end and there was no actual possession. Then the learned judge says:

> "Whether such failure be occasioned by a disentailing deed or by natural causes cannot, I think, make any difference. In both cases the right would exist under the limitations of the will taken alone, but in neither case could that right be enforced."

From the passage that I have quoted, it is quite clear that the learned Master of the Rolls has held that in spite of the fact that the conditions which the legatee had to fulfil were not fulfilled, yet he was at liberty to uphold the bequest to him because they would have been fulfilled unless a disentailing deed had been executed.

It appears to me that that reasoning is wholly unsound. In the present case we have words which are perfectly clear, that the chattels are bequeathed to the person who for the time being is in actual possession or entitled to the receipt of the rents and profits of the property. Here Basil was not in possession nor in receipt of the rents, nor could he ever fulfil the description of the bequest. Whether it was his death or whether it was a disentailing deed, or whatever the event may have been, there is nothing in this will to show that the testator contemplated any person getting the chattels except a person who should be in actual possession of the mansion house. It seems to me beyond controversy and quite immaterial what the event which caused him not to be in possession or not in receipt of the rents was. It might have been a natural cause, his death or the birth of some other tenant in tail whose title was in realty, or a disentailing deed, but whatever the cause may have been, he cannot by any possibility fulfil the conditions of this deed.

I decline to give any artificial meaning to this will. Counsel has ably urged that what ought to have been done was to look at the will itself, to ignore the fact that a disentailing deed has been executed, and then see who under the will and the pedigree—he has to add that—would have been entitled if certain events had happened or had not happened. He might just as well, to my mind, say that you should ignore the births and deaths of the prior tenants for life and tenants in tail in remainder. It is quite plain that in the events which have happened Basil cannot fulfil the conditions and thus comply with the terms of the bequest; and without going into any of the other cases that have been cited, in my opinion, he has failed on the ground that Basil never did fulfil and never could have fulfilled the conditions of the bequest after the disentailing deed had been executed. For those reasons, which I think are the same reasons as LUXMOORE, J., would have decided upon but for the decision in *Hogg* v. *Jones* (1), which I decline to follow, I agree that the appeal should be allowed.

A **ROMER, L.J.**—The will in this case is peculiar in two respects. The first respect as to which it is peculiar is the reference to the testator's will, as though that will in some way had limited the Waresley estates. I think that nothing really turns upon that. The will, so far as it had any operation at all upon the Waresley estates, had only the effect that it confirmed the re-settlement of those estates. It may well be that the testator thought that that confirmation gave a validity to the B re-settlement which it did not otherwise possess, and that was the reason why he referred to

> "the person or persons who under or by virtue of this my will for the time being be in the actual possession"

of the Waresley estates. Assuming that he did so think and that that was the C reason why he referred to it, of course in the end it is the same thing as though he had said:

> "The person or persons who under or by virtue of this my will shall for the time being be in the actual possession under the indenture of re-settlement."

The other respect in which this will is peculiar is this. If the gift had been of D the chattels to the person or persons who shall for the time being be entitled to the receipt of the rents and profits of the Waresley estates, the chattels would undoubtedly have vested in the son of Lady Calthorpe, who became entitled to the first tenancy in tail under the re-settlement. If, on the other hand, the gift had been solely to the person or persons who shall for the time being be in the actual possession of those estates, then, but for the disentailing deed, it is quite plain E that the representatives of Basil would now be entitled to the chattels. The testator has used both expressions. He has given the chattels to the person or persons who for the time being shall be—leaving out the reference to the re-settlement—in the actual possession or entitled to the receipt of the rents and profits. I think it is quite plain, inasmuch as we have to construe strictly the sentence as intending the two phrases to be alternative, that we should have come F to the conclusion that the whole trust failed for uncertainty. In those circumstances, I think it is clear that we must treat the word "or," not merely as introducing an alternative, but as introducing words which, in the opinion of the testator, meant the same thing as the words which he had just used. Therefore, I read those words as being "in trust for the person or persons who shall for the time being be in the actual possession or in the actual receipt of the rents and G profits." So construing the words, but for the disentailing deed, the representatives of Basil would be entitled to the chattels. Having regard to the disentailing deed, Basil was not in actual possession, and never would be in actual possession, nor had he got any estate in possession as distinguished from any remainder in the real estate. Therefore, it would appear that he did not come within the description of legatees. Counsel says: "I can rely upon these words: H 'Under or by virtue of the indenture of re-settlement.' Those words make a difference, and although without those words I might not have been entitled to the chattels, yet, I am so entitled having regard to the fact that those words are included." Had the gift been to the persons who under or by virtue of the will should for the time being be entitled to the actual possession, there would be something in the argument, and for the reason that in such a case it would be I possible, or might be possible, to regard those words as referring, not to a fact of actual possession, but to a title to actual possession that would have existed under the re-settlement, looking at the re-settlement and that alone. A construction of that sort was applied to somewhat similar words by JOYCE, J., in *Re Petre's Settlement Trusts, Legh* v. *Petre* (3), where he said ([1910] 1 Ch. at p. 296):

> "Having regard to all this and what was said in the judgment in *Hogg* v. *Jones* (1), which was cited to me, upon the whole I think that 'entitled to the actual possession under the limitations' means here, entitled to such possession looking to the terms of the settlement and not regarding anything else."

But the words "in actual possession" refer to a fact and not a title, and seeing that the representatives of Basil are not in actual possession, it is useless to go further. They do not fulfil the first branch of the description.

In the case of the lady, who did become eventually entitled in actual possession of the estates, it would have been necessary, had we now to decide that point, to go further and to consider whether she was so in possession under or by virtue of the indenture of re-settlement. In Basil's case it is not necessary to go further, because, not being in actual possession, he does not come within the first words of the description. That being so, I should unhesitatingly decide, as Luxmoore, J., would unhesitatingly have decided, against his claim were it not for the decision of *Hogg* v. *Jones* (1). *Hogg* v. *Jones* (1) is a very unsatisfactory case. It has been criticised by the Master of the Rolls and by Lawrence, L.J., and I do not want in any way to repeat their criticisms. I venture to point out that there are other matters in respect of which the case lays itself open to most severe criticism. The Master of the Rolls first decided against the claims of the disentailing tenant in tail on the ground that his tenancy in tail was defeasible during the whole period of his life, as, indeed, it was. But in point of fact it was the first tenancy in tail in remainder that took effect, and it was impossible to defeat his claim on that ground. His claim was defeated and properly defeated on the ground that he never was in actual possession. It could not have been defeated on the ground that during his life his estate tail was defeasible. Then, dealing with the claim of E. M. Lyte, who was a tenant in tail by descent, he says this:

> "I think that the words of the will are satisfied by the vesting in the legatee of the right to the actual possession and enjoyment of the real estate. If so, E. M. Lyte is clearly the person entitled to the plate. He is the person who, under the limitations contained in the will (regarding them, and them alone, undisturbed by any foreign cause) is entitled to such possession and enjoyment."

That is the sort of argument which was applied by Joyce, J., in *Re Petre's Settlement* (3), and in support of which there may be a good deal to be said; but with great respect to the learned Master of the Rolls, he had not got the word "entitled" before him. He had the words which we have here "in the actual possession." Having said that he goes on as follows:

> "It is plain, as was well put by Mr. Druce, that the disentailing deed, which has no operation over chattels, could not in any degree affect the devolution of them; they must go exactly as if such deed had never been executed."

With great respect to the learned Master of the Rolls, he is confusing the case where chattels are settled upon trusts by reference, upon similar trusts to the trusts which have been declared in respect of real estate and the uses which have been limited in respect of real estate, with a case like that before him and the case before us, in which the chattels are directed to go with the real estate, and to go to the persons who, under the limitations of the real estate, from time to time became entitled, whether in possession or actual possession matters not for the moment. In such a case the devolution of the chattels is affected by a disentailing, because the limitations under the will are affected by the disentailing and the title of persons who would otherwise come after the tenant in tail who disentails are entirely different.

For these reasons it seems to me that the case of *Hogg* v. *Jones* (1) ought not to be followed and must be overruled, and that this appeal must be allowed.

Appeal allowed.

Solicitors: *Trower, Still, & Keeling*; *Evans, Barraclough & Co.*

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

ELLIS *v.* JOHN STENNING & SON

[Chancery Division (Luxmoore, J.), January 11, 12, 13, March 23, 1932]

[Reported [1932] 2 Ch. 81; 101 L.J.Ch. 401; 147 L.T. 449; 76 Sol. Jo. 232]

Conversion—Transfer to convertor of title to goods—Judgment for damages for conversion—No satisfaction of judgment.

In 1925 one L. conveyed some ten acres of land to J. and M.N., reserving all timber and timber-like trees, with right to enter any time before Oct. 11, 1927, and remove such timber. Shortly afterwards L. sold the timber to the C. company, who later sold to the plaintiff, who entered, felled, and sawed them in planks. Some of the timber was removed before October, 1927, but a considerable quantity remained after that date, and J. and M.N. refused to allow the plaintiff to remove the remainder.

In 1930 the plaintiff obtained from the Court of Appeal (reversing a decision of Clauson, J.) a judgment against J. and M.N. for £250 for the conversion of the timber. After the issue of the writ in that action, J. and M.N. purported to sell the timber to the defendants in the present action. The plaintiff took no steps to enforce the order of the Court of Appeal as he regarded J. and M.N. as having no means to satisfy the judgment, but he began the present action claiming from the defendants damages for the conversion of the timber.

Held: (i) the fact that at the time of the alleged sale by J. and M.N. to the defendants the defendants had no notice of the plaintiff's claim to the timber was immaterial; (ii) the claim of the plaintiff in the present action was not barred by the judgment of the Court of Appeal on the ground that the defendants and J. and M.N. were joint tortfeasors and the plaintiff had elected to bring his action against J. and M.N. only, because the cause of action against J. and M.N. was the transfer of the timber to the defendants whereas the claim against the defendants was in respect of their failure to deliver up the timber after a demand made on them by the plaintiff; (iii) a judgment for damages for the conversion of goods did not, by itself and apart from special circumstances (which did not exist here), divest the owner of the property of his title thereto unless and until the judgment was fully satisfied; and, therefore, the plaintiff was entitled to succeed.

Notes. As to the effect of judgments in trover or detinue, see 33 Halsbury's Laws (2nd Edn.) 78–80, and for cases see 43 Digest 530, 531.

Cases referred to:

(1) *Ellis* v. *Noakes*, [1932] 2 Ch. 98, n.; 101 L.J.Ch. 409, n.; 147 L.T. 453, n.; Digest Supp.

(2) *Re Gunsbourg*, [1920] 2 K.B. 426; sub nom. *Re Gunsbourg, Ex parte Trustee*, 89 L.J.K.B. 725; sub nom. *Re Gunsbourg, Ex parte Cook*, 123 L.T. 353; 36 T.L.R. 485; 64 Sol. Jo. 498; [1920] B. & C.R. 50, C.A.; 21 Digest 225, *585*.

(3) *Bradley and Cohn, Ltd.* v. *Ramsay & Co.* (1912), 106 L.T. 771; 28 T.L.R. 388, C.A.; 21 Digest 222, *567*.

(4) *Brinsmead* v. *Harrison* (1871), L.R. 6 C.P. 584; 40 L.J.C.P. 281; 24 L.T. 798; 19 W.R. 956; affirmed (1872), L.R. 7 C.P. 547; 21 Digest 584, *1615*.

(5) *Morris* v. *Robinson* (1824), 3 B. & C. 196; 5 Dow. & Ry. K.B. 34; 107 E.R. 706; 21 Digest 226, *589*.

(6) *Cooper* v. *Shepherd* (1846), 3 C.B. 266; 15 L.J.C.P. 237; 7 L.T.O.S. 282; 10 Jur. 758; 136 E.R. 107; 21 Digest 225, *582*.

(7) *Cooper* v. *Willomatt* (1845), 1 C.B. 672; 14 L.J.C.P. 219; 5 L.T.O.S. 173; 9 Jur. 598; 135 E.R. 706; 3 Digest 106, *316*.

(8) *Buckland* v. *Johnson* (1854), 15 C.B. 145; 2 C.L.R. 784; 23 L.J.C.P. 204; 23 L.T.O.S. 190; 18 Jur. 775; 2 W.R. 565; 139 E.R. 375; 21 Digest 222, *566*. A

(9) *Barnett* v. *Brandao* (1843), 6 Man. & G. 630, Ex. Ch.; on appeal, sub nom. *Brandao* v. *Barnett* (1846), 12 Cl. & Fin. 787; 3 C.B. 519; 8 E.R. 1622, H.L.; 43 Digest 516, *536*.

(10) *Rice* v. *Reed*, [1900] 1 Q.B. 54; 69 L.J.Q.B. 33; 81 L.T. 410, C.A.; 43 Digest, 536, *712*. B

(11) *Bishop* v. *Viscountess Montague* (1604), Cro. Eliz. 824; Cro. Jac. 50; 78 E.R. 1051; 43 Digest 512, *504*.

(12) *Marston* v. *Phillips* (1863), 3 New Rep. 35; 9 L.T. 289; 12 W.R. 8; 43 Digest 530, *665*.

(13) *Re Ware, Ex parte Drake* (1877), 5 Ch.D. 866; 46 L.J.Bcy. 105; 36 L.T. 677; 25 W.R. 641, C.A.; 43 Digest 530, *664*. C

(14) *Smith* v. *Baker* (1873), L.R. 8 C.P. 350; 42 L.J.C.P. 155; 28 L.T. 637; 37 J.P. 567; 43 Digest 536, *711*.

(15) *Whitehorn Bros.* v. *Davison*, [1911] 1 K.B. 463; 80 L.J.K.B. 425; 104 L.T. 234, C.A.; 39 Digest 535, *1458*.

Action for damages for conversion. D

In September, 1925, land of about ten acres called Brick Yard Shaw Lodge, Westfield, Sussex, part of the Coghurst Estate, was conveyed by M. C. Lord and his mortgagee, H. W. Reeves, to J. Noakes and his sister M. V. Noakes, in fee simple as tenants in common in equal shares. There was a reservation of all timber and timber-like trees as follows:

> E
>
> "There are excepted out of the hereditaments hereinbefore described and there are reserved unto the mortgagee and the vendor respectively and their respective heirs and assigns (a) All timber timber-like and other trees . . . with full right and liberty for the mortgagee and the vendor respectively and their respective heirs and assigns or other the owner or owners for the time being of the said timber and his and their servants and licensees to enter upon the hereditaments hereby assured or any part thereof at all times up to October 11, 1927, with or without carts . . . and to fell and remove in a proper and usual manner the said timber . . ." F

In December, 1925, M. C. Lord and his mortgagee conveyed to Coghurst Estates, Ltd., the said timber, timber-like and other trees. On April 1, 1926, the company sold the timber and trees to the plaintiff, who felled them and made them into planks. G Part thereof was removed by him before Oct. 11, 1927, but a considerable quantity remained. This delay was said to be due to the interference of J. and M. V. Noakes, who claimed that he had forfeited his interest therein.

On June 1, 1928, the plaintiff issued a writ against them claiming a declaration that the timber not removed before Oct. 11, 1927, was his property and an injunction restraining them from removing, selling or otherwise disposing of or H interfering with or damaging it, and from preventing the plaintiff from removing it and damages. The action was tried by CLAUSON, J., and he gave judgment for the defendants. On appeal this decision was reversed, and it was held that the property remained vested in the plaintiff, although not removed before Oct. 11, 1927, and they gave judgment for him for £250 for conversion by the defendants. Before the trial before CLAUSON, J., J. and M. V. Noakes purported to sell the I timber, planks, &c., remaining, to the defendants in the present action for £200, and they proceeded to remove it, the plaintiff not having taken any steps to enforce the order of the Court of Appeal, as, in his view, the defendants in the first action had no means of satisfying the judgment. He told the defendants in the present action that he considered the sale to them ineffective, as the vendors had no title, and asked for the return of the timber or payment of the value. The defendants repudiated liability, and the present action was commenced by the plaintiff claiming damages for conversion. The defendants pleaded that the plaintiff had not removed the timber, planks, &c., before Oct. 11, 1927, and had thereby lost all interest therein, and that it belonged to J. and M. V. Noakes; that at the time of its purchase and removal by them they (the defendants) had no notice of any claim by the plaintiff; that he knew of the purchase and stood by, and was, therefore, estopped from disputing the right of the removal; and that the judgment in *Ellis* v. *Noakes* (1) for £250 was a bar to these proceedings.

Vaisey, K.C., and *Wilfrid Hunt*, for the plaintiff, referred to *Re Gunsbourg* (2); *Bradley and Cohn, Ltd.* v. *Ramsay & Co.* (3); *Brinsmead* v. *Harrison* (4); Bullen and Leake's Pleadings, 8th Edn., p. 879; Pollock on Torts, 13th Edn., p. 375; Williams on Personal Property, 18th Edn., pp. 17, 18; R.S.C., Ord. 48 and Order 13, r. 5; *Morris* v. *Robinson* (5); *Cooper* v. *Shepherd* (6); *Cooper* v. *Willomatt* (7); and *Buckland* v. *Johnson* (8).

Grant, K.C., and *L. F. Potts*, for the defendants, referred to *Barnett* v. *Brandao* (9); *Rice* v. *Reed* (10); *Bishop* v. *Montague* (11); *Marston* v. *Phillips* (12); *Ex parte Drake* (13); *Buckland* v. *Johnson* (8); and *Smith* v. *Baker* (14).

Cur. adv. vult.

March 23. **LUXMOORE, J.**, read a judgment in which he stated the facts substantially as set out above, and continued: I gather that the defendant company at the time of their purchase of the timber had some knowledge that there was a dispute as to Mr. and Miss Noakes' title to the timber sold, for they insisted upon and were given an indemnity against any claim which might be made by any third party in respect of the timber, whether as to ownership or otherwise. Subsequently, Mr. Ellis ascertained that the defendant company had agreed to purchase the timber, and at the request of his solicitors one of the directors of the defendant company attended at the trial in the action of *Ellis* v. *Noakes* (1) in order to give evidence of this sale. The trial took place before Clauson, J., on Jan. 23, 1930, and he dismissed the action against Mr. and Miss Noakes on the ground that the plaintiff had no property in the timber after Oct. 11, 1927. There was an appeal from this order, and on April 9, 1930, the Court of Appeal reversed it, holding that the property in the timber remained vested in Mr. Ellis, although he had not removed it before Oct. 11, 1927, and in the result the Court of Appeal gave judgment for £250 for the plaintiff against Mr. and Miss Noakes. The material part of the order is in these words:

> "It is ordered that the defendants do pay to the plaintiff the sum of £250 by way of damages for the conversion of the timber."

The amount of the damages was fixed at this figure by Clauson, J., at the request of the parties at the trial. He said this in his judgment:

> "It is common ground here that for the convenience of all parties I should treat, and I do treat, this action as one in which, if the sale was one to which the plaintiff can object, the plaintiff is entitled to claim damages for the infringement of his rights occasioned by the sale, in other words, notwithstanding the sale may not have been before the action started, I may treat the action as an action for conversion of the timber by the defendant, and I proceed on that footing. The timber having been sold [to the defendant company in the present action] it is quite obvious that no injunction can be granted. That is a reason why the matter resolves itself into one for damages. Assuming for a moment that damages are payable by the defendants for having sold this timber, if I were of that opinion, I should be prepared on the materials before me to assess the damage at the sum of £250. It is perfectly true that I have before me an estimate of the value of the timber which is very considerably in excess of that sum. I have, on the other hand, some evidence from a gentleman who assisted professionally the defendants in regard to the sale that the bulk of the wood fetched £200. There was some not sold apparently and used by the defendants and allowance is made for that. I think also an allowance must be made for this. After the claim had arisen the title to the timber was

> not altogether free from doubt. The purchaser insisted on having an indemnity against claims, and I think I should not be doing injustice if I put the value just a little higher than the actual figure which in the circumstances could be got. If I assess the damages on the footing of the value of the timber converted, I should fix on the figure of damages £250."

The plaintiff has not taken any step to enforce the order of the Court of Appeal against Mr. or Miss Noakes. The reason he has given for not doing so is that it would be a useless waste of money, because he is satisfied by inquiry made on his behalf that neither Mr. nor Miss Noakes has any available means to satisfy the judgment, either wholly or in part.

The claim against the defendant company is for damages for conversion. The writ and statement of claim fixed the amount of such damage at £490, but at the hearing before me the parties by their counsel agreed that the value of the timber acquired by the defendant company should be taken to be £250, and that this sum should be awarded to the plaintiff in the event of the legal questions in this action being decided in his favour. The conversion relied on by the plaintiff in the present action is not the sale by Mr. and Miss Noakes to the defendant company, but the refusal by the defendant company to return the timber in compliance with the demand made on June 10, 1930, with notice of the fact that the vendors to the defendant company had no title to sell the timber. The defendant company defends the action on four grounds. First, the company says that at the time the timber was purchased from Mr. and Miss Noakes, and when it was removed from Brick Yard Shaw Lodge, it had no notice of the plaintiff's claim to the timber. Secondly, it says that the plaintiff knew that Mr. and Miss Noakes were minded to sell the timber to the defendant company and that with this knowledge he stood by and allowed the defendant company to purchase the timber and remove it from Brick Yard Shaw Lodge. Thirdly, that the judgment obtained by the plaintiff in his action against Mr. and Miss Noakes in the Court of Appeal on April 9, 1930, is a bar to this present action, because Mr. and Miss Noakes and the defendant company were joint tortfeasors, and the plaintiff by bringing his action against Mr. and Miss Noakes alone has elected to proceed against them only and cannot now proceed against the defendant company. And, fourthly, it says that the form of the judgment of the Court of Appeal is equivalent to a final election on the part of Mr. Ellis to recover the value of the timber from Mr. and Miss Noakes and to abandon his title to the timber itself, and, consequently, Mr. Ellis cannot now rely on that title as imposing any right to recover either the timber or damages for its conversion from the defendant company.

So far as the first point is concerned, I am satisfied that it makes no difference to the position of the defendant company whether it had or had not notice of the plaintiff's claim to the timber when the agreement to purchase it from Mr. and Miss Noakes was entered into or when the timber was removed by the defendant company under that agreement. If in fact the timber was at either of those dates the property of Mr. Ellis, any dealing with it so as to deprive Mr. Ellis of his property, whether with or without notice of his right, would constitute as against him a conversion of the timber. With regard to the second point, I am unable to find a tittle of evidence to support the suggestion that the sale of the timber to the defendant company was made with the knowledge of Mr. Ellis or that Mr. Ellis with knowledge of what was being done stood by and allowed the defendant company to purchase and remove the timber. The sale was, indeed, made after the writ in the action against Mr. and Miss Noakes was issued. It is true that Mr. Ellis obtained information as to the sale before the action was heard, because he invited one of the directors of the defendant company to attend at the trial to give evidence of the sale in order to prove the fact that the timber was converted by Mr. and Miss Noakes. I do not understand how it can be said in these circumstances that Mr. Ellis stood by so as to deprive himself of any right he might otherwise have against the defendant company. In my judgment, there is no substance in the second point. In order to succeed on the third point the defendant company must establish that the conversion in respect of which it is being sued is the same as that which constituted the cause of action against Mr. and Miss Noakes, namely, the sale to and purchase by the defendant company. As I have already pointed out, the conversion for which the defendant company is now sued is not the purchase of the timber, but the refusal by the defendant company to deliver up the timber to Mr. Ellis in compliance with the demand of June 10, 1930. If this refusal cannot be justified, it constitutes a tort quite distinct from that arising out of the sale and purchase agreement and one in which neither Mr. nor Miss Noakes took any part. In my judgment the third point affords no defence to this action.

The fourth point is one of greater difficulty. It is said that a judgment in trover for the value of property without actual satisfaction does not in any way affect the title to the property of the plaintiff or his right to recover on the judgment. A plaintiff in these circumstances, therefore, may exercise all his rights as owner notwithstanding the judgment. He may seize the property either from the defendant or from anyone else in whose hands it may be. Further, he may sue a third person for its specific restitution or for damages, and get a second judgment for the value of the property against a third person in respect of any other conversion committed either before or after the conversion on which the first action was brought. Of course, he cannot in any case by the exercise of his concurrent remedies obtain a double satisfaction. If he actually recovers the property, his judgment for its value becomes inoperative; and if he recovers its value he cannot exercise his right of recaption or enforce his judgment for specific restitution—in other words, if he receives the value from one defendant he cannot enforce his judgment against another. This summary is in substance taken from the well-known textbook on Torts by the late Sir John Salmond: see Salmond on Torts, 7th Edn., p. 416. The authorities on which it is based are stated to be *Brinsmead* v. *Harrison* (4); *Ex parte Drake* (13); *Morris* v. *Robinson* (5), and *Bradley and Cohn, Ltd.* v. *Ramsay & Co.* (3). Similar general statements to that quoted from Sir John Salmond's book are to be found in other well-known textbooks to which I was referred by counsel during the course of the argument, namely, Pollock on Torts, 13th Edn., p. 375; Halsbury's Laws of England (1st Edn.), tit. Trover and Detinue, vol. 27, p. 916; Bullen and Leake on Pleadings, 8th Edn., p. 879; and Mayne on Damages, 10th Edn., p. 395. If these statements are correct, they cover the present case. Counsel on behalf of the defendant company argued that the statement is too wide, and that its accuracy really depends on what is meant by the phrase, "a judgment in trover for the value of the property." He argued that a judgment of this kind is one for the value of the property and for damages, the judgment for the value to be reduced to the amount of the damages if the property is retained in specie; and that a judgment merely for the value without the alternative provision for the return of the property is not a judgment contemplated by the statement.

An examination of the authorities shows, I think, clearly that in each of the cases *Brinsmead* v. *Harrison* (4) and *Ex parte Drake* (13), the judgment relied on as a bar to a subsequent proceeding was in the alternative form. But this was not so in *Morris* v. *Robinson* (5) nor in *Bradley and Cohn, Ltd.* v. *Ramsay & Co.* (3). In *Morris* v. *Robinson* (5) the judgment relied on was for damages for the wrongful sale of certain chests of indigo by the owners of the ship in which they were being carried, the amount of the damages being limited to the value of the ship and freight, which was in fact considerably less than the actual value of the chests sold. Holroyd, J., in his judgment, said that the verdict recovered in the first action was not in law sufficient to bar or diminish the plaintiff's claim in the proceeding before the court, which was against the purchasers from the shipowners, because the ground of the first action was that the sale by the shipowners was wrongful, and, therefore, the action itself could not be a ratification of that sale. He went on to add:

> "But where in trover the full value of the article has been recovered, it has been held that the property is changed by judgment and satisfaction of the damages. Unless the full amount is recovered, it would not bar even other actions in trover."

LITTLEDALE, J., said: "But an action of trover is clearly no bar, unless the full value has been recovered. . . ."

In *Bradley and Cohn, Ltd.* v. *Ramsay & Co.* (3) the facts were as follows. Bradley and Cohn, Ltd., were shipping merchants and agents doing business between London, South Africa and Australia. The defendants, Ramsay & Co., carried on business as jewellers in London. The plaintiff company brought its action for the wrongful detention, and, alternatively, conversion, of a parcel of black opals. The defendants by way of defence alleged, among other things, that on March 22, 1909, they bought the opals from one Isidor Braun for £300, that he was at the time of the purchase by the defendants, Ramsay & Co., the owner of the opals or entitled to pass the property in them to a purchaser. The defendants put in certain alternative defences, but they are not material for consideration in the present case. The circumstances in which the sale by Braun to the defendants was made are stated in the report to be as follows. The plaintiff company had received the opals from a firm abroad for exhibition in this country, with instructions to sell them if not less than £750 could be obtained for them. The opals were exhibited, but no sale was effected. Shortly afterwards Isidor Braun persuaded the plaintiff company to allow him to have the opals on approval. Braun declined to give £750 for the stones, but offered £300 for them. This offer was communicated to the owners, who refused to accept it. Before the owners' refusal had been received, Braun purported to sell the opals for £300 to the defendants, who acted with complete bona fides in the transaction. When the plaintiff company demanded the return of the opals from Braun, it was discovered that he had sold them to the defendants. Thereupon the plaintiff company brought an action against him for £750, or, alternatively, for the return of the stones or damages. This action did not come to trial, because Braun's solicitor wrote offering to consent to judgment for £750, and judgment was, accordingly, entered against him for that amount and costs. After the judgment was obtained, Braun was adjudicated a bankrupt. The plaintiff company not having recovered the £750, or any part of it, brought the action against the defendants for the opals or £750, their value, of £750 damages for their detention.

PHILLIMORE, J., held that the plaintiff company was debarred from recovering against the defendants by reason of the form of judgment in the action against Braun. The learned judge says this (106 L.T. at p. 773):

> "I quite agree that an ordinary judgment in detinue does not pass the property until the damages are paid. The case of *Re Ware, Ex parte Drake* (13), is clear on that subject, and the procedure on execution of a judgment in detinue suing in the writ for delivery, or for an order for the delivery of a chattel shows the same. But here the plaintiffs did not take judgment in that form. If they had taken judgment for £750 and 1s. damages, the £750 to be reduced to 1s. for damages if the goods were returned, they would have been in the position of the plaintiff in *Re Ware, Ex parte Drake* (13). But whether it was of importance to Braun to have consented to judgment in another way, or whether it was not, Braun's solicitor offered another form of judgment, and that judgment was the one which the plaintiffs accepted. I think that they accepted a judgment which excluded them from a right to recover the goods, and amounted to a legal transfer of the goods to Braun. That being so, the principle applied by my Lords in the recent case of *Whitehorn Bros.* v. *Davison* (15) in the Court of Appeal governs the present case. The subsequent transfer to Braun forwards the title of the defendants under Braun. It is in the nature of a further and better assurance of the sale to Braun. Upon those grounds and very reluctantly I think that the plaintiffs fail to recover."

A He then dealt with the question whether an action for detinue is an action of contract or tort. I need not refer to that part of his judgment, but he concluded with this: "I think that the plaintiffs parted with their right to have these goods back from Braun for a judgment of £750."

The case went to the Court of Appeal. That court, which was composed of LORD COZENS-HARDY, M.R., and BUCKLEY, L.J., and KENNEDY, L.J., affirmed the B decision of PHILLIMORE, J. The first judgment was delivered by KENNEDY, L.J. The important passage is as follows (106 L.T. at p. 774):

> "The plaintiffs' contention is that, though they have sued Braun to judgment, they are, notwithstanding, entitled to sue the persons to whom Braun disposed of the opals. The defendants say that the action is not maintainable because the plaintiffs have obtained judgment against Braun, and they cannot sue C them, having obtained that judgment. The plaintiffs rely on the case of *Brinsmead* v. *Harrison* (4). The judgment of WILLES, J., in that case was not questioned on this point in the Court of Exchequer on appeal, and has never been dissented from since. The plaintiffs on the authority of that case said that, although they had recovered judgment against Braun, the judgment not having been satisfied, it did not result from it that the property in the goods D was vested in Braun, and it was, therefore, open to them to make a claim against the present defendants. No one questions the judgment in *Brinsmead* v. *Harrison* (4), and the only point that we have now to decide is whether it is applicable to the present case. PHILLIMORE, J., has held that it is not applicable, because the present plaintiffs did not take the ordinary judgment in detinue. I myself, though I felt some difficulty in the course of the argu- E ment, have come clearly to the conclusion that the view that the learned judge took is the right view, and that, looking at the terms of the letter written by Braun's solicitor which were accepted by the plaintiffs and carried out in the judgment that they obtained against Braun, the plaintiffs did obtain a judgment for the price of these very opals. The authority of *Brinsmead* v. *Harrison* (4) has, therefore, no application to the present case. The judgment F obtained by the present plaintiffs was different from the judgment in that case, and prevents the plaintiffs from suing again for the opals."

I think the key to the judgment is to be found in the passage from the judgment of BUCKLEY, L.J. He says this (106 L.T. at p. 775):

> "The second point is this: The plaintiffs brought an action against Braun, and G they took a judgment in that action. What was the effect of that judgment? KENNEDY, L.J., has dealt with that at length, and I have little to add to what he has said. It seems to me that in that action, looking at the pleadings, the claim which the plaintiffs were putting forward—whether rightly or wrongly is immaterial for this purpose—was this: These goods were delivered to Braun upon the terms that he should either pay £750 or return the goods. He did H not return the goods; he is liable to pay £750, and the plaintiffs claim payment by him of that sum of £750. They were in fact affirming, although it may be with regard to what I have said that the appro contract was at an end. On June 8, 1909, Braun had said:
>
> > 'I think if you deal carefully with your correspondent that you will be able to obtain a substantial reduction for me on the price asked, for which I am I responsible.'
>
> Then the letter of Oct. 15, 1909, I think, was written upon this footing: 'I have looked into the matter for my client, and I now accede to your view that you are entitled to sue him for £750—not for damages measured by £750, but you are entitled to sue him for £750. That may have been the footing that on March 22, 1909, there was a continuing appro contract, and under s. 18, r. 4 (a) of the Sale of Goods Act, 1893, the property had passed, which it may be they were affirming was right. I think that that was the footing upon which the judgment was given. There was no allegation at all that £750 was the value

for the purpose of recovering value as distinguished from the price; there is no A
such allegation in the pleadings. The defendant Braun was acceding to the view that he was responsible for the price, and judgment was being taken for the price. It may either be expressed in that way or in the way that the learned judge in the court below expressed it when he used these words:

> 'I think that the plaintiffs parted with their right to have these goods back B
> from Braun for a judgment for £750.'

That, of course, means that at the date of that judgment—which, I think, was Oct. 15, 1919—the property passed. In my view the property passed at the earlier date—namely, at the date when the letter was written—when the bargain was made between the parties. But at any rate it seems to me that the learned judge in the court below was right in deciding that the judgment C
amounted to an affirmation as between the plaintiffs and Braun of Braun's property in the goods. Having affirmed the property in the goods, they cannot maintain this subsequent action."

It seems to me to be plain that the judgment in the action against Braun was consented to by him and accepted by the plaintiff company on the footing that there was a contract for sale and purchase by Braun for £750; and on this basis a D
judgment for £750 would necessarily operate as a recognition of Braun's title. In such circumstances it was impossible for the purchasers from Braun to be guilty of conversion. A judgment for damages for conversion obviously differs from one for an agreed purchase price. I am unable to understand how it can be said that a mere judgment for damages for conversion constitutes an election by the owner of the property to confirm any title to it in the convertor, for the convertor cannot E
have any title which can be confirmed. The title which a convertor subsequently obtains through satisfaction of the judgment for the value of the property converted is not by confirmation, but by estoppel. It was contended by counsel that the decision of the Court of Appeal in *Re Gunsbourg* (2) supported his argument. He based his argument on the statement by WARRINGTON, L.J., that the orders relied on were in effect the same as the ordinary alternative judgment for delivery of F
goods or their value ascertained by the jury, and he contended that this statement established by implication the proposition that the acceptance of a judgment for the value of the goods, without any alternative order for the delivery of the goods, constituted an election by the plaintiff to abandon his title to the property converted. I do not so read the judgments, nor do I think there is anything in the decisions or judgments in that case which is contrary to the other authorities to G
which I have referred. It is true that a plea of judgment in an action for trover was held in *Buckland* v. *Johnson* (8) to be a bar to a subsequent action where there had been no satisfaction of the former judgment. This decision is in conflict with the other authorities and was not followed in *Brinsmead* v. *Harrison* (4), but it is to be noticed that the judgment there relied on was apparently a judgment for the value of the goods without any alternative provision for the delivery up of the H
goods.

The conclusion which I have come to, after a consideration of the cases, is that whether the judgment is in the alternative form, or is merely a judgment for the value of the goods or for damages for their conversion, it does not by itself, and apart from some special circumstances, divest the owner of the property of his title thereto unless and until the judgment is fully satisfied. In the present case the I
form of the judgment against Mr. and Miss Noakes is for £250 damages for conversion. This is not the price of the timber paid to them by the defendant company, but the sum fixed by the judge as the value of the timber at the request of the parties. It is, I think, impossible to hold that there are in the present case any special circumstances sufficient to constitute any confirmation by the plaintiff of any title to the timber in Mr. and Miss Noakes, for in fact they had no such title, and this was the basis of the plaintiff's complaint in the action. Nor can it, in my judgment, be properly said that the plaintiff—by accepting the judgment in

the form he did in the action against Mr. and Miss Noakes—conferred any title on them or either of them or on the defendant company by estoppel. In my judgment, for the reasons I have endeavoured to express, the defendant company has failed to justify its refusal to deliver up the timber, and I, accordingly, give judgment for the plaintiff for £250, the agreed amount of the damages for its conversion. The defendant company must pay the plaintiff's taxed costs.

Solicitors: *Kingsford, Dorman & Co.*, for *Dawes, Son & Prentice*, Rye; *Williamson, Hill & Co.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

BLEACHERS ASSOCIATION, LTD., AND ANOTHER *v.* CHAPEL-EN-LE-FRITH RURAL DISTRICT COUNCIL

[CHANCERY DIVISION (Luxmoore, J.), November 16, 1932]

[Reported [1933] Ch. 356; 102 L.J.Ch. 17; 148 L.T. 91; 96 J.P. 515; 49 T.L.R. 51; 76 Sol. Jo. 902; 31 L.G.R. 88]

Water—Riparian rights—Underground water becoming surface stream—Need of riparian owner to prove flow in defined channel underground.

The plaintiffs, who were the owners and tenants of works on the bank of a stream which was fed by a spring supplied with underground water, sued the defendants, claiming an injunction to restrain them from interfering with such underground water on their own land whereby the plaintiffs alleged they would suffer damage.

Held: the question of fact to be determined in such a case was whether the underground water appearing at a given point and then becoming a surface stream came from subterraneous percolation or oozing or flowed in a defined channel or watercourse underground to the point where it appeared; to decide that question it lay on the party asserting his right to the flow to show affirmatively, not as a matter of fact, but as a reasonable inference from known facts, that the water came to the place of emergence, not by percolation or oozing, but in a defined channel; this the plaintiffs had failed to prove; and, therefore, they were not entitled to the injunction which they claimed.

Bradford Corpn. v. *Ferrand* (1), [1902] 2 Ch. 655, explained.

Notes. As to riparian rights, see 33 HALSBURY'S LAWS (2nd Edn.) 593 et seq., and for cases see 44 DIGEST 11 et seq.

Cases referred to:

(1) *Bradford Corpn.* v. *Ferrand*, [1902] 2 Ch. 655; 71 L.J.Ch. 859; 87 L.T. 388; 67 J.P. 21; 51 W.R. 122; 18 T.L.R. 830, D.C.; 44 Digest 35, *262*.

(2) *Ewart* v. *Belfast Guardians* (1881), 9 L.R.Ir. 172; 44 Digest 34, *248g*.

(3) *Dickinson* v. *Grand Junction Canal Co.* (1852), 7 Exch. 282; 21 L.J.Ex. 241; 18 L.T.O.S. 258; 16 Jur. 200; 155 E.R. 953; 44 Digest 12, *40*.

(4) *Chasemore* v. *Richards* (1859), 7 H.L.Cas. 349; 29 L.J.Ex. 81; 33 L.T.O.S. 350; 5 Jur.N.S. 873; 23 J.P. 596; 7 W.R. 685; 11 E.R. 140, H.L.; 44 Digest 34, *252*.

(5) *Black* v. *Ballymena Township Comrs.* (1886), 17 L.R.Ir. 459; 44 Digest 35, *k*.

Action for an injunction.

The following statement of the facts are taken from the judgment: The plaintiffs, Bleachers Association, Ltd., and Bennett and Jackson, Ltd., which is a subsidiary company of the association, claim an injunction to restrain interference by the defendant council with a spring in the Peak District of Derbyshire known as the Rainside Spring, so as materially to diminish the quantity of water flowing into a stream known as the Randal Carr Brook through a tributary of that stream known as the Meveril Brook. The association are the owners of bleachworks which are situate on the left bank of the Randal Carr Brook, and the plaintiff company is the tenant at will of the association of those works. The defendant council is the local authority for the rural district in which the Rainside Spring is situate. Recently the council acquired, for the purpose of supplementing the public water supply of the district, a considerable area of moorland in the neighbourhood of the Rainside Spring, including the actual site where it emerges from the hillside. In July, 1931, the defendant council was proposing to sink a shaft in the hillside to the south of the Rainside Spring at a point about thirty-one feet from the spring's point of issue, and to drive adits from that shaft in several directions. One of such adits was to be driven in a south-easterly direction from the proposed shaft to a point behind and within twenty-four feet of the point of issue. The plaintiffs contend that the waters of the Rainside Spring flow in a defined underground channel, or in a number of such channels, and that this fact was, at the date of the issue of the writ, known with reasonable certainty. They contend that certain excavations which have been made since the issue of the writ establish the existence with reasonable certainty of defined underground channels constituting the Rainside Spring. The defendant council contend that there is, or are, no defined underground channel or channels constituting the Rainside Spring before its point of issue, and that, even if such defined underground channel or channels existed, it was impossible for anyone to have any knowledge of that existence without actual excavation. It is now contended, on behalf of the defendant council, that the excavations actually made have failed to prove the existence of any defined underground channel. The contention of the defendant council is that the water which feeds the Rainside Spring before it reaches the point of issue percolates through the surrounding soil and rock and does not run in any defined underground channel.

A plan of the work proposed to be carried out by the defendant council was sent to the plaintiffs' advisers on July 14, 1931, and, as the result, the writ in this action was issued on the same day. Leave to serve notice of motion with the writ was obtained, and on July 17 the plaintiffs moved for an injunction to restrain the defendant council from proceeding with the proposed work pending the trial of the action. On July 24, 1931, I [Luxmoore, J.] gave directions for a speedy trial, and on Oct. 13, 1931, the action came on for hearing. After counsel for the plaintiffs had opened the case it was suggested that the question whether there was, or were, a defined underground channel or defined underground channels could be ascertained and determined with certainty if an excavation were made at an agreed point. In the result, the parties agreed that the defendant council should proceed, under observation of the plaintiffs' advisers, with the excavation of the proposed shaft and a trench running into it along the line of the proposed adit. The case accordingly stood over for this work to be done. The excavation work, which was agreed upon, has now been completed. The plaintiffs contend that the excavations have established that the water which emerges from the hillside as the Rainside Spring was running into the site of the excavated shaft and trench in defined underground channels, and that the excavation has done nothing more than establish what was known with reasonable certainty before the work was done—that is to say, it has established the existence of those defined underground channels which an expert geological survey of the site prognosticated would be found. The defendant council contends that the excavations have established what was contended on its behalf before the excavations were made, namely, that the water which has been tapped during, and by reason of, the work is nothing more than percolating water, that it does not run in any defined channel in the proper sense of that phrase, and that if, contrary to its contention, it should be held that the water runs to the Rainside Spring in a defined underground channel, or defined under-

A ground channels, this fact could not have been known to anyone, no matter how expert a geologist, unless and until the excavations had, in fact, been made.

Grant, *K.C.*, and *Harold Christie* for the plaintiffs.
Vaisey, *K.C.*, and *G. D. Johnston* for the defendants.

LUXMOORE, J., stated the facts and continued: It is, I think, necessary for B me to determine, first, whether the water which runs into the excavations is percolating water, or whether it runs in a defined underground channel or defined underground channels. If the first alternative is established, there is an end of the case, for it is well settled that there is no legal ground on which the defendant council could be prevented from collecting percolating water, no matter how serious the result may be to the plaintiffs. If, on the other hand, it is established that the C water runs in a defined underground channel or defined underground channels, it is necessary to consider whether this fact was "known" at the date of the issue of the writ, or is now known. In this connection it is necessary to consider the meaning of the word "known." It was decided by FARWELL, J., in *Bradford Corpn.* v. *Ferrand* (1) that, unless the existence and course of a defined underground channel is known with reasonable certainty, a lower riparian owner can have no D right of action against the owner of the land through which the channel flows for abstraction of the underground water. The headnote [of the report of the case in the Law Reports] contains the following passage:

> "If underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian E proprietors on the banks of the stream have no right of action for the abstraction of the underground water."

It seems to me that this statement is too wide, and does not accurately represent the effect of the judgment, for the statement I have just read from the headnote would appear to exempt the landowner, through whose land it has been ascertained F by excavation that water flows in a defined underground channel from all subsequent liability for abstraction of that water, although the abstraction took place long after the existence of the defined channel had been ascertained as a matter of precise knowledge. In my view, the judgment was intended to deal with, and ought to be read as confined solely to, the case where the excavations, although disclosing a defined channel, do not establish with reasonable certainty the continuation and course of that defined channel through the surrounding land, for it G seems to me that where an excavation has disclosed the existence of a defined channel, then, at least so far as the excavation extends, that channel has become a known channel, and any subsequent act of interference with its known flow would inflict an injury on the lower riparian proprietor capable of prevention by appropriate action. That some limitation on the meaning of the word "known" was H contemplated by the learned judge is, I think, clear from the passage where, after quoting from the judgment of FITZGIBBON, L.J., in the Irish case of *Ewart* v. *Belfast Poor Law Guardians* (2) (9 L.R.Ir. at p. 205), he refers to the river Mole. The quotation and passage is as follows ([1902] 2 Ch. at p. 664):

> " 'In my opinion it is impossible to recognise a natural right which would subject the lands of another to the burden of maintaining an unknown I flow of water (whatever be the geological character of its channel), without introducing every difficulty which has already prevailed to prevent the recognition of such a right in respect of "percolating" water, strictly so called. It appears to me impossible to find the test of the existence of . . . natural rights . . . in ex post facto geological investigations; yet it is by some means alone that any difference could be discovered between oozing or percolating water and water running through or collecting in underground fissures.'

There is nothing inconsistent with this view in cases like that of the river Mole, where a river disappears into the ground and what is apparently the

> same river re-appears on lower ground. In such cases there is a terminus a quo and a terminus ad quem, and the owners of land between the two and their riparian neighbours can fairly be presumed to know of the existence and course of the stream. As POLLOCK, C.B., says in *Dickinson* v. *Grand Junction Canal Co.* (3):
>
> > 'If the course of a subterranean stream were well known, as is the case with many, which sink underground, pursue for a short space a subterranean course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground.'
>
> That passage was cited with approval by LORD CHELMSFORD in *Chasemore* v. *Richards* (4). At any rate, cases of that class rest on the knowledge, actual or presumed, of the existence of an underground stream."

It is, I think, clear that the question whether the lower riparian owner had any right to prevent abstraction or interference by acts subsequent to the making of the excavation which established the existence of the defined underground channel was not considered by FARWELL, J., for the case came before him for argument on the point of law raised by the defence in that action in the following passage:

> "Assuming that underground water flows or flowed to the spring in a defined channel, but that the existence and course of that defined channel is not and cannot be ascertained or known except by excavation of the soil, the plaintiffs have no right of action for the abstraction of such underground water, and are not entitled to maintain this action."

The point of law was, I think, confined to the case where the existence and course of the defined channel is not known at the date of the issue of the writ, and cannot be ascertained except by excavation subsequent to its issue, for once it is established that there is a defined underground channel, and that its course can be ascertained with reasonable certainty, the rights of the lower riparian owner are crystallised, and any fresh act of interference or abstraction which, ex hypothesi, must be done with knowledge of those rights, must then be actionable. In other words, the liability for abstraction or interference must depend on the knowledge of the actor at the time the act complained of is committed, and not on the manner in which that knowledge has been obtained. Of course, if the result of the excavation is only to define the course of the channel so far as that channel is uncovered, the landowner will be under no liability in respect of acts which, in fact, interfere with the flow of the water in any part of the underground channel which has not, as the result of such excavation, been ascertained to exist with reasonable certainty. To put a concrete case, if, as the result of excavation, it is established that a defined channel exists over an ascertained length, but there is no reasonable certainty as to the continuation of that channel, or of its course through the unexcavated ground, then the lower riparian owner cannot legally object to any act by the landowner which may result in the abstraction of, or interference with, water from or in the ascertained defined channel if such abstraction or interference results, not from direct interference with the ascertained defined channel, but from interference with the defined channel as ascertained by excavation subsequent to the interference. I think the headnote [in the LAW REPORTS] should be amended by reading into it the word "subsequent" immediately before the word "excavation," so that it reads:

> "If underground water flows in a defined channel into a well supplying a stream above ground, but the existence and course of that channel are not known, and cannot be ascertained except by subsequent excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water."

A I think that the words "defined" and "known," when used in the statement of the rule of law that subterranean water can only be the subject of riparian rights when flowing in defined and known channels, must be construed in the manner in which they were defined by CHATTERTON, V.-C., in *Black* v. *Ballymena Township Comrs.* (5). In that case the learned Vice-Chancellor construed "defined" as meaning "a contracted and bounded channel, although the course of the stream B may be undefined by human knowledge," and "known" as meaning "the knowledge, by reasonable inference, from existing and observed facts in the natural or pre-existing condition of the surface of the ground." I respectfully refer to and adopt what he says in his judgment (17 L.R.Ir. at p. 474). After stating that it is well established that no riparian rights exist in respect of subterranean waters unless they are shown to flow in defined and known channels, he goes on to point C out that a difficulty appears to exist as to the application of that rule by reason of the use of the word "known" in connection with the word "defined," and he says:

> "It does not seem to have been sufficiently laid down as yet what the nature or extent of the knowledge is which must be proved to exist in order to constitute the riparian relation. It cannot mean that a channel should be visible D throughout its course, which would be an impossibility from the very fact of its being subterranean. In considering this question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel; but must be a knowledge, by reasonable inference, from existing and observed facts in the natural, or rather the pre-existing, condition of the surface of the ground. The onus of proof lies, of E course, on the plaintiff claiming the right, and it lies upon him to show that without opening the ground by excavation, or having recourse to abtruse speculations of scientific persons, men of ordinary powers and attainments would know, or could with reasonable diligence ascertain, that the stream, when it emerges into light, comes from and has flowed through, a defined subterranean channel. The instance given in some of the cases of a stream F sinking underground when it reaches a certain place, and pursuing for a short space a subterranean course, and then emerging, shows plainly the kind of knowledge required. No one knows as a matter of fact that it flows underground from the one point to the other in a defined channel, or indeed even that it is the same stream; but our reason, grounded on our knowledge of ordinary natural laws, and on the impossibility or great improbability of the G phenomena being otherwise accounted for, leads to an inference of fact, amounting practically to knowledge, that it is the same stream, and that it has flowed underground in a defined channel. The question of fact to be determined in such cases is whether the water appearing at a given point, and then becoming a surface stream, comes from subterraneous percolation or oozing, or flows in a defined channel or watercourse underground to the point H where it so appears; and for the decision of that question it lies on the party asserting his right to the flow to show affirmatively, not as a matter of fact, but as a reasonable inference from known facts, that the water comes to the place of emergence, not by percolation or oozing, but in a defined channel. Beyond this I do not think proof of knowledge can be required without destroying the claim of right to the flow of underground streams altogether."

I Let me now apply what I have stated to be my appreciation of the law to the facts of this case, so far as the Rainside Spring is concerned. The plaintiffs called no expert witness, but I have had the benefit of the evidence of an experienced geologist called on behalf of the defendant council. He has made a study of the conditions under which subterranean water exists in the Pennine Range, and has made many surveys in the Chapel-en-le-Frith district, and particularly of Combs Moss, from which I think all the streams mentioned, including the Rainside Spring, emerge. Geologically, Combs Moss is occupied beneath the peaty topsoil by a bed of sandstone locally called "third grits." This sandstone is pervious to water. The bed is of an average thickness of 150 ft. Immediately below this bed of sandstone is a thick bed of shale. The shale is impervious to water, and therefore it is unnecessary to consider, for the purposes of this case, the lower strata. Combs Moss slopes from a southerly direction towards the north, and the shale bed tilts in the same direction. Mr. Morton graphically described the impervious shale bed as forming a saucer holding the porous sandstone bed which tilted in the same direction as the slope of the hillside. The top of the shale bed on the one side is between 1,550 ft. and 1,600 ft. above ordnance datum, and on the other side the level varies from between 1,300 ft. and 1,250 ft. The sandstone, or grit, which lies in this shale saucer is intersected by systems of joints. These joints run vertically and horizontally, the vertical joints are called fissures, and the horizontal joints are called bedding planes. It is usual to find the systems of fissures running in more or less parallel directions intersected at right angles by other parallel systems of fissures. The shale saucer, being impervious, holds up the rainwater which has fallen on the surface of the moor and has penetrated through the sandstone itself and the fissures and bedding planes contained in it, with the result that at its lower levels the sandstone is saturated. The level of saturation in the sandstone is known as the water table. The whole of the water in the saturated area must gradually move in the direction of the tilt of the shale bed, that is, towards the side of Combs Moss on which the Rainside Spring is situated.

The excavations made on behalf of the defendant council were started about Nov. 24, 1931; a shaft some 8 ft. square was sunk with a trench 5 ft. wide running from the shaft in a south-easterly direction. The excavations were made in the hillside and were dug in a slope in conformity with the vertical slope of the hill. The excavations disclosed successive layers of broken stone and marl until the stratified sandstone rock was reached at a depth of about 12 ft. No water was observed until a depth of between 19 ft. and 20 ft. was reached, although the sound of running water appears to have been heard before it was actually reached in the excavation. When the excavation was between 19 ft. and 20 ft. deep, water was discharged into the shaft in considerable quantities from two fissures found to exist in the rock. The excavation disclosed that the sandstone which had been uncovered possessed the same features as were displaced in the sandstone already exposed in the district, namely, the existence of systems of intersecting fissures and bedding planes. The fissures from which the water was seen to flow into the shaft were the largest fissures disclosed, but water could be seen to be exuding from the smaller fissures and cracks, and from the sandstone itself. Mr. Morton said that almost every crack and fissure in the excavations showed this, and it was on this account as well as from his examination of the sandstone that he based his conclusions that, at the depth of about 19 ft. to 20 ft. in the shaft, the top of the water table in the district had, in fact, been reached.

Mr. Morton suggested that if the trench and shaft were excavated to a lower depth this fact would clearly be established. He pointed out that the top of the water table must necessarily vary in wet and dry seasons, and that his observations in the excavations made satisfied him that the highest point to which the water table had risen during the period of excavation was at the time when the water flowed out of the two main fissures at the points I have already mentioned at a depth of between 19 ft. and 20 ft. in the shaft. Mr. Morton stated that the lowest level to which the water table fell during the period of his observations was the level at which the water stood at the time of his last visit a few days before the trial of the action. I am satisfied by the evidence of Mr. Morton that, although the water was found to flow into the excavations in considerable quantities from these two main fissures, and also from one other fissure disclosed in the trench, yet the presence of the water in those fissures at the depth reached was in no way exceptional, but was, in fact, the condition found in the narrower fissures and cracks which were also disclosed in the shaft and trench, and I am further satisfied that that condition is what geologists expect to find throughout the district. It is true that when the fissures were reached and cut, water was found to flow out of them

A into the lower parts of the excavations in considerable quantities, because the excavations had been carried below the top of the water table at those points. The excavations established that fissures of varying width existed, but there was nothing to prove that the particular fissures exposed, or any one of them, continued from the point of exposure to the point where the Rainside Spring emerges from the hillside in the sense that these fissures, or any of them, could properly be described B as constituting defined channels, or a defined channel. I have come to the conclusion that the water disclosed in the excavations is the water percolating through the soil and rock of the district, including the fissures, cracks, and bedding planes existing in the rock, and that the water issuing from the three fissures to which I have referred does not run in a defined channel. I do not think that anything in the evidence of the plaintiffs' witness, Mr. Lomax, as to his observations C and experiments is in any sense at variance with this conclusion. Indeed, I think that Mr. Morton accepted those observations and experiments as being entirely consistent with the conclusions he drew as an expert geologist from his own observations.

In my judgment, the plaintiffs have failed to establish that the water which emerges as the Rainside Spring flows in any defined underground channel or chan- D nels, and, consequently, they have failed to establish any right to prevent the interference by the defendant council with the flow of underground water into the Rainside Spring. If, however, I am wrong in my conclusion, and I ought to hold —contrary to the view expressed by me—that the underground water runs in a defined underground channel, I am satisfied by the evidence that before any excavation was made it was quite impossible to establish that such defined under- E ground channel existed, or that its course was known or ascertained. Further, I am satisfied that, notwithstanding the excavation, it is at the present time impossible to prove that any defined channel exists in the ground which remains unexcavated, or, a fortiori, to point out the course of any such channel beneath the unexcavated ground. In other words, I hold that the plaintiffs are unable to prove that the underground water, even if it flows in a defined channel, flows in a F known defined channel. On either view of the case, I hold that the plaintiffs have failed to establish any legal right to the uninterrupted flow of any underground water. Consequently, I hold that the action fails, and I dismiss it with costs.

Solicitors: *Patersons, Snow & Co.*, for *Wilson, Wright, Earle & Co.*, Manchester; *Moodie, Sons, & Brown*, for *Bennett, Bunting & Co.*, Chapel-en-le-Frith.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

BEST *v.* BUTLER AND ANOTHER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Macnaghten, JJ.), April 28, 29, 1932]

[Reported [1932] 2 K.B. 108; 101 L.J.K.B. 759; 147 L.T. 99; 96 J.P. 303; 48 T.L.R. 481; 30 L.G.R. 315; 29 Cox, C.C. 482]

Trade Union—Offence—Wilfully withholding moneys of union—Continuing offence—Need to prove money still in possession of defendant—Sum withheld by two persons—Unascertainable proportions—Order against each for whole sum—Trade Union Act, 1871 (34 *&* 35 *Vict.*, *c.* 31), *s.* 12.

The offence of "wilfully withholding" the moneys of a trade union contrary to s. 12 of the Trade Union Act, 1871, is a continuing offence.

Where a sum of money is withheld by two or more persons in unascertainable proportions an order may be made against each for the whole sum.

An official of a trade union was charged with having committed the above offence on a certain date, and the magistrate dismissed the information on the ground that there was no evidence that sums of money, which had come into his possession prior to that date and had not been accounted for by him to the union, were still in his possession at the date of the information, and that, therefore, they could not be said to have been wilfully withheld.

Held: it was not necessary for the prosecution to prove that the sums of money were still in the possession of the official at the date of the information, and the case must go back to the magistrate for him to hear further evidence.

Notes. As to offences connected with trade unions, see 32 HALSBURY'S LAWS (2nd Edn.) 502–505, and for cases see 43 DIGEST 109, 110. For Trade Union Act, 1871, see 25 HALSBURY'S STATUTES (2nd Edn.) 1244.

Case referred to:

(1) *Pullen* v. *Carlton*, [1918] 2 K.B. 207; 87 L.J.K.B. 904; 119 L.T. 82; 82 J.P. 153; 26 Cox, C.C. 296; 16 L.G.R. 770, D.C.; 15 Digest (Repl.) 863, *8297*.

Case Stated by a metropolitan police magistrate.

The appellant, Best, on behalf of the Chief Registrar of Friendly Societies, preferred an information under s. 12 of the Trade Union Act, 1871, against the respondents, Butler and FitzGibbon, charging them that they

> "on March 30, 1931, did unlawfully withhold moneys of the Army Clothing Department Employees' Union, a trade union registered under the Trade Union Act, 1871, namely, the sum of £379 4s. 3d."

At the hearing of the information it was proved or admitted that at all material times (except from April to September, 1926, when he was absent through illness) Butler was the secretary of the union. During the period of Butler's absence all moneys received from the collectors were handled by FitzGibbon, who had become the treasurer on June 13, 1924, by resolution of that date. At all material times it was the secretary's duty to keep a record of income and expenditure, to pay petty cash accounts under £1, to prepare the annual general statement required by the Trade Union Act, 1871, and to send a copy of this to the registrar and each member at the appointed time. At all material times it was the treasurer's duty to receive money from the collectors of contributions to the general fund of the union, to render true accounts of these, and to bank all moneys received at least once a month. These duties had not been regularly carried out. Until 1926 moneys collected were handed to Butler, and thereafter, with certain exceptions, to FitzGibbon, who made payments from time to time to Butler for petty cash, but neither of them kept or produced any records of those payments. FitzGibbon kept a treasurer's cash-book till 1927, when he discontinued keeping it, as the accounts were in a state of confusion. This cash-book was destroyed by FitzGibbon, but all moneys were duly handed over by the collectors and duly recorded

A in another cash-book, which Butler had kept in his own handwriting and had not been handled by any persons other than the defendants. The last annual general meeting was held on March 30, 1931, the date of the alleged offence. Various discrepancies were proved, amounting in all to £379 4s. 3d.

At the close of the complainant's case Butler's counsel submitted that the summons was bad because it did not allege that Butler had in his possession the money B alleged to be withheld; that there was no evidence that he had had the alleged or any sum in his possession; and that the information was out of time by virtue of s. 11 of the Summary Jurisdiction Act, 1848 [see now s. 104 of the Magistrates' Courts Act, 1952], because, if Butler withheld any money, it was money which came into his possession more than six months before the date on which the information was laid. For the prosecution it was argued, inter alia, that the prosecu- C tion was not out of time because withholding was by its nature a continuing offence. Without hearing evidence for the respondents, the magistrate dismissed the information on the following grounds:

> "(i) Although there was a discrepancy, a man cannot withhold what he has not got, and the whole case for the prosecution was to show that the money D had been squandered. If the section had been 'neglect or refuse to deliver' the matter would have been different. (ii) If I found the [respondents] guilty of the offence charged, I was bound as a matter of law to make an order for the refund of the amount referred to in the summons—namely, £379 4s. 3d.—and I could not make an order against both [respondents] to refund the total sum because the society would get double if they both paid, and I had no E evidence that each had had half or any other proportion."

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Wilfrid Lewis* for the appellant.

W. R. E. Borregaard for the respondent Butler.

The respondent FitzGibbon was not represented.

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LORD HEWART, C.J.—This is a Case stated by one of the magistrates of the police courts of the metropolis. It arises in the following way. An information was preferred on behalf of the Chief Registrar of Friendly Societies under the Trade Union Act, 1871, against one J. G. Butler and one G. FitzGibbon, for that on March 30, 1931, in St. Gabriel's Schoolroom, Glasgow Terrace, Pimlico, S.W., G they did unlawfully withhold moneys of the Army Clothing Department Employees' Union, a trade union registered under the Trade Union Act, 1871, namely, the sum of £379 4s. 3d. The learned magistrate, having heard the information, dismissed it, and the question is whether, in so doing, he was right in point of law.

So far as the facts are concerned, it is found that at all material times Butler was the secretary of the union, except for the period from April to September, 1926, H when he was absent through illness, and during that period FitzGibbon handled all moneys received from the collectors. FitzGibbon, by resolution dated June 13, 1924, became the treasurer. It is further found as a fact that it was the treasurer's duty to receive money from the collectors of contributions, to render true accounts, and to bank all moneys received at least once a month, and, again, that until 1926 the moneys collected were handed to Butler, and thereafter, subject to certain I exceptions, were handed to FitzGibbon. FitzGibbon, it is said, made payments from time to time to Butler for petty cash, but neither kept or produced any records of those payments. FitzGibbon kept a treasurer's cash-book until 1927, when he discontinued keeping it, as the accounts were in a state of confusion, and that cash-book was destroyed by FitzGibbon. The Case finds that

> "all moneys were duly handed over by the collectors and duly recorded in another cash-book, which the secretary, i.e., Butler, had kept in his own handwriting since 1924 inclusive and had not been handled by any persons other than the defendants."

The last annual general meeting was held on March 30, 1931, and that date is A treated as the date of the offence. The total discrepancy made up in the manner which has been explained to the court amounts to £379 4s. 3d.

It was in those circumstances that the learned magistrate dismissed the summons. He gives two reasons for so doing. The first is:

> "Although there was a discrepancy, a man cannot withhold what he has not got, and the whole case for the prosecution was to show that the money had B been squandered. If the section had been 'neglect or refuse to deliver' the matter would have been different."

The words of s. 12 of the Trade Union Act, 1871, are:

> "If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act . . . obtain possession of C any moneys, securities, books, papers, or other effects of such trade union, or having the same in his possession, wilfully withhold or fraudulently misapply the same . . ."

It seems to me that the term "wilfully withhold" indicates a continuing offence, and that there is no difference between wilfully withholding and neglecting or refusing to deliver. D

Reference was made to *Pullen* v. *Carlton* (1), where the word "detain" was considered, and it was held that detaining under the Act of Parliament there referred to was a continuing offence and meant adversely withholding. I think, therefore, that the learned magistrate, who evidently devoted great care to this matter, was in error in his first ground. The second ground is:

> "If I found the [respondents] guilty of the offence charged, I was bound as a E matter of law to make an order for the refund of the amount referred to in the summons—namely, £379 4s. 3d.—and I could not make an order against both [respondents] to refund the total sum because the society would get double if they both paid, and I had no evidence that each had had half or any other proportion."

The evidence was that the two between them had had the whole of the money, and F the evidence, as it stands, was that each was aiding and abetting the other in the matter. I think that the case ought to go back to the learned magistrate and that he ought to have the opportunity of hearing further evidence. In particular, the respondents in the case ought to have an opportunity of putting forward their answer, but if the Case remains as it is now, I think it is open to the learned G magistrate to make an order against each for the sum of £379 4s. 3d.

It is said that a difficulty arises from the making of any such order, because in default there is a power to order imprisonment, but the words of the section are that the court "may order the said person so convicted to be imprisoned." The matter would be then a matter for the consideration of the tribunal. At present, as the matter stands, I have no doubt that the case ought to go back to the learned H magistrate, in order that it may be further considered and the respondents, and each of them, have an opportunity of making their answer. I think, therefore, that this appeal from the decision dismissing the summons ought to be allowed.

AVORY, J.—I am of the same opinion. I observe that the learned counsel who appeared on behalf of Butler before the learned magistrate appears to have submitted that the summons was bad because it did not allege that Butler had the I money alleged to be withheld in his possession. That reads as if the objection was taken that the summons was bad on the face of it for not containing the allegation that the money was in his possession. Learned counsel, who has argued the case before us, says that he does not take the point that the summons is bad on the face of it on account of that omission. Therefore, it must be taken to be merely an objection that it was necessary to prove, for the purpose of this case, that the defendant Butler had the money in his possession on March 30, 1931. I entirely agree with what has been said already by my Lord, that it was not necessary to show that either of the respondents had the money in his possession on March 30, 1931, if there was evidence, as there most certainly was, that the money belonging to the union had been in their possession and was still being withheld. There is no doubt whatever that the withholding of money in these circumstances is a continuing offence. Therefore, I agree that the case should go back with the directions which my Lord has enunciated.

MACNAGHTEN, J.—I am of the same opinion.

Case remitted.

Solicitors: *Treasury Solicitor*; *Butler, Marris, & Shepherd.*

[*Reported by* T. R. Fitzwalter Butler, Esq., *Barrister-at-Law.*]

BEAUMONT *v.* BEAUMONT

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 10, 1932]

[Reported [1933] P. 39; 102 L.J.P. 4; 148 L.T. 247; 49 T.L.R. 35]

Divorce—Costs—Death of husband respondent before hearing—Fund already in court as security for wife's costs—Jurisdiction to order taxation and payment thereout of wife's costs—Balance of fund—Attendance at taxation—Rights of husband's personal representative.

Where there is a fund in court the court has jurisdiction to deal with it notwithstanding the death of a party to the suit: *Hall* v. *Hall* (1) (1864), 3 Sw. & Tr. 347, *Cunningham* v. *Cunningham* (2) (1897), 77 L.T. 405, and dicta of Shearman, J., in *Maconochie* v. *Maconochie* (3), [1916] P. at p. 328, and of Sir Henry Duke, P., in *Coleman* v. *Coleman* (4), [1920] P. at p. 74, approved and applied.

On a wife's petition for judicial separation the husband was ordered to pay £43 for costs up to setting down, and £200 into court "to cover the costs and expenses of and incidental to the hearing of the cause . . . for the payment of such expenses of the petitioner as shall be certified to be due and payable by the said respondent." The husband paid the £200 into court, but died before the suit had been heard. On appeal against the dismissal of a motion for an order for the ascertainment of the petitioner's costs and for the payment thereof to the wife's solicitors out of the fund in court,

Held: (i) the court had jurisdiction to deal with the fund notwithstanding the death of the husband.

(ii) this jurisdiction should be exercised in the suit in which the money had been paid into court, and not in independent proceedings to deal with the fund or costs.

(iii) the proper order to make in that suit should be that the wife's costs incurred down to her husband's death should be taxed, that the costs properly so incurred should be paid to the wife's solicitors out of the fund in court, and that the balance of the fund should be paid to the husband's executor.

(iv) the husband's executor was entitled to notice of the wife's solicitors' claim, and to attend the taxation of the wife's costs.

Notes. Claims enforceable against a person after his death have been rendered enforceable against his personal representatives as such by the Law Reform (Miscellaneous Provisions) Act, 1934.

Referred to: *Morriss* v. *Baines & Co., Ltd.*, [1933] 1 K.B. 540; *Hyde* v. *Hyde*, [1948] 1 All E.R. 362.

As to recovery of the wife's costs of divorce proceedings after the husband's death, see 12 HALSBURY'S LAWS (3rd Edn.) 381, para. 835, and as to the taxation of such costs, see ibid. 462, para. 1035, text and notes (s) and (t), and for cases on these subjects see 27 DIGEST (Repl.) 536, *4829–4833*.

Cases referred to:

(1) *Hall* v. *Hall* (1864), 3 Sw. & Tr. 347; 33 L.J.P.M. & A. 65; 9 L.T. 810; 164 E.R. 1309; 27 Digest (Repl.) 374, *3084*.

(2) *Cunningham* v. *Cunningham* (1897), 77 L.T. 405; 27 Digest (Repl.) 536, *4829*.

(3) *Maconochie* v. *Maconochie, Maconochie* v. *Maconochie and Blake*, [1916] P. 326; 86 L.J.P. 10; 115 L.T. 790; 33 T.L.R. 50; 61 Sol. Jo. 57; 27 Digest (Repl.) 536, *4832*.

(4) *Coleman* v. *Coleman and Simpson*, [1920] P. 71; 89 L.J.P. 107; 122 L.T. 804; 36 T.L.R. 255; 27 Digest (Repl.) 536, *4833*.

(5) *Dering* v. *Dering and Blakeley* (1868), L.R. 1 P. & D. 531; 37 L.J.P. & M. 52; 19 L.T. 48; 16 W.R. 1176; 27 Digest (Repl.) 587, *5475*.

(6) *M.* v. *M. and A.* (1910), 26 T.L.R. 305; 54 Sol. Jo. 309; 27 Digest (Repl.) 536, *4822*.

(7) *Beevor* v. *Beevor* (1809), 3 Phillim. 261; 161 E.R. 1319; 27 Digest (Repl.) 567, *5211*.

(8) *Brydges* v. *Brydges and Wood*, [1909] P. 187; 78 L.J.P. 97; 100 L.T. 744; 25 T.L.R. 505, C.A.; 27 Digest (Repl.) 674, *6424*.

(9) *Brown* v. *Feeney*, [1906] 1 K.B. 563; 75 L.J.K.B. 494; 94 L.T. 460; 54 W.R. 445; 22 T.L.R. 393; 50 Sol. Jo. 358, C.A.; 24 Digest (Repl.) 777, *7656*.

(10) *Wright* v. *Mitchell* (1811), 18 Ves. 293.

(11) *Roundel* v. *Currer* (1786), 6 Ves. 250; 2 Bro.C.C. 67; 29 E.R. 39; 20 Digest 434, *1617*.

Appeal by a wife petitioner against the order of LORD MERRIVALE, P., dismissing her motion for payment of her costs to her solicitors out of a fund lodged in court by her deceased husband, the respondent.

On Oct. 27, 1930, the wife petitioned for judicial separation on the ground of cruelty. On March 6, 1931, the husband filed an answer and cross-prayed for the same relief. On July 10, 1931, orders were made that the husband should pay a sum of £43 for costs up to setting down, and that he should pay into court £200

> "to cover the costs and expenses of the petitioner of, and incidental to the hearing of the cause . . . for the payment of such expenses of the petitioner as shall be certified to be due and payable by the said respondent."

The £200 was lodged in court by the husband. On Jan. 8, 1932, before the suit had been heard, the husband died. On Feb. 26, 1932, the registrar gave the wife leave to file a bill of her further costs, but the taxing registrar refused to proceed with the taxation without further order. On March 14, 1932, the registrar by a further order varied the order of Feb. 26, 1932, gave the wife leave to tax her costs and the husband's executor leave to attend the taxation, and ordered that after such taxation the fund in court be paid out to the wife's solicitors on their undertaking to pay any excess over their taxed costs to the husband's executor. BATESON, J., on a summons by the husband's executor, held that no order for costs could now be obtained as the suit had abated by reason of the husband's death, that as no order for costs had been made no taxation should have been ordered, and that no order could be made on an application in a suit which had abated, and accordingly set aside the registrar's order.

Leave to appeal from this decision of BATESON, J., was obtained, but no appeal was brought within the time limited.

On June 6, 1932, the wife brought an original motion before LORD MERRIVALE, P., for an order for the ascertainment of the wife's costs, and for the payment thereof

A to the wife's solicitors out of the fund in court, or for directions generally for dealing therewith. LORD MERRIVALE held that the order of July, 1931, was an order in common form providing that a sum be secured and the petitioner's costs paid out of it if the judge so ordered, but that the right to that fund did not vest in the wife until such order was made by the court at the trial. It was impossible to make any order as to costs until the hearing of the cause, and the suit having B abated by the death of the husband, the ground on which the fund was brought into court had failed. The conditional provision in the order for security could not be satisfied. The motion must be dismissed with costs against the wife. The wife appealed.

J. E. Singleton, K.C., and *T. Bucknill* for the wife.

Clifford Mortimer and *William Latey* for the husband's executor.

C During the hearing of the appeal the court, for the reasons set out in the judgments, extended the time for appeal from the order of BATESON, J., and treated such appeal as being before it.

LORD HANWORTH, M.R.—This case raises an interesting point which has been well argued on both sides, and we are indebted to Mr. Mortimer for calling D attention to the cases decided. [His Lordship then stated the facts.] Difficulties have occurred to the court in dealing with the matter on an appeal from an order of LORD MERRIVALE, P., on a motion before him independently of the suit commenced by the wife's petition. That difficulty can be removed because it is possible to treat this appeal as an appeal from the order made by BATESON, J., on a summons taken out in the petition proceedings, if we extend the time of appealing E from his decision, as we have power to do. We have accordingly decided that the right mode of dealing with the substance of the matter is to extend the time for appealing from BATESON, J.'s decision and to treat this appeal as an appeal from him.

It is said on behalf of the wife that security was necessarily ordered to enable the wife to prosecute the suit and defend herself against the cross-claim, that she F has since incurred costs with her solicitors, and that these solicitors have no means of being paid apart from the fund remaining in court.

Mr. Mortimer, who appears here on behalf of the husband's executor, has told us quite frankly that the estate of the husband is insolvent. He has also told us that the wife has no separate estate and no other means of satisfying her solicitors' claim for payment of her costs except the fund in court. He admits that it is a G case of hardship to the wife and her solicitors—to the wife in having incurred these expenses, and to the solicitors who, if he is right in his contention, are unable to obtain payment and are offered by him the cold comfort that it might be possible for them to proceed at common law against the wife, who has no money, and against the estate of the husband, which is insolvent. He admits the hardship but says that there is a legal point, on which he is entitled to rely, which deprives the H wife of the right to payment of her costs out of the fund in court.

It is said first of all that the proceedings by petition were abated by the death of the respondent. On examining a number of cases I find it clear that until the death of a party has been brought to the knowledge of the court it does not act on its own initiative and remove the petition from the file. The death has to be proved. That is established by *Dering* v. *Dering and Blakeley* (5). Moreover, in I divorce proceedings, although one of the spouses has died, or the co-respondent has died, so that the suit is no longer in existence as originally constituted, it must be treated as in being for certain purposes.

Thus in *M.* v. *M. and A.* (6)—a case in which the respondent, the wife, had died before decree nisi—it was still upheld as right for the petitioner to proceed against the co-respondent for damages, and, although the suit for dissolution of marriage had abated, it was to be treated as in being till the claim against the co-respondent had been determined. If the petition does not abate simpliciter on the death of the respondent in the sense that there can be an application in order that the rights of the other parties may be determined, it would seem difficult to affirm the A proposition of counsel for the executor that, as the action has abated in this case, no application can be made in addition in regard to the sum in court.

Our attention has been called to the various rules on which the court has acted in ordering a husband to provide means for the wife to carry on her suit, and in particular our attention was called to *Beevor* v. *Beevor* (7), where the matter is put as follows: B

> "The general rule is that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since the marriage gives all the property to the husband."

Our attention was also called to the old system under which provision was made for the wife's costs by steps, and to the rules of 1865 [Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes dated Dec. 26, 1865, and C set out in L.R. 1 P. & D. 752] which first modified that practice by rr. 158 and 159 so as to make it possible under those rules for security to be obtained by a wife who had entered an appearance. This she did under r. 158 by filing her bill of costs for taxation as against her husband,

> "and the registrar to whom such bill of costs is referred for taxation shall at the same time . . . ascertain and report to the court what is a sufficient sum of D money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife, or what is a sufficient security to be given by the husband to cover the costs of the wife of or incidental to the hearing or trial of the cause."

Then r. 159 provided that when on the hearing or trial the decision was against E the wife

> "no costs of the wife of and incidental to such hearing or trial shall be allowed as against the husband, except such as shall be applied for, or ordered to be allowed by the Judge Ordinary at the time of such hearing or trial."

It must, however, always be remembered that except in cases fully covered by the rules, the power given by s. 22 of the Divorce and Matrimonial Causes Act, 1857 F (20 & 21 Vict., c. 85), to resort to the practice of the Ecclesiastical Courts still remained.

The order in the present case was one by which a sum of £200 was ordered to be lodged in court for the costs of the petitioner of or incidental to the costs of the hearing, and the word "incidental" is important and must connote those costs which would be incurred in ascertaining what evidence should be called and what G documents ought to be placed in counsel's hands at the trial. Those were costs in addition to the costs of the hearing. Here the nature of the case was such that an order was made for further security to be provided, but the death of the husband took place before that order had been complied with, and it is impossible to make an order for costs against his executor who is not a party to that suit. Indeed, the very foundation of the suit has gone, as there is no longer a nexus between the two H spouses, seeing that the marriage has been dissolved by the husband's death. All the facts dwelt on in *Brydges* v. *Brydges* (8) are to be found in this case to the extent that it is impossible to make any order against the executor of the respondent who has passed away.

But that does not dispose of the case we have to deal with. It is a case in which there is a fund in court which is provided as security for the wife's costs of and I incidental to the trial and justified her in proceeding with the preparation of the case for trial. In respect of such a fund is it to be said that the court can make no order at all because the suit has abated? I have commented on the use of the word "abated" in the course of the argument. It is merely a metaphorical term and does not mean that the court itself has taken the suit off the file. The suit is in reality sterilised by the death of one of the spouses. But is the court not to have authority over the res under its jurisdiction? Apart from cases in the Probate Division, it would seem that the court had power to deal with such a fund.

A Thus in *Brown* v. *Feeney* (9) money had been paid into court by the defendant in satisfaction of a claim for damages in an action for libel without denying liability; and after the death of the defendant his executors applied for an order that the money in court should be paid out to them, as this action had been persisted in and the money had not been taken out by the plaintiff in settlement of his claim. But VAUGHAN WILLIAMS, L.J., said ([1906] 1 K.B. at p. 568):

B

> "In my opinion when money is paid into court the court must have power to say what should be done with it, though circumstances may have ousted the operation of the rules with regard to it."

The other members of the court, particularly STIRLING, L.J., dealt with the matter on the footing that the court had inherent jurisdiction to deal with a sum remaining in its jurisdiction. C In *Wright* v. *Mitchell* (10) a bill

> "was filed on behalf of the plaintiff and all other creditors of an intestate for an account and to set aside the assignment of a lease by the intestate to two of the defendants in trust for a third. The tenants of the premises, being also made parties, paid the rent into court. The bill having been dismissed for want of prosecution, a motion was afterwards made by the assignees of the D lease that the money in court should be paid out to them."

The Lord Chancellor said the court had jurisdiction to make an order for payment of the money out of court, and ordered the money to be paid out. In other words, he treated the fund in court as subject to its jurisdiction, and the court as competent to deal with it.

E I turn from these cases to those to which our attention was particularly called in the Divorce Division. In *Hall* v. *Hall* (1): Where the husband had paid a sum into the registry to meet the wife's costs of the hearing, and had died shortly before the time appointed for the hearing, the court made an order for the taxation of the costs incurred for the hearing of the wife's solicitors and the payment to them of such taxed costs out of the fund in the registry with leave to the solicitors of the F husband's executor to attend the taxation. That is obviously an application made in the petition, for when Dr. Tristram asked the court to dismiss the petition on the ground of the respondent's death, the Judge Ordinary said:

> "The solicitors for the respondent have a claim on the fund paid into the registry for their costs. I will make an order for their costs to be taxed and paid out of the fund. There should be someone present at the taxation to G protect the rights of the petitioner. The executor is the proper person. The solicitors of the executor will therefore have leave to attend."

In that case it is clear that the Judge Ordinary treated the application in the petition as a right one, and ordered taxation of the wife's costs and payment of such costs when taxed, these costs having been incurred before the hearing. Then in *Cunningham* v. *Cunningham* (2) the wife had instituted proceedings for a divorce H and the husband died on the eve of the trial, and

> "an order for the wife's costs, limited to the amount lodged in court, was afterwards made against the husband's executors, to whom leave was given to attend the taxation."

It is plain that the petition was not forthwith dismissed, but was adjourned as I counsel for the wife desired to consider the position, and when the case came on again an order was made on the application for taxation of the wife's costs and their payment out of the fund in court. The order was made by BARNES, J. It is said that the case was wrongly decided, but I should have the greatest reluctance so to hold, having regard to the experienced judge who decided it; and from the reasoning of the cases so far referred to it would appear that the court had power to deal with the sum brought into court by the husband.

Two more cases must be referred to. In *Maconochie* v. *Maconochie* (3) the decision was that

> "upon the death of a husband a party in a consolidated matrimonial suit, the causes of action being purely personal, the suit abates and the Divorce Division has no jurisdiction to entertain an application against the legal personal representative of the deceased husband in respect of taxation and payment of the wife's costs of suit where no taxation or order for security of those costs had been applied for or made . . . against the husband during his lifetime."

In other words, when there is no res within the jurisdiction of the court no order can be made, but SHEARMAN, J., made it plain that the position would have been different if there had been a fund in court. He said ([1916] P. at p. 328):

> "These personal actions then having abated, no one can come to the court and make an application in these actions. There is one exception to the rule, and that is when there are funds already in court."

Following that case the President in *Coleman* v. *Coleman* (4) decided that

> "Where in a suit brought by a husband for divorce an order has been made that the husband should pay his wife's taxed costs and pay into court, or give security for money towards her future costs, and the husband dies before the order has been obeyed, the court has no jurisdiction to enforce payment against his executors. In such a case the suit is at an end, and there is nothing in the Divorce Act or in the practice of the court to enable it to be revived or the petitioner's executors to be brought before the court."

But the President said ([1920] P. at p. 74):

> "At the time of the husband's death there was not actually in existence any fund for payment of the wife's costs or any security for them, and although the wife had obtained her order she was in no better position than if the time for complying with it had not lapsed, because the course adopted had practically extended the time for compliance. It is urged that the case of *Cunningham* v. *Cunningham* (2) is an authority by analogy for enforcing the order after the death of the husband. But in that case the money was in court, and therefore the court had jurisdiction over it, as in rem."

The authority of the cases I have referred to of *Hall* v. *Hall* (1), *Cunningham* v. *Cunningham* (2), *Maconochie* v. *Maconochie* (3), and *Coleman* v. *Coleman* (4) all point to the conclusion that where there is a res in court there is jurisdiction to deal with it notwithstanding the death of a party to the suit. In these circumstances it appears to us that the requisite order should be made on appeal from BATESON, J., and that the order in that appeal should be that the wife's costs incurred down to the date of the husband's death should be taxed. At that taxation it will be possible to decide whether costs have been properly or improperly incurred and the deceased husband's executor will be at liberty to alter the taxation. There will also be an order for payment of the amount of the costs properly incurred, when they have been ascertained, out of the sum in court, and that the balance, if any, shall be paid to the husband's executors.

I desire to repeat that we are only dealing by our decision with a case where there is a res in court, and to make it clear that we are not challenging cases where it has been definitely decided that no order can be made against executors of a deceased husband to fulfil an order made against the husband for payment of money into court by way of security for the wife's costs, or themselves to secure those costs. What we are dealing with is a case when there is a fund in court which is available to answer the wife's costs.

LAWRENCE, L.J.—I agree. Counsel for the husband's executor does not seriously dispute the fact that notwithstanding the abatement of the suit the court has power to order payment of the fund in court to the person primarily entitled to it; but he resists an order in this case because under the rules the money in court is security only for such costs as have been ordered in the suit to be paid by the husband to the wife, and he says that, as the suit has abated, no order can be made on the husband or his executor to pay the costs.

It is true that under the rules the security which has to be given is only for costs of and incidental to the hearing, and that it is subject to the judge making an order at the hearing that the wife's costs should be paid by the husband; moreover, that it is in the discretion of the judge in a proper case not to make any order for the payment of the wife's costs. But these considerations are, in my opinion, no bar to an application by the wife for payment of any costs properly incurred by her in the suit in the circumstances of this case. The security is for costs incidental to the hearing, which include costs incurred in preparing for the hearing, and such costs are admittedly in the discretion of the judge at the hearing. The rules themselves do not provide for the cases where the proceedings are abated or where the petition is withdrawn before the hearing, but the same reasoning applies to such cases as was applied by the Court of Appeal in *Brown* v. *Feeney* (9), where VAUGHAN WILLIAMS, L.J., said ([1906] 1 K.B. at p. 568):

> "I do not think that that power [that is, the power to order money in court to be paid out to any person to whom the court might think it ought properly to be paid] is one which can only necessarily be exercised under the rules. In my opinion, when money is paid into court, the court must have power to say what shall be done with it, though circumstances may have ousted the operation of the rules with regard to it."

As regards the jurisdiction to make an order for payment out and taxation of costs, I think that this jurisdiction should preferably be exercised in the suit in which the money has been paid into court; it seems to be inappropriate to make an order in independent proceedings for the taxation of costs incurred in another proceeding. In my opinion this suit is not abated for the purpose of the distribution of the fund in court, and in so holding I found myself on *Hall* v. *Hall* (1) and *Cunningham* v. *Cunningham* (2) and what was said by SHEARMAN, J., in *Maconochie* v. *Maconochie* (3), namely,

> "when one of these parties dies the action abates; it comes to an end; it is dead and done with. These personal actions then having abated, no one can come to the court and make an application in these actions. There is one exception to the rule, and that is where there are funds already in court."

Counsel for the husband's executor was perfectly right in saying that no order could be made on the husband's executor to pay the wife's costs. He is not a party to the action, and no order can be made in it against him. But after the husband's death the wife remains a party to the suit so far as that suit is not at an end, and she is the proper person to apply for the distribution of the fund in court. The court ought not, however, to distribute the fund without notice to the executor to whom it belongs subject to the wife's claim, and, of course, the court should allow the executor to attend the taxation of the wife's costs.

In my opinion for the reasons stated the court should give the wife extension of time for appealing from the decision of BATESON, J., and ought to deal with the matter on the footing that a notice of appeal from that order had been served and was now before the court. I do not agree with the President that "the jurisdiction of the court in the meantime is limited to keeping the money in court." In my opinion the jurisdiction of the court extends to dealing with the fund in court in any mode which may be found to be proper after taxing in the presence of the husband's executors. The appeal must be allowed.

ROMER, L.J.—I agree. It was settled long ago, in the Court of Chancery at any rate, that when a fund had been paid into court in the course of proceedings there was jurisdiction to deal with the fund after the suit had abated. That jurisdiction was exercised in *Wright* v. *Mitchell* (10) and earlier in *Roundell* v. *Currer* (11), and in both cases the fund was directed to be paid to the persons who showed that they had a clear right to it. In *Brown* v. *Feeney* (9) that same jurisdiction was exercised in a case in the King's Bench Division, and therefore after the action had abated by reason of the death of the defendant the court directed payment out to the plaintiff of a sum of money paid into court in the action, as it was satisfied A that if the action had gone on to trial the plaintiff would have established a right to it.

In the present case we are asked to exercise a similar jurisdiction and to order payment of the wife's costs up to the date of the husband's death out of the fund in court. It is recognised and admitted that, having regard to the husband's death, it is not open to the court to make an order against his executors for payment of B any costs or any other sum of money; and the distinction is not very apparent between making such an order and ordering payment of the costs out of a fund in court which, but for the wife's claim, would belong to the executors. But such an order was made in *Hall* v. *Hall* (1) and *Cunningham* v. *Cunningham* (2), and the authority of those cases was re-confirmed in 1916 by SHEARMAN, J., in *Maconochie* v. *Maconochie* (3) and in 1920 by the President in *Coleman* v. *Coleman* (4). C

In view of these authorities I am not prepared to say that such an order as is asked for here ought not to be made; and as nothing has been said to create the slightest doubt in my mind that the wife would have obtained an order at the trial against the husband for payment of these costs whatever the result of her petition might have been, I think it is right that we should order these costs to be paid out of the fund in court. D

Appeal allowed.

Solicitors: *Mackrell, Ward, & Knight*; *Scott & Son.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

E

CROKER *v.* CROKER F

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), June 23, July 1, 1932]

[Reported [1932] P. 173; 101 L.J.P. 69; 147 L.T. 464;
48 T.L.R. 597; 76 Sol. Jo. 527]

Divorce—Appeal—Court of Appeal—Verdict for respondent set aside as being unreasonable—Power of Court of Appeal to grant decree nisi—R.S.C., Ord. 58, *r.* 4. G

Where the verdict of a jury dismissing a petition for divorce was set aside by the Court of Appeal on the ground that it was such that no reasonable body of men could have come to it, the evidence practically compelling a verdict the other way, H

Held: the Court of Appeal was not bound to order a new trial, but had power to allow the appeal of the petitioner and grant a decree nisi.

Notes. R.S.C., Ord. 58, r. 4, has been revoked. See now Order 58, rr. 9, 10. As to appeals in divorce suits, see 12 HALSBURY'S LAWS (3rd Edn.) 420 et seq., and for cases see 27 DIGEST (Repl.) 592 et seq. I

Cases referred to:

(1) *Wilkins* v. *Wilkins*, [1896] P. 108; 65 L.J.P. 55; 74 L.T. 62; 44 W.R. 305; 12 T.L.R. 212; 40 Sol. Jo. 274, C.A.; 27 Digest (Repl.) 598, *5596*.

(2) *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603; 55 L.J.Q.B. 445; 34 W.R. 695, C.A.; on appeal, sub nom. *Toulmin* v. *Millar* (1887), 12 App. Cas. 746; 57 L.J.Q.B. 301; 58 L.T. 96; 3 T.L.R. 836, H.L.; 1 Digest 505, *1739*.

(3) *Allcock* v. *Hall*, [1891] 1 Q.B. 444; 60 L.J.Q.B. 416; 64 L.T. 309; 39 W.R. 443; 7 T.L.R. 260, C.A.; Digest Practice, 599, *2398*.

(4) *Paquin, Ltd.* v. *Beauclerk*, [1906] A.C. 148; 75 L.J.K.B. 395; 94 L.T. 350; 54 W.R. 521; 22 T.L.R. 395; 50 Sol. Jo. 358, H.L.; 27 Digest (Repl.) 175, *1289*.

(5) *Skeate* v. *Slaters, Ltd.*, [1914] 2 K.B. 429; 83 L.J.K.B. 676; 110 L.T. 604; 30 T.L.R. 290, C.A.; Digest, Practice 564, *2226*.

(6) *Banbury* v. *Bank of Montreal*, [1918] A.C. 626; 87 L.J.K.B. 1158; 119 L.T. 446; 34 T.L.R. 518, H.L.; Digest, Practice 780, *3446*.

(7) *Rutherford* v. *Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 39 T.L.R. 42; 67 Sol. Jo. 78, H.L.; 27 Digest (Repl.) 592, *5536*.

(8) *Rugg-Gunn* v. *Rugg-Gunn and Archer*, [1931] P. 147; 100 L.J.P. 61; 145 L.T. 200; 47 T.L.R. 398; 75 Sol. Jo. 424, C.A.; 27 Digest (Repl.) 542, *4898*.

Appeal by the husband from an order of LANGTON, J., dismissing the husband's petition for divorce after a verdict by the jury that the wife had not committed adultery.

The Court of Appeal came to the conclusion on the evidence that it was clear that adultery had been committed and the judgment in this report deals only with the question whether the Court of Appeal after that conclusion had a power itself to grant a decree nisi.

Compton Miller for the husband.

F. H. Collier for the wife.

The arguments and the cases cited in support sufficiently appear from the judgment.

Cur. adv. vult.

July 1. **LORD HANWORTH, M.R.**, read the following judgment of the court: This is a husband's petition for divorce. We have already given judgment on that part of the case which relates to the co-respondent.

The facts are these. The marriage took place on April 27, 1918, and there are three children of the marriage. On Dec. 6, 1930, the husband presented his petition for divorce and named the co-respondent as the adulterer with whom the wife committed adultery. In January, 1931, the wife put in her answer denying the adultery. In July particulars were filed. At the trial it appeared that the parties had not been living as man and wife for about three years. The reason why the husband withdrew from cohabitation was because the wife had admitted adultery with a named person. The co-respondent lived not far away from the petitioner and respondent. The petitioner and his wife still occupy the same house. There is cogent evidence that the wife had sought access to the co-respondent. There is evidence that they had often been seen together, that they had been in the same room with the blinds partly drawn and that the co-respondent was there seen fondling and kissing the wife, and that they had been out for drives together.

These circumstances show access, intention and opportunity, and if on that evidence the jury had found for the husband there could have been no objection to the verdict. In addition two documents were produced, first, a confession by the wife and, secondly, a note found in her private handbag from the co-respondent, informing her "I have told Ethel all." Further the wife said: "I have told him we were going about together." Those two documents are admissible and must be construed according to their tenor. The confession of the wife contained information which could have been known only to the wife, namely, the places and dates of the misconduct. Those two documents, the confession by the wife and the confession by the co-respondent, are conclusive.

The trial took place and occupied several days before LANGTON, J. The jury gave what LANGTON, J., characterised as a "surprise verdict" that the wife had not committed adultery with the co-respondent. The co-respondent had given notice of appearance and did not appear at the trial and his case was not tried by the jury. LANGTON, J., was minded to find that the co-respondent had committed adultery with the wife, but he found himself embarrassed and gave judgment A following the jury's verdict and gave leave to appeal.

When the matter came before this court we found that the co-respondent had committed adultery with the wife, and we set aside the judgment of LANGTON, J., on the ground that the verdict of the jury was such that no reasonable body of men could have come to and we also directed that judgment should be entered against B the co-respondent. There remains the question whether we should send back the wife's case for a new trial or whether we should ourselves grant a decree nisi. I now give the judgment of the court on that point. It is plain from *Wilkins* v. *Wilkins* (1) ([1896] P. at p. 113) that an appeal from the Divorce Court to the Court of Appeal was governed by the same rules which applied to cases coming from the King's Bench Division. LORD LINDLEY said expressly: C

> "The practice is governed by the Rules of the Supreme Court which apply to proceedings in the Court of Appeal";

and that ruling has been acted on in a number of cases. By Order 58, r. 4, the Court of Appeal has power

> "to give any judgment and make any order which ought to have been made, D and to make such further or other order as the case may require."

In Order 39, which governs proceedings for a new trial, there are also relevant rules. By r. 1:

> "Every application for a new trial or to set aside a verdict, finding, or judgment where there has been a trial with or without a jury shall be made to the E Court of Appeal."

Rule 2 stated:

> "Every such application shall be brought before the Court of Appeal in like manner as an appeal and on the hearing of such application the Court of Appeal shall have all such powers as are exercisable by it upon the hearing of an F appeal."

In r. 6 it was laid down:

> "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to G leave to them, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage has been thereby occasioned. . . ."

All these rules carry out the principle of Order 58, r. 4, namely, that the Court of Appeal is to have full power to give such judgment as ought to have been reached in the court below. In the present case the application was for divorce and for £50 damages for the wrong done, but in this court the husband has withdrawn his H claim for damages, so that the only question to be decided is as to the relief to be given on the petition for divorce.

In *Millar* v. *Toulmin* (2) judgment was entered by the Court of Appeal in favour of a plaintiff, who had been unsuccessful in the Divisional Court, on the principle that on an application for a new trial the Court of Appeal had power under Order 58, r. 4, to give judgment instead of directing a new trial. BOWEN, L.J., said (17 I Q.B.D. at p. 605):

> "I agree with the Master of the Rolls that under Order 58, r. 4, the Court of Appeal has power to relieve against all miscarriages of justice, and can direct judgment to be entered, if satisfied that no jury could properly come to a different conclusion."

Applying these words here this court were satisfied that no jury could come to any other decision than that adultery had been committed. The co-respondent did not give evidence as he never attended at the trial. So we have here the same materials as were said to be sufficient in *Millar* v. *Toulmin* (2) to justify us in entering judgment for the petitioner.

In *Allcock* v. *Hall* (3) ([1891] 1 Q.B. at p. 448) it was again determined that the Court of Appeal could enter judgment for either party instead of ordering a new trial. Lopes, L.J., after referring to the rule made in August, 1890 (S.R. & O. 1890) pursuant to Mr. Finlay's Act, the Supreme Court of Judicature Act, 1890 (53 & 54 Vict., c. 44), said:

> "I think that the effect of that rule is to put a motion for a new trial in the same position as an appeal; and if that be so, a motion for a new trial will be governed by Order 58, r. 4. When we contrast that rule with the corresponding rule which applied to motions for a new trial in a Divisional Court, Order 40, r. 10, the difference in the language is very marked. Rule 10 of Order 40 contained the words, 'Not inconsistent with the finding of the jury'; but there are no similar words in r. 4 of Order 58. This is a most important difference. Therefore, in my opinion, in the circumstances of the present case, the Court of Appeal has power to enter judgment for the defendants. *Millar* v. *Toulmin* (2) is a direct authority upon the construction of Order 58, r. 4, so far as it related to an appeal to the Court of Appeal before Mr. Finlay's Act; and if I am right in saying that motions for a new trial are now governed by the same rules, that authority is applicable to the present case."

And he came to the conclusion that, as no fresh evidence could be useful, the right course was for the Court of Appeal to enter judgment.

The question is whether the course followed in *Millar* v. *Toulmin* (2) still stands good or whether it does not apply to an affirmative judgment. So in *Paquin, Ltd.* v. *Beauclerk* (4) Lord Loreburn, after referring to *Millar* v. *Toulmin* (2) and *Allcock* v. *Hall* (3), said ([1906] A.C. at p. 161):

> "Obviously the Court of Appeal is not at liberty to usurp the province of a jury. Yet, if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value."

In *Skeate* v. *Slaters, Ltd.* (5) Buckley, L.J., went through the authorities on the point, and accepted the principle laid down in *Millar's* (2), *Allcock's* (3), and *Paquin's* (4) *Cases*. It was true that he called attention to the criticism of Lord Halsbury in *Toulmin* v. *Millar* (2) in the House of Lords, the criticism being directed against the giving by the Court of Appeal of an affirmative judgment, in the plaintiff's favour, with assessment of damages, but, as pointed out in several cases, where the evidence was such that it pointed in one way only, and was consistent only with one verdict which ought to have been given, that criticism did not apply.

In *Banbury* v. *Bank of Montreal* (6) Lord Atkinson dealt with the same point, and did not dissent from the principle stated in *Millar* v. *Toulmin* (2) and the other cases. Finally, in *Rutherford* v. *Richardson* (7) Lord Birkenhead clearly accepted the view that it was in the power of the Court of Appeal to do what it thought in the interests of justice ought to have been done in the court below.

In the present case the evidence practically compels a verdict in one way, and, as it was laid down by the Court of Appeal in *Rugg-Gunn* v. *Rugg-Gunn and Archer* (8) that parties to a matrimonial suit have now no inherent right to insist on having trial by a jury, it seems not only unnecessary to send the case back for a new hearing, but that the court would be failing in its duty if it did not do what was required of it under Order 58, r. 4, and failed to give the relief which ought to have been given below. The right order, therefore, is to allow the appeal and for this court to grant a decree nisi to the husband for the dissolution of the marriage with costs here and below.

[After discussion with counsel, the court ordered that the decree should date back to the date of the hearing of the petition on Dec. 9, 1931, and that notice be given at once to the King's Proctor.]

Decree nisi.

Solicitors: *Kingsford, Dorman & Co.*, for *Kingsford, Arrowsmith, & Wightwick*, Canterbury; *Lea & Lea*, for *Mercer & Cadle*, Canterbury.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

CHINA NAVIGATION CO., LTD. *v.* ATTORNEY-GENERAL

[COURT OF APPEAL (Scrutton, Lawrence and Slesser, L.JJ.), January 12, 13, 14, 15, 18, March 17, 18, April 11, 1932]

[Reported [1932] 2 K.B. 197; 101 L.J.K.B. 478; 147 L.T. 22; 48 T.L.R. 375; 18 Asp.M.L.C. 288]

Crown—Protection of British subjects and property abroad—Duty of Sovereign—Anticipated danger—Right to charge if protective services rendered.

There is no legally enforceable duty on the Crown to protect by its military forces British subjects or their property in foreign parts. The matter is one for the uncontrolled discretion of the Sovereign as head of the Army, both as to whether it is proper in the circumstances that he should afford protection against anticipated danger, and, if so, as to the terms on which he should afford it. If a subject wants protection he must pay for it if the Sovereign requires him to do so, but, there being no compulsion on him to seek the protection and to pay for it, the Sovereign is not imposing any charge on him without the authority of Parliament.

Where, therefore, a shipowner, without the assent of the Crown, trades for purposes of his own profit in neighbourhoods insufficiently policed by foreign governments and takes on board large numbers of foreign passengers going on the high seas to a foreign port the Crown has no legal duty to protect the shipowner against the criminal action of the passengers.

Per LAWRENCE, L.J.: If the aid of the armed forces of the Crown were available and were required to defend a British ship which was actually being attacked by pirates at the time, entirely different considerations would arise.

Notes. As to the Crown's duty towards the subject, see 7 HALSBURY'S LAWS (3rd Edn.) 208, and for cases see 11 DIGEST (Repl.) 562.

Cases referred to:

(1) *Calvin's Case* (1608), 4 Co. Rep. 1a; Jenk. 306; 2 State Tr. 559; 77 E.R. 377; sub nom. *Union of Scotland and England Case*, Moore, K.B. 790; 11 Digest (Repl.) 560, *2*.

(2) *Glamorgan County Council* v. *Glasbrook Bros.*, [1924] 1 K.B. 879; 93 L.J.K.B. 669; 131 L.T. 322; 88 J.P. 111; 40 T.L.R. 448; 68 Sol. Jo. 576, C.A.; affirmed, sub nom. *Glasbrook Bros., Ltd.* v. *Glamorgan County Council*, [1925] A.C. 270; 94 L.J.K.B. 272; 132 L.T. 611; 89 J.P. 29; 41 T.L.R. 213; 69 Sol. Jo. 212; 23 L.G.R. 61, H.L.; 37 Digest 186, *82*.

(3) *Dew* v. *Parsons* (1819), 2 B. & Ald. 562; 1 Chit. 295; 106 E.R. 471; 12 Digest (Repl.) 627, *4846*.

(4) *Morgan* v. *Palmer* (1824), 2 B. & C. 729; 4 Dow. & Ry.K.B. 283; 2 Dow. & Ry.M.C. 232; 2 L.J.O.S.K.B. 145; 107 E.R. 554; 12 Digest (Repl.) 627, *4847*.

(5) *Steele* v. *Williams* (1853), 8 Exch. 625; 22 L.J.Ex. 225; 21 L.T.O.S. 106; 17 J.P. 378; 17 Jur. 464; 1 C.L.R. 258; 155 E.R. 1502; 12 Digest (Repl.) 628, *4851*.

(6) *A.-G.* v. *Wilts United Dairies* (1922), 91 L.J.K.B. 897; 127 L.T. 822; 38 T.L.R. 781; 66 Sol. Jo. 630, H.L.; 25 Digest 132, *519*.

(7) *T. and J. Brocklebank, Ltd.* v. *R.*, [1925] 1 K.B. 52; 94 L.J.K.B. 26; 132 L.T. 166; 40 T.L.R. 869; 69 Sol. Jo. 105; 16 Asp.M.L.C. 415, C.A.; Digest Supp.

(8) *Southwark Borough Council* v. *Partington Advertising Co.* (1905), 69 J.P. 183; 3 L.G.R. 505; 12 Digest (Repl.) 236, *1777*.

(9) *Macdonald* v. *Steele* (1793), Peake, 175; 170 E.R. 140, N.P.; 39 Digest 326, *130*.

(10) *R.* v. *Secretary of State for War*, [1891] 2 Q.B. 326; 60 L.J.Q.B. 457; 64 L.T. 764; 56 J.P. 105; 40 W.R. 5; 7 T.L.R. 279, C.A.; 11 Digest (Repl.) 582, *168*.

(11) *Mitchell* v. *R.* (1890), [1896] 1 Q.B. 121, n.; 6 T.L.R. 332, C.A.; 16 Digest 240, *357*.

(12) *Gidley* v. *Lord Palmerston* (1822), 3 Brod. & Bing. 275; 1 State Tr.N.S. 1263; 7 Moore, C.P. 91; 129 E.R. 1290; 38 Digest 60, *362*.

(13) *Re Tufnell* (1876), 3 Ch.D. 164; 45 L.J.Ch. 731; 34 L.T. 838; 24 W.R. 915; 39 Digest 324, *111*.

(14) *Dunn* v. *R.*, [1896] 1 Q.B. 116; 65 L.J.Q.B. 279; 73 L.T. 695; 60 J.P. 117; 44 W.R. 243; 12 T.L.R. 101; 40 Sol. Jo. 129, C.A.; 11 Digest (Repl.) 571, *85*.

(15) *Kinloch* v. *Secretary of State for India* (1882), 7 App. Cas. 619; 51 L.J.Ch. 885; 47 L.T. 133; 30 W.R. 845, H.L.; 11 Digest (Repl.) 576, *118*.

(16) *Grant* v. *Secretary of State for India in Council* (1877), 2 C.P.D. 445; 46 L.J.Q.B. 681; 37 L.T. 188; 25 W.R. 848; 11 Digest (Repl.) 572, *90*.

(17) *The Mary Ann* (1823), 1 Hag. Adm. 158; 166 E.R. 57; 39 Digest 318, *27*.

(18) *The Cargo ex Ulysses* (1888), 13 P.D. 205; 58 L.J.P. 11; 60 L.T. 111; 37 W.R. 370; 6 Asp.M.L.C. 354; 39 Digest 320, *51*.

(19) *R.* v. *Keyn* (1876), 2 Ex.D. 63; 46 L.J.M.C. 17; 41 J.P. 517; 13 Cox, C.C. 403, C.C.R.; 1 Digest 109, *125*.

(20) *Re Johnson, Roberts* v. *A.-G.*, [1903] 1 Ch. 821; 72 L.J.Ch. 682; 88 L.T. 161; 51 W.R. 444; 19 T.L.R. 309; 11 Digest (Repl.) 359, *283*.

(21) *Markwald* v. *A.-G.*, [1920] 1 Ch. 348; 89 L.J.Ch. 225; 122 L.T. 603; 36 T.L.R. 197; 64 Sol. Jo. 239, C.A.; Digest Supp.

(22) *A.-G.* v. *Tomline* (1880), 14 Ch.D. 58; 49 L.J.Ch. 377; 42 L.T. 880; 44 J.P. 617; 28 W.R. 870, C.A.; 36 Digest (Repl.) 282, *332*.

(23) *The Isle of Ely Case* (1609), 10 Co. Rep. 141a; 77 E.R. 1139; 41 Digest 51, *373*.

(24) *R.* v. *Anderson* (1868), L.R. 1 C.C.R. 161; 38 L.J.M.C. 12; 19 L.T. 400; 33 J.P. 100; 17 W.R. 208; 11 Cox, C.C. 198, C.C.R.; 14 Digest (Repl.) 150, *1124*.

(25) *A.-G. for Hong Kong* v. *Kwok-a-Sing* (1873), L.R. 5 P.C. 179; 42 L.J.P.C. 64; 29 L.T. 114; 37 J.P. 772; 21 W.R. 825; 12 Cox, C.C. 565, P.C.; 14 Digest (Repl.) 145, *1074*.

(26) *The Lustre* (1834), 3 Hag. Adm. 154; 166 E.R. 363; Digest Supp.

(27) *The Ewell Grove* (1835), 3 Hag. Adm. 209; 166 E.R. 384; 39 Digest 319, *31*.

(28) *Wathen* v. *Sandys* (1811), 2 Camp. 640; 170 E.R. 1279; 41 Digest 74, *74*.

(29) *Snowdon* v. *Davis* (1808), 1 Taunt. 359; 127 E.R. 872; 1 Digest 673, *2839*.

(30) *R.* v. *Dawson* (1696), 13 State Tr. 451; 15 Digest (Repl.) 870, *8379*.

Appeal by the plaintiffs from a decision of ROWLATT, J.

The plaintiffs were a British company incorporated and registered under the Companies Acts carrying on a shipping business in Far Eastern waters and conveying in their ships a large quantity of valuable cargo and large numbers of Chinese passengers. For many years there had been a great deal of piracy in the China seas, and the Crown had recognised that protection was necessary for these ships, and armed guards had been put on board by the Crown. By a letter written by the Admiralty on March 18, 1930, the plaintiffs were informed that regular guards would only be supplied if paid for by the shipping companies in full. In reply the shipowners said they must accept guards from His Majesty's forces to be paid for in full, but did so under protest. The plaintiffs then brought an action against the Attorney-General claiming a declaration that the stipulations for the provision of protection against, and for the prevention of, piracy, sought to be imposed upon them by the letter of March 18, 1930, were illegal, unenforceable, and void; further, that the plaintiffs were under no obligation to make any of the payments to or for the use of the Crown for which the stipulations provided; and further, that so long as and whenever in the view of the Crown such protection was required, the plaintiffs were entitled to enjoy the same without making any specific payments therefor. By his defence the Attorney-General pleaded that His Majesty was not under any duty to provide armed guards or to use his naval or military forces for the purpose of preventing the outbreak of internal piracy in British ships, and that armed guards had been from time to time provided at the request of shipping companies upon the terms that the whole cost thereof should be paid by the shipping companies, including the plaintiffs. ROWLATT, J., held that the action was misconceived, and gave judgment in favour of the Crown. The plaintiffs appealed.

Sir Leslie Scott, K.C., and *Valentine Holmes* for the plaintiffs.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *Sir William Jowitt, K.C.*, *S. O. Henn Collins, K.C.*, and *Wilfrid Lewis* for the Attorney-General.

Cur. adv. vult.

April 11. The following judgments were read.

SCRUTTON, L.J.—An English shipping company carrying passengers and goods on the coast of China desires protection from the British military forces against what may be called "internal piracy." It receives for payment large numbers of Chinese passengers. Some of them coming on board under pretence of being passengers, but with the intent of robbery, during the voyage attack and overpower the ship's officers and rob the ship. Various means have been suggested for meeting this danger. For some time under Hong Kong Ordinances the local police supplied Indian guards for which the shipowners paid; but the shipowners came to the conclusion that such guards were inefficient. The British authorities suggested convoy by naval forces, but the owners of fast ships objected that their operations were handicapped by the slow pace in the convoy of inefficient ships. The local authorities favoured a grille system, which might enable armed officers to defend themselves in a kind of fortress till assistance arrived; but the shipowners argued that the grille, if strictly worked, interfered with the working of the ship, and, if worked with less rigid precautions, was of no use. The system then tried was to put a small military guard of British soldiers in each ship; but the British forces in the locality were not numerous enough to supply a guard for each ship. Some 200 British ships were concerned, and the plaintiffs calculated that they alone wanted 200 men. At first the British authorities provided free such soldiers as they did provide, though in some cases the shipowners furnished the food. Ultimately, after the highest authorities had been consulted, by a letter of March 18, 1930, the shipowners were informed at first that regular guards would only be supplied if paid for by the shipping companies in full. By a letter of March 26, 1930, the shipowners said they must, in the circumstances, accept guards from His Majesty's forces to be paid for in full, but did so under protest. The govern-

A ment required the companies, before guards were supplied, to give a written assurance of agreement to the conditions as to cost and liability on the terms of a document of March 28, 1930, and payments were made accompanied by letters similar to that of June 19, 1930.

The shipowners now bring, not a petition of right to recover the money paid, as paid under illegal duress, but an action against the Attorney-General for four B declarations alleging in substance that the Crown has no authority to demand money for providing protection against piracy, the shipowners being entitled to require the Crown to provide the necessary protection without payment. ROWLATT, J., decided in favour of the Crown, and the shipowners appeal. The argument before this court took rather a different course from that before the judge below. C As I understand, the argument below was mainly that the Crown was under a duty to supply protection and could not demand money payments for performing their duty. The argument begins with the very general statement in *Calvin's Case* (1):

> "For as the subject oweth to the King his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects,"

D which in turn is founded on a passage in GLANVILLE as to the relation between the landlord and his tenant by homage. Henry II would, I think, have been surprised to hear that, if his tenant went to China, the King was bound to follow and protect him. The argument then relied on the authorities cited by ATKIN, L.J., in his dissentient judgment in *Glamorgan County Council* v. *Glasbrook Bros.* (2), such as *Dew* v. *Parsons* (3), *Morgan* v. *Palmer* (4), and *Steele* v. *Williams* (5), where E public officials demanded fees not authorised by Parliament for performing their duty. The argument also relied on the post-war cases in which controllers, who had the duty to grant licences, affixed to them conditions of payment not authorised in the statutes appointing them: see *A.-G.* v. *Wilts United Dairies, Ltd.* (6) as to the Food Controller; the case of the Shipping Controller, *T. and J. Brocklebank, Ltd.* v. *R.* (7); and also *Southwark Borough Council* v. *Partington Advertising Co.* F (8). ROWLATT, J., distinguished these cases as relating to persons who had a duty legally enforceable, whereas there was no duty legally enforceable against the Crown to afford protection, especially in foreign countries. Indeed, counsel for the shipowners agreed that the courts could not control or review the discretion of the executive as to the method in which the Crown should afford protection, if any, but argued that, if the Crown did afford protection, it must be because it was G necessary, and for necessary protection no payment could be required.

I entirely agree with the view of ROWLATT, J., that there is no legal duty on the Crown to afford by its military forces protection in foreign parts of British subjects. A missionary, in self-sacrificing devotion to his religious views, goes without the consent of the Crown into savage countries inhabited by tribes who strongly object to the missionary denouncing their religion. Has the Crown any duty to follow H and protect the missionary and send armed forces to rescue him from his self-imposed danger? A shipowner without the assent of the Crown trades for purposes of his own profit in neighbourhoods inefficiently policed by foreign governments; for his profit he takes on board large numbers of foreign passengers going on the high seas, or up a navigable river, to a foreign port. He is unable to control these foreign passengers or guarantee their peaceful intentions. Has the Crown a legal I duty to protect the shipowner against the criminal action of the passengers whom the shipowner himself has invited aboard? It is said, on the one hand, that a British ship on the high seas, or on the Yangtze, is British territory, and that the Crown must protect British subjects in British territory; on the other hand, that the protection asked is against anticipated danger which may never occur and which results from the act of the shipowner himself in taking evilly disposed passengers on board, and not against actual danger in existence.

Counsel for the shipowners used the same dilemma which ATKIN, L.J., unsuccessfully used in *Glasbrook's Case* (2). He says ([1924] 1 K.B. at p. 899):

> "If the request [for special protection] is one which is improper, they should not comply with it. If they do comply with it, they accept it as a proper means, though possibly not the best means of performing their duty." A

The majority of the House of Lords objected to being impaled on this dilemma. LORD CAVE, L.C., said ([1925] A.C. at p. 279), after reading the dilemma:

> "With great respect to the learned lord justice I am disposed to think that this reasoning rests on an ambiguous use of the word 'duty.' There may be services rendered by the police which, although not within the scope of their absolute obligations to the public, may yet fall within their powers, and in such cases public policy does not forbid their performance." B

LORD FINLAY, after again citing the passage of ATKIN, L.J., says ([1925] A.C. at p. 287): C

> "I think that this argument, like most arguments put in the form of a dilemma, fails to cover the whole ground. There was no duty on the police to give the special protection asked for, but it does not follow that it was their duty not to give it."

In the same way the King, as head of the Army, may think this a way of affording protection which, in view of other calls on the Army, he is not able to afford except D on the terms that those who ask for this special and extravagant form of protection for enterprises which they themselves have selected without any authority from the King shall pay for the protection that they want for the dangerous enterprises which they themselves have chosen to enter upon for their private profit. Because every jeweller who leaves valuable jewelry at night protected only by a plate-glass window against smash-and-grab raids is in danger of robbery, are the police bound E to keep a policeman outside every jeweller's shop, or can they say: "If you want this kind of individual protection, you, the individual, must pay for it"? Because every owner of a motor car who uses the street as a garage and leaves his car unprotected runs the risk of losing it, are the police under a legal duty to keep a policeman in charge of every car which the owner has left in self-created danger, or may the police authorities say that if this kind of special protection is wanted F and can be afforded the individual must pay for it? The House of Lords accepted the second alternative in *Glasbrook's Case* (2). In my opinion, there is no legally enforceable duty to protect British property from danger in foreign parts. The remedy, if any, is pressure brought by Parliament on Ministers either to take diplomatic action or otherwise to protect British subjects. Britons fortunately are enterprising people accustomed to look after themselves; to suggest a duty on the G British government to follow adventurous Britons all over the world into places where their personal wishes or adventures have taken them and to protect them from the difficulties into which they have got themselves, does not represent a legal duty of any kind.

Before this court, while the question of duty to protect as correlative with allegiance was argued, more stress was laid on the argument that the Crown had H no authority to demand payment for the use of its armed forces. ROWLATT, J., did not deal with this argument, but treated what he called "using the forces for reward" as a matter to which no objection could be taken. The important question was thus raised in this court as to the exact powers of the King as head of the Army, whether His Majesty by his prerogative could regulate the Army as he pleased, so far as he was not expressly restrained by the Army Act, or by the financial provisions I of the Appropriation Act, or whether the position was not that the King as head of the Army could only incur such expense and take such action as was authorised by statute, and especially could not demand money for protection afforded by his armed forces, which was said to be imposing a charge on the subject without the authority of Parliament. But, if there was no duty to afford anticipatory protection in foreign parts, no charge was imposed on the subject, because he was not bound to accept the protection, and need not pay money unless he asked for protection, which the Crown was under no duty to afford him. I am reluctant

A to discuss the matter under the head of "Prerogative," because, as PROFESSOR DICEY said, the word introduces the political controversies of an earlier age as to whether the Sovereign had some power which could not be superseded, regulated, or abolished by Act of Parliament. PROFESSOR DICEY treats the prerogative as

> "the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King B himself or by his Ministers. Every act which the executive government can lawfully do without the authority of the Act of Parliament is done by virtue of the prerogative."

Now, it is clear that there is a wide margin of executive acts done by the King or his Ministers in relation to the administration of the Army which the courts of C law will not interfere with or control. The Statute Law Revision Act, 1863, left unrepealed that part of the preamble of the Act [relating to the King's sole right over the militia] of 1660 (13 Car. 2, c. 6) which recited that

> "within all his Majesties realmes and dominions the sole supreme government command and disposition of the militia and of all forces by sea and land and of all forts and places of strength is and by the lawes of England ever was the D undoubted right of his Majesty and his royall predecessors Kings and Queenes of England and that both or either of the Houses of Parliament cannot nor ought to pretend to the same."

LORD HALDANE, in HALSBURY'S LAWS OF ENGLAND (1st Edn.) (vol. 25, p. 37, para. 69), cited this preamble as the authority for his statement that [see now 2nd Edn., vol. 28, p. 585, para. 1206]

E

> "the government of the forces is vested in the Crown, who has power to make regulations as to command and administration."

As LORD KENYON said in *Macdonald* v. *Steele* (9), where an officer was asking the paymaster-general for his half-pay,

> "His Majesty's pleasure supersedes all inquiry, as he has the absolute direc- F tion and command of the Army."

The courts have repeatedly refused to intervene in questions of pay and service, though the Royal Warrants appear to entitle the claimant to what he asks the court to give him. This is so, whether the claimant asks relief from the King or from the executive officer. Colonel Mitchell, in *R.* v. *Secretary of State for War* (10), demanding half-pay under a warrant, failed against the Secretary of State G for War on the ground that there was no obligation on the Secretary except to the Crown, and that "there is no obligation upon the Crown to make this allowance recognised by the law." He also failed in *Mitchell* v. *R.* (11), cited on petition of right against the Crown. LORD ESHER said ([1896] 1 Q.B. 121):

> "An officer cannot, as between himself and the Crown, take proceedings in the H courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The courts of law have nothing to do with such a matter."

This is because the administration of the Army is in the hands of the King, who unless expressly controlled by an Act of Parliament cannot be controlled by the courts. Similar decisions are found in *Gidley* v. *Lord Palmerston* (12), *Re T. J.* I *Tufnell* (13) (3 Ch.D. at p. 176), and *Dunn* v. *R.* (14), where it was held that a servant of the Crown, though expressly engaged for a fixed term of years, could be dismissed without notice at the pleasure of the Crown, *Kinloch* v. *Secretary of State for India in Council* (15), and *Grant* v. *Secretary of State for India* (16).

The constitutional aspect of the financial side of the question was more fully explored in this court than it had been below. The court was anxious to ascertain exactly in what kind of cases the Crown received money for the sale or use of Crown materials, or for the services of members of the national forces, and under what authority and how the sums so received were dealt with in the national accounts. In consequence the hearing was adjourned, and the Attorney-General A supplied us with two detailed memoranda as to the Navy and Army respectively. Counsel for the plaintiffs did not discuss in detail the Navy papers, as he appeared to take the view that the prerogative of the Crown in respect of the Navy was much wider than that, if any, in regard to the Army, owing to the historical circumstances connected with the Revolution of 1689 and the Bill of Rights in connection with a "standing Army." In the case of the Navy it was obvious that the B Admiralty constantly received payments from outsiders, foreign governments, or British and foreign subjects, for work done or services or materials supplied to those outsiders; and that the Admiralty so acted without any express authority from statutes, though the sums which they received were dealt with in the Appropriation Act as stated hereafter. For instance, the Admiralty charter the Navy oil-tankers to private individuals for reward when they are not required for C Navy services, and there is no statute authorising such action. The most interesting question is that of salvage. In *The Mary Ann* (17) LORD STOWELL had said:

> "although there is an obligation upon King's ships to assist the merchant vessels of this country, yet, when services have been rendered, those who confer them are entitled to an adequate reward."

D

That statement was limited in later years by the statutes requiring that no salvage reward should be claimed without permission of the Admiralty. It was also made more precise by the decision in *The Cargo ex Ulysses* (18), where the court said that it would not treat the presence of a King's ship protecting against actual pirates or robbers as salvage service, but did treat the presence of guards and sentinels not on the King's ship but on a wrecked ship to guard against pirates or E robbers who might attack, and of members of the Navy salving cargo from maritime perils, as entitling them to salvage reward. This was not the case of a claim for salvage service and remuneration under an agreement made, not when perils were actually endangering the ship, but in anticipation that such perils might arise.

The question of King's ship salvage was not exhaustively discussed before us, but will be found so discussed in KENNEDY ON CIVIL SALVAGE, pp. 112 to 118. The F Admiralty render services to private persons and companies in time of civil commotion for payment. A similar series of payments to the War Office for the supply of materials and men is set out in the Army memorandum. None of these payments is required or protected by express statutory authority; all are said to be justified by the uncontrolled discretion of the King as head of the Army, in matters under which he is under no express statutory restriction, such as the requirement G that he shall not employ more men or spend more money than Parliament authorises. He need not employ all these men or spend all the money that Parliament authorises. The matter is left to the uncontrolled discretion which he exercises by his Ministers. The courts cannot question it, though Parliament by vote of no confidence, or pressure in Parliament, may influence it.

The financial side of the matter, the question of imposing a charge on subjects H without the consent of Parliament, is illuminated by two memoranda from the Treasury produced to us during the second hearing. The first sets out the way in which receipts for services rendered by the Army and Navy have been dealt with during the last 120 years. After much discussion, the system was put on a statutory footing by the Public Accounts and Charges Act, 1891. Section 2 deals with all such receipts as appropriations in aid, under the direction of the Treasury, I of money provided by Parliament for any purpose, and as such they are so applied and audited and dealt with. The suggestion that such receipts are not authorised by Parliament disappears. The second memorandum shows in detail in the case of a payment by the present plaintiffs, for services similar to those the subject of the present appeal, the progress of the particular payment through the various revenue authorities, till at last it is sanctioned as an appropriation in aid under the head "Miscellaneous Receipts" by the Appropriation Act for the year, and this is devoted to the relief of the sum voted by Parliament.

I am, therefore, of opinion that the appeal fails on the following grounds: (i) That there is no duty enforceable by the courts on the Crown to render the services for which the plaintiffs ask. The matter is one for the uncontrolled discretion of the King as head of the Army, both as to whether he shall afford such protection against such anticipated, not actual, danger, and as to the terms on which he should afford it. (ii) There is no compulsion on the plaintiffs to make the payment of which they complain; but if they want the services they must pay for them if the King requires them so to pay. (iii) The payment, where made, is sanctioned and controlled by Parliament in the Appropriation Act under the system of appropriations in aid under the Act of 1891. The appeal must be dismissed with costs.

LAWRENCE, L.J.—The plaintiff company is an English company incorporated under the Companies Acts and carries on an extensive shipping business in Chinese and neighbouring waters. These waters have for some considerable time past been infested by Chinese pirates, and frequent piratical attacks have been made on ships belonging to the plaintiff company and other owners both from without and within the ships. An important part of the plaintiff company's business consists of carrying Chinese passengers travelling from one port to another along the coast, and the plaintiff company and other owners have found it difficult to prevent pirates from coming on board their ships in the guise of passengers and then overpowering the master and crew and taking forcible possession of the ship and her cargo.

Various expedients for preventing this form of piracy having been tried in vain, the plaintiff company and other owners (being unwilling to give up the Chinese passenger traffic, which constituted a valuable section of their trade) in the autumn of 1928 approached the military authorities in Hong Kong and London and urgently requested them to provide military guards to be carried in their ships. In response to such request the military authorities in the month of October, 1928, while maintaining that the defence of ships against internal piracy was essentially a matter for the owners to deal with, eventually agreed as a temporary emergency measure to provide armed guards on as many British ships carrying Chinese passengers as was reasonably practicable in view of the limited number of soldiers at their disposal on the China station. In making this provision the authorities pointed out that these protective measures could not be continued indefinitely and that shipowners should themselves take adequate measures for internal defence. As about 200 British ships were engaged in the China trade, and the plaintiff company alone would have required about 200 soldiers adequately to guard all their ships, it was obviously impracticable for the military authorities to provide armed guards for more than a small proportion of the total number of ships requiring them. At first no charge was made to the shipowners for providing these guards beyond the additional expenditure over and above the normal cost of the guards. Later on, in the month of December, 1928, the military authorities notified the shipowners that the provision of guards would be continued for a period of six months as from Nov. 1, 1928, on the conditions then in force, but that, if military guards were required after that date the full cost of providing them must be met by the shipping interests concerned. Early in 1930 the military authorities, after informing the shipowners that it had been decided to reduce the strength of the British garrison in the China command by one battalion from Hong Kong at the end of February, 1930, and that consequently it would be necessary to reduce considerably the number of military guards available in British ships, notified the shipowners that it was the declared policy of His Majesty's government that all military guards should be withdrawn on April 1, 1930, and that consideration must be given by the shipowners to the steps which they were prepared to take for providing guards from other sources. The plaintiffs and other shipowners protested against this decision and requested the authorities to reconsider it and to continue the supply of military guards after March 31, 1930. In the month of March, 1930, the commander-in-chief on the China station notified the shipowners that, in view of the fact that the shipping companies concerned were then engaged in working out details for the formation of a properly trained force for the prevention of piracy of their vessels, His Majesty's government had reconsidered its attitude to the extent that it had decided to sanction a further extension of the provision of military guards for a definitely limited period, subject (inter alia) to the condition that any guards supplied after March 31, 1930, must be paid for in full. The plaintiffs and other shipowners at first protested against the condition of paying for the military guards in full, but ultimately submitted to that condition and agreed to pay, and, in fact, paid in full for all military guards supplied to them after March 31, 1930. The plaintiff company, after having made that agreement, commenced this action against the Attorney-General, alleging that the agreement was made under compulsion and asking the court to declare that the condition imposed upon the plaintiff company by the Crown of paying for the military guards was illegal and unenforceable, and that the plaintiff company was under no obligation to make any such payment.

The first ground on which the plaintiff company bases its claim is that the Crown has provided the military guards in fulfilment of the common law duty which it owes to its subjects, and that in the absence of express statutory sanction it is not entitled to demand any payment as a condition of fulfilling that duty. The plaintiffs' contention on this branch of the case was that the King, both as liege lord and as defender of the realm, was by the common law under a duty to protect the lives and property of his subjects and to defend his realm and every part of it (including British ships wheresoever they might happen to be) against attacks by enemies. In support of the proposition that the King owed such a duty as liege lord the following authorities were cited: (1 Blackstone, p. 354):

> "Allegiance is the tie of ligament which binds the subject to the King in return for that protection which the King affords the subject";

Calvin's Case (1) (4 Co. Rep. at p. 5a):

> "ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them";

and *R.* v. *Keyn* (19) (2 Ex.D. at p. 236):

> "According to the doctrine of Lord Coke in *Calvin's Case* (1) protection and allegiance are correlative."

Counsel also referred to *Re Johnson* (20) and *Markwald* v. *A.-G.* (21) on this point. In support of the proposition that by the common law the King owed a duty to the plaintiff company to defend its ships against internal piracy counsel cited the following authorities: *A.-G.* v. *Tomline* (22), which was a case dealing with the King's duty to defend the realm from the encroachments of the sea (14 Ch.D. at p. 66):

> "It is said by Lord Coke, who is a great authority, in the case of *Isle of Ely* (23), that by the common law
>
> > 'the King ought of right to save and defend his realm as well against the sea as against the enemies that it should not be drowned or wasted'
>
> —that is to say, there is a duty on the King, by reason of his being King, to defend his realm, and therefore, of course, all his realm and every part of his realm";

R. v. *Anderson* (24) (L.R. 1 C.C.R. at p. 163):

> "It has been decided that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island";

Hawkin's Pleas of the Crown (vol. 1, cap. 20, p. 251):

> "A pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure; and he is called hostis humani generis";

the Army Act, s. 190 (20): "The expression 'enemy' includes all armed mutineers, armed rebels, armed rioters and pirates"; *A.-G. for Hong Kong* v. *Kwok-a-Sing* (25) (L.R. 5 P.C. at p. 200), where it was held that passengers as well as mariners who violently dispossess the master and carry away the ship or any part of the cargo are pirates. It is contended that these authorities support the proposition that as by the common law it is the duty of the King to defend every part of his realm against enemies, and as every ship belonging to the plaintiff company (being part of the territory of England) is a part of the King's realm, and as all pirates are enemies, so the King ought of right to defend the plaintiff company's ships against piratical attacks by the passengers carried in those ships.

It is admitted that the manner in which the King should perform this alleged duty is entirely in his discretion; that it is for the King to say whether any case for its exercise has arisen and in whose favour it ought to be exercised, and that the King could not be compelled by any process of law to perform it:

> "It is a duty of what is called imperfect obligation. Supposing that the King were to neglect that duty, I know of no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty, but there is that duty of imperfect obligation on the part of the Royal authority":

per BRETT, L.J., in *A.-G.* v. *Tomline* (22) (14 Ch.D. at p. 66).

Whatever may be the extent of the duty which the King owes as liege lord or as defender of the realm—and I do not propose to attempt to define the limits of that duty—I am clearly of opinion that it does not extend to the provision of military guards for the plaintiff company's ships in the circumstances of the present case. If the aid of the armed forces of the Crown were available and were required in order to defend a British ship which was actually being attacked by pirates at the time, entirely different considerations would arise. That, however, is not the case here; the plaintiff company, realising that if it continues the Chinese passenger traffic such continuance will almost certainly lead to further internal piracy, but being unwilling to discontinue that traffic, has asked the Crown to provide military guards in order to assist its officers and crews in controlling the persons whom it intends to invite to become passengers in its ships and in preventing those passengers after they have been taken on board from committing piracy; in other words, has asked the Crown by means of its armed forces to assist it to continue its Chinese passenger traffic with more safety, and thus enable it to earn the resulting profit. In the circumstances I entirely agree with the view expressed by the Crown to the shipowners that the provision of preventive measures against internal piracy is essentially a matter for the owners and forms no part of the duty of the Crown. It would, I think, be stretching the duty of the Crown beyond all reasonable limits to hold that it extended to providing military guards on ships belonging to private traders engaged in the Chinese passenger traffic in view of the fact that such traders are free to continue or discontinue this traffic as they please, and that the Crown has no right to control or interfere with the manner in which that business is conducted. I know of no authority which lends countenance to the suggestion that it is the duty of the King, either as liege lord or as defender of the realm, to provide military guards for the protection of a ship which her owner voluntarily takes into foreign ports with the intention of embarking passengers, some of whom to his knowledge may turn out to be pirates in disguise.

In the result, I have come to the conclusion that there was no common law duty on the Crown to provide the military guards for the plaintiff company's ships, and consequently no question as to the Crown having demanded payment for the performance of a duty which it owed by the common law arises in this case. This conclusion, however, by no means disposes of the case. There remains the important and difficult question whether, assuming the Crown to be under no common law duty to provide the military guards, but having in its discretion decided that it was a proper thing to do in the circumstances, the Crown can legally demand a money payment as a condition of rendering those services. This question has given rise to an interesting discussion on the question occupied by the Crown in relation to the royal forces. The contention of the plaintiff company, stated shortly, was that all prerogative powers in relation to the Army in time of peace had long since been swept away; that the powers exercised by the Crown in relation to the disposition and use of the Army in time of peace at the present day are purely statutory powers; and that the Crown has a statutory duty to exercise those powers whenever it considers that they ought properly to be exercised, and cannot, therefore, in the absence of express statutory authority, legally demand any payment as a condition of such exercise.

In support of the proposition that it is illegal for the Crown or any other body or person invested by statute with discretionary powers to exact money colore officii, the plaintiffs relied mainly on the following cases: *Morgan* v. *Palmer* (4), where it was held that the mayor of Yarmouth, who in his character of mayor was one of the justices of peace in and for the borough, had no right to demand a sum of money for granting the renewal of the annual licence of a publican; *A.-G.* v. *Wilts United Dairies* (6), where it was held by the House of Lords that the Food Controller had no power to impose as a condition of the grant of a licence to purchase milk in a certain area a charge of 2d. per gallon payable to him by the purchaser; and *T. and J. Brocklebank, Ltd.* v. *R.* (7), where it was held that the Shipping Controller had no power to impose as a condition of the grant of a licence to sell a ship to a foreign firm the payment to the Ministry of Shipping of a percentage of the purchase money. The basis of the decisions in the two last-mentioned cases was that the demand of payment made by the Crown as a condition of granting a licence amounted to the levying of money for the use of the Crown without grant of Parliament contrary to the Bill of Rights and was, therefore, illegal. Lord Buckmaster, in the *Wilts United Dairies Case* (6), says (127 L.T. at p. 823):

> "However the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax, the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

The question whether the principle upon which these cases were decided applies to the facts of the present case depends entirely upon the nature and extent of the discretionary powers admittedly exercisable and exercised by the Crown in relation to the disposal and use of the Army in time of peace. As to the nature of these powers counsel for the plaintiffs has been at great pains to demonstrate that they are purely statutory, for which purpose he has placed before the court a short historical survey of the position occupied by the Crown in relation to the royal land forces from the Conquest to the present time, culled from various well-known writers. An admirable historical account of the Army in a compendious form is to be found in the Manual of Military Law, published by the War Office (particularly in chapter 2, dealing with the history of military law, written by Lord Thring, and in chapter 9, dealing with the history of the military forces of the Crown, written by Sir H. Jenkyns), from which source I have taken most of the historical facts to which I am about to refer. After the Restoration in 1660 considerable changes took place in the military system of this country, and the foundations for the present standing Army were laid. Among the various Acts which were then passed I need only mention the statute of 13 Car. 2, c. 6, containing the following recital, which still stands unrepealed upon our statute book:

> "Forasmuch as within all his Majesties realmes and dominions the sole supreme government command and disposition of the militia and of all forces by sea and land of all forts and places of strength is and by the lawes of

> A England ever was the undoubted right of his Majesty and his royall predecessors Kings and Queenes of England and that both or either of the Houses of Parliament cannot nor ought to pretend to the same."

One of the causes which led to the Revolution in 1688, no doubt, was the increase in the number of troops raised and maintained by James II, and to prevent trouble B arising from such a cause in the future the Convention Parliament, when calling the Prince and Princess of Orange to the throne, inserted in the Declaration of Rights a declaration that

> "the raising and keeping a standard Army within the Kingdom in time of peace unless it be with consent of Parliament is against law."

This declaration was embodied in the Bill of Rights and in the first Mutiny Act. C It has since been repeated in the subsequent Mutiny Acts and in the annual Army Acts down to the present time, and the Army has since the year 1689 continued to exist only by virtue of the annual renewal of the sanction given by Parliament. In addition to the control which Parliament then assumed over the raising and payment of the Army it also secured to itself full control over the discipline requisite for the government of the Army. The various statutory provisions D relating to matters of discipline were finally consolidated in the Army Act, which of itself has no force, but requires (see s. 2) to be brought into operation every year by the annual Army Act; each of these annual Army Acts contains a preamble reciting (inter alia) the illegality of raising or keeping a standing army in time of peace without the consent of Parliament, the necessity of continuing a body of forces for the safety of the United Kingdom and the defences of the possessions of E the Crown, the number of such forces required and the necessity of the observance of an exact discipline, and then enacts that the Army Act shall be and remain in force for a period of twelve months. As regards the payment of the Army, Parliament grants the necessary money on estimates submitted by the Crown, but the expenditure of the money granted is left to the discretion of the Crown, subject only to audit on the part of Parliament. Under the legislation referred to a standing F Army has been maintained in England without intermission since the passing of the Bill of Rights. As the raising, government, and payment of the Army has always been expressly sanctioned by Parliament for a period of twelve months at a time, the Army may properly be said to be a statutory and not a prerogative force, and the Crown is under the necessity of asking annually for the consent of Parliament to its maintenance.

G Except in so far as Parliament has by statute regulated matters relating to the raising, keeping, and discipline of the Army, however, the Crown has retained and exercises many wide and important powers in relation to the Army. It was by no mere oversight that the preamble to 13 Car. 2, c. 6, has remained unrepealed, as in 1863 the whole of the rest of the Act was repealed, but the declaration as to the King's right to the government, command, and disposition of the forces by sea and H land was expressly left standing. It is to be noted that Parliament has never purported expressly to confer upon the Crown any powers of disposing of or using the Army or administering its affairs. When Parliament has given its consent to the raising and keeping of the Army for the year, it leaves the Crown to exercise its prerogative powers as to the manner in which the Army is to be raised and kept and in respect of the disposition of its affairs. The manner in which these powers I are exercised is constitutionally subject, like the exercise of other prerogatives, to the advice of the Ministers of the Crown, of whom the one particularly responsible for the Army was, until recently, the Secretary of State for War. By Letters Patent dated Feb. 6, 1904, all the prerogative powers of the Crown in relation to the Army, which had theretofore been exercised by the Secretary of State, the Commander-in-Chief, and other officials, were vested in the Army Council, to whom further powers were transferred by the annual Army Act, 1909, but the Secretary of State for War remains responsible to the Crown and Parliament for all the business transacted by the Council. It is unnecessary to specify the various powers relating to the Army which Parliament has thus tacitly left to the unfettered control of the Crown; it is sufficient to state that they undoubtedly include the organisation, armament, maintenance, disposition, and uses of the standing Army in time of peace.

In my opinion, therefore, the powers which the Crown exercises as to the disposition and use of the standing Army in time of peace are powers vested in the Crown by prerogative right at common law, and are not powers conferred upon the Crown by statute. However, the question whether the Crown was acting under its prerogative powers or under powers conferred upon it by statute, when acceding to the request of the plaintiff company to provide guards for its ships, is, in my opinion, not really the material question to be decided in this case. The extent of the powers exercisable by the Crown in relation to the Army is, in my opinion, the same whether they are technically prerogative powers or statutory powers. If, contrary to my opinion, they are statutory powers, Parliament has not limited them in any way save by the enactments already referred to and, except as so limited, their scope must be measured by the powers which were vested in the Crown by prerogative right at the time of Charles II.

This brings me to the crucial question in the present case, whether the powers of disposition and use of the royal forces vested in the Crown include a power to hire out troops to a British company at its request for the protection of its property and the lives of its employees. Admittedly, the powers retained by or vested in the Crown, in relation to the Army, are wide and undefined, and unless the plaintiffs can establish that these powers do not include a power to lend troops to a private individual for the protection of himself and his property in consideration of a money payment, or that the Crown by providing the guards in consideration of a money payment has violated some constitutional principle of which the court can take cognisance, I think that the plaintiff company must fail on this appeal. In my judgment, the powers of the Crown are wide enough to include a power to lend troops to a private individual for reward, and the Crown has not violated any constitutional principle in providing the guards in consideration of a money payment. The manner in which the Crown exercises its powers is not a matter which can be inquired into by a court of law. As Lord Kenyon said in *Macdonald* v. *Steele* (9) (Peake at p. 234):

> "His Majesty's pleasure supersedes all inquiry, as he has the absolute direction and command of the Army. It is true Parliament has provided a sum of money, but that is to be distributed as the King chooses."

The contention that the Crown, by imposing, as a condition of providing the guards, the payment of a sum of money to cover their pay while they are employed on that service, has attempted to levy a tax on the subject without grant of Parliament contrary to the Bill of Rights is, in my opinion, not well founded. The plaintiff company was at liberty to carry on its trade without any licence or interference from the Crown. The Crown was under no duty to provide the guards; the plaintiff company was free to accept or reject the offer made by the Crown. The facts of the present case are quite different from the facts in the cases upon which the plaintiff company has relied, and the principle referred to by Lord Buckmaster in the *Wilts United Dairies Case* (6) has no application to this case.

Counsel for the plaintiffs put his case on this point in the form of a dilemma. He contended that either the Crown in its discretion decided that it was necessary to provide the guards for the protection of the plaintiff company, in which case the Crown was performing a duty which it owed to the plaintiff company, or else the Crown was at the request of the plaintiff company making use of the Army in an unauthorised manner, in which case the contract was void as being contrary to public policy. This is the dilemma which, according to the speech of Lord Cave, in *Glasbrook Bros., Ltd.* v. *Glamorgan County Council* (2) ([1925] A.C. at p. 278), was put by Atkin, L.J., in that case in the Court of Appeal. The answer given by Lord Cave to the dilemma so put applies to the present case. It by no means follows that, because it was not the duty of the Crown to provide guards for the plaintiff company's ships, that, therefore, the Crown had no power to provide the guards and to demand the payment of a sum of money in consideration for making such provision. I know of no authority which prevents the Crown, if so minded, from employing any available soldiers in time of peace as well as in time of war in rendering services to private individuals, or from demanding and receiving remuneration for any services so rendered. It might form the subject of just criticism in the House of Commons if the Crown were to employ soldiers gratuitously for such purposes, but I see no valid reason for holding that such employment, with or without remuneration, is unconstitutional or against public policy. The only cases to be found in the reports where the armed forces of the Crown have in time of peace rendered services to private individuals for reward are the salvage cases. These cases are not closely analogous to the present, although in some of them the Admiralty has made a claim for the use of his Majesty's ships and in others the Admiralty has deducted the pay of the officers and crew employed on the salvage operations from the amount recovered by them, but some of the passages in the judgment are not without interest in connection with this case.

In *The Mary Ann* (17), where a demand was made for the remuneration of salvage services which had been rendered by the commander and crew of one of the King's ships, LORD STOWELL said:

> "Undoubtedly, the parties may fairly claim a remuneration although the ship belongs to the State; and although there is an obligation upon King's ships to assist the merchant vessels of this country, yet, when services have been rendered, those who confer them are entitled to an adequate reward."

The case of *The Lustre* (26) was where a government steamer assisted a merchant vessel on a stipulation to reimburse all expenses arising from damage to the steamer or the stores, and it was held that such a stipulation was no bar to salvage compensation. SIR JOHN NICHOLL, in the course of his judgment, said:

> "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense; these government steam vessels are kept for the public service, and the officers in command cannot employ them in the service of individuals, and thus risk the public property without authority, or an indemnity for all expenses and damage."

In *The Ewell Grove* (27), where a merchant vessel was salvaged by a government steamer and 200 men, and the court awarded £1,200 and costs to the salvors, SIR JOHN NICHOLL said (3 Hag. Adm. at p. 224):

> "It is true that the *Rhadamanthus* is one of His Majesty's ships, worked by steam, found and paid at the expense of the public, yet that does not give a title to private individuals to employ and be assisted by them without remuneration, any more than by any other vessel in the public service. . . . I have, therefore, no doubt as to the title of His Majesty's steam vessels, in the case of civil salvage, to remuneration."

In the present case we requested the Attorney-General to procure a search to be made for precedents both at the Admiralty and at the War Office in order to see whether there was any and what practice on the part of the Crown in regard to charging for services rendered to private individuals by the naval or military forces. In response to this request we have been furnished with statements on behalf of the Admiralty and of the War Office. The Admiralty statement says that services rendered to private individuals for payment are subject to varying conditions according to the nature of the service, and that in general such services would only be rendered in special circumstances and in response to a definite request, and generally would not be undertaken if alternative private or commercial facilities were available. It also appears from that statement that in 1879 the principle of charging for the services of naval personnel was recognised in the Queen's Regulations (art. 1772), which provided that where divers are lent to effect repairs to merchant ships a charge of 21s. a day is to be made for wear and tear of their dresses and apparatus, and in addition a sum that will cover the pay and allowances of the persons engaged for the time they may be actually absent from their ships. It also appears that in times of strike or civil commotion naval ratings have been employed, in the absence of regular workers, on railways in manning pumping and power stations, coal-mine pumping, machinery, lock gates, tugs and lighters conveying petrol, oil, and foodstuffs, and in loading and unloading these commodities, for which services it has been the practice to make a charge on the companies concerned based on the wages which would have been payable at current industrial rates if naval personnel had not been employed, or on the actual naval pay and allowances of the naval personnel employed, whichever was the greater amount. Counsel for the plaintiffs contended that the Navy stood on an entirely different footing from that of the Army, and that what the Crown may have done in exercise of its prerogative in the case of the Navy could have no bearing on the question what the Crown is empowered to do as regards the Army. It is true that the Navy was never looked upon as a menace to the country like the Army was considered to be in the seventeenth century, and that it has never been brought under control of Parliament to the same extent as the Army, yet the preamble of 13 Car. 2, c. 6, declares the prerogative rights of the Crown in respect of the forces both by sea and on land in the same terms, and except in so far as there are any statutory restrictions the prerogative powers of the Crown in relation to the Army are the same as those in relation to the Navy.

The statement from the War Office contains many instances of occasions upon which the War Office without statutory authority has received payment in respect of services rendered by the personnel of the Army. From these instances it appears that for very many years it has been the practice of the War Office to demand and receive payments for services rendered to foreign countries, British Dominions, Colonies, and private individuals. These payments fall under four heads, namely: (i) Payments for services rendered in ordnance factories; (ii) payments for services rendered by military forces; (iii) payments by Dominions, colonial and mandated territories, and foreign governments; and (iv) payments in respect of foreign missions. The instances given include under head (i) charges made to many private individuals and firms for goods sold and services rendered; under head (ii) charges for military protection afforded to Malta, the Ionian Islands, and Ceylon, for services rendered to private individuals, companies, and firms during the war by the Dock Battalion and the Transport Workers' Battalion, for services rendered by military fire brigades, and for lending troops to reputable British film companies; under head (iii) charges for British troops stationed in the territory of Dominions, colonies, and foreign countries; and under head (iv) charges in respect of foreign missions, all of which (with the exception of one instance in 1904 when ten officers were lent to the Turkish govenment for services with the gendarmerie in Macedonia) were post-war missions arising out of the War. In reference to the War Office, it is to be observed that no case has been found where a military guard has been provided for the ship of a trader who for his own profit sets out on a hazardous enterprise. In my opinion, however, the propriety of lending troops for such a purpose and of making a charge for doing so is not a matter which can properly be inquired into in a court of law. If the wide powers which the Crown has and exercises with regard to the disposition and use of the Army are to be restricted in any way, this can only be done by Parliament. In view, however, of what has been said in the course of the argument, I would only add that if a shipowner asks the Crown to provide armed guards to assist him to control the passengers whom he invites on board his ship, and the Crown accedes to his request, it seems only reasonable that he and not the public should pay for that privilege.

Lastly, it has to be remembered that ever since Parliament has sanctioned the raising and keeping of a standing Army in 1689 it has insisted upon a thoroughly open and independent examination of the annual Army estimates and audit of the Army receipts and expenditure. All receipts in respect of the Army have to be applied as an appropriation in aid of the money provided by Parliament for that service under s. 2 of the Public Accounts and Charges Act, 1891, and have, therefore, to be brought into the Army estimates. The amount which may be appropriated is definitely limited to the sum authorised by Parliament by the Appropriation Act of the year, and any sum received in excess of that amount is surrendered to the Exchequer as an extra receipt. In practice the Army Council submit their estimates to the Treasury, which critically examines them both as to the estimated expenditure and as to the estimated receipts. After approval by the Treasury the estimates are submitted to Parliament by the Secretary for War and may be discussed in Parliament before the granting of supply and the passing of the Appropriation Act. After the supply has been granted the administration of the moneys granted is left to the War Office under the direction of an accounting officer, who is responsible to the Treasury and to Parliament for the due administration of those moneys. The accounts are audited annually by the Comptroller and Auditor-General, whose duty it is to report to Parliament any case in which he considers that service has been wrongfully given, or for which inadequate authority existed, or for which inadequate or improper payment was made. The accounts are then placed before the Public Accounts Committee of the House of Commons. The sums paid by the plaintiff company for the provision of armed guards on its ships were included in the estimates for the years in which they were received as an appropriation in aid, and were duly granted by Parliament as part of the supply for the Army for that year; they were subsequently passed as proper receipts by the Comptroller and Auditor-General. In the face of these facts it is difficult to see how the contention that the Crown has levied money for its use without grant of Parliament contrary to the Bill of Rights can successfully be maintained. Moreover, if, contrary to my opinion, the sanction of Parliament was wanted for the Crown hiring out troops to the plaintiff company and other shipowners trading in Chinese waters, such sanction is, in my opinion, necessarily implied from the grant by Parliament of the amount received by the Crown for such hire as part of the supply for the Army.

In the result, for the reasons stated, I have come to the conclusion that the decision of ROWLATT, J., was right and that this appeal should be dismissed with costs.

SLESSER, L.J.—In this case declarations are sought against the Crown to the effect, in substance, that the Crown is not entitled to charge the plaintiff company for the use of troops employed to protect the property of the company and the lives of their employees in circumstances stated by my Lords, which I do not repeat. The plaintiff company seek to support their case on three grounds. First, they say that the powers of the Crown with regard to the Army are by law limited, and that, in particular, the common law and statutes which authorise or require the Crown to employ the Army do not authorise it to make charges for the use of the Army. Secondly, they argue that, in any event, even if the Crown has a discretion how it will protect the subject, yet that discretion should not be influenced by any consideration of the giving of money by the subject or the denial of such money. Thirdly, it is said that the Crown has a duty to protect the subject and that its officers cannot properly demand money from the subject, colore officii, as a term of the performance of that duty.

These three arguments I propose to consider in the order in which I have stated them. (a) As regards the alleged limitation of the prerogative of the Crown in its disposition of the Army. By statute 13 Car. 2, c. 6, it is declared that

> "the sole supreme government command and disposition of the Militia and of all forces by sea and land is, and by the lawes of England ever was the undoubted right of His Majesty and his royall predecessors Kings and Queenes of England."

This declaratory Act is still law, and, as late as the year 1863, by schedule to the Statute Law Revision Act of that year, the words in the preamble of the Act of Charles II which I have quoted, are expressly preserved.

> "His Majesty's pleasure supersedes all inquiry, as he has the absolute direction and command of the army":

per Lord Kenyon in *Macdonald* v. *Steele* (9) (Peake at p. 234). The government of the forces is vested in the Crown, which has power to make regulations as to command and administration (Halsbury's Laws of England (2nd Edn.), vol. 28, p. 585).

> "The supreme government and command of all forces by sea, land, and air, and of all forts and places of strength, is vested in the Crown by prerogative right at common law and by statute"

(Halsbury's Laws of England (3rd Edn.), vol. 7, p. 256). This last quotation cites Comyns's Digest to the like effect, and although Sir John Comyns appears to limit his statement, that

> "the government and command of the militia and of all the forces by sea and by land belong only to the King"

(Prerogative—Command of the Forces, 4th Edn., vol. 6, p. 33), to prerogative in respect of the King's own subjects in time of war, apart from the legislation of the Army by the Army Acts, his submission would appear to be equally true as regards time of peace. It is by virtue of his prerogative that the King by letters patent in 1904 constituted the first Army Council, and it is there stated that the Army Council has been constituted.

> "for the administration of matters pertaining to our military forces and the defence of our Dominions, that such power and authority for the purpose as has hitherto been exercised under our prerogative"

by various officers. . . . Although by s. 7 (1) of the Army Act express provision is made for removing doubts as to the powers of command vested or to be vested in officers, by sub-s. (2) of that section it is expressly provided that nothing in the section shall be deemed to be in derogation of any other power otherwise vested in His Majesty.

Counsel for the plaintiffs, confronted with the declaratory words of the Act of Charles II, sought to confine them to forces by sea and land existing at the time of the passing of that Act. He argued that in effect there were at that time no forces by sea and land other than the militia itself. It is true that an Act of the previous year (12 Car. 2, c. 15) had provided for the speedy disbanding of the Army, but it appears that this disbanding had not been completed at the time when the Act 13 Car. 2, c. 6, was passed, for there are several later statutes of the reign of Charles II dealing with the remnants of the then Army: see Clode, Military Forces of the Crown, Appendix 1. But, in any event, whether there were or were not at that time any forces by sea or land on which the statute could operate, other than the militia, it is clear from the language of the statute, which is a declaration of the existing prerogative, that the prerogative of command of the forces by sea or land has always been vested in the Crown, that it would equally apply in the absence of express statutory provision to any forces thereafter lawfully to be raised. The language of the statute which I next consider is the first Mutiny Act (1688) (1 Will. & M., c. 5). That Act, which contained provision for punishing officers and soldiers who should mutiny or desert their Majesties' service, was to continue until November, 1689, and it is significant that it contains no provision for amending or repealing the Act of Charles II which had declared the prerogative. In 1689 was passed the Act generally known as the Bill of Rights (1 Will. & M., sess. 2, c. 2), which recites that the late King James II

> "did endeavour to subvert and extirpate the Protestant religion, and the laws and liberty of this Kingdom by raising and keeping a standing army within this Kingdom in time of peace without consent of Parliament,"

A and declares, among other matters, that the raising or keeping of a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law. This was by ch. 2. By ch. 4 of the same session was enacted the second Mutiny Act. The position, therefore, in 1689 was this: A standing army was illegal without the consent of Parliament, but, when once Parliament had given its consent, the standing army became legal. There is no indication in the B statutes that the prerogative of the King with regard to the government or command of such a legalised standing army was in any way impaired.

It is not necessary, in my opinion, to consider in detail the subsequent Acts which continued annually to legalise the Army. The earlier Acts did not specify the number of troops to be raised. This was not done until the Mutiny Act, 1714, and in 1715 power was given to the Crown to draw up articles of war for the C discipline of troops in the United Kingdom. But such articles of war which continue to have statutory authority (see the Army Act, s. 69) are to be distinguished from the King's Regulations, which, with certain exceptions, continue to have force apart from the authority of statute. Articles of war are said by s. 69 of the Army Act to be for the better government of officers and soldiers, and statutory power is given by s. 71 of the same Act to make regulations as to persons D to be invested as officers. These regulations now appear among the King's Regulations, but the remainder of the regulations have no statutory authority and are made by virtue of the prerogative. It is also worthy of note that the responsibility, both to the Crown and to Parliament, of all the business of the Army Council borne by the Secretary of State is conferred upon him by Order in Council and not by statutory provision: see the Order in Council dated Aug. 10, 1904. In place E of the Mutiny Acts there is now passed an annual Army Act which, as a rule, contains amendments of the principal Act, which it continues for one year. It provides in its preamble that the keeping or raising of a standing army within the United Kingdom in time of peace, unless it be with the consent of Parliament, is against law (see the Army and Air Force Annual Act, 1931), and provides that the Army Act and the Air Force Act shall be and remain in force during the periods F thereafter mentioned and no longer unless provided by Parliament. There follows a period to April 30, 1932, in Great Britain and Northern Ireland, the Channel Islands, and the Isle of Man, with different provisions elsewhere: see s. 2 (1) (a) and (b).

This short investigation of the history of the relations of Parliament and the Army shows clearly that at no time has Parliament derogated from the prerogative G with regard to the command of the forces as it was declared in the time of Charles II. It has declared the standing Army illegal in time of peace without the consent of Parliament, but has abstained from interfering with the command by the Crown over a legalised army. In so far as practice is to be considered in such a connection, the memorandum with which we were furnished by the War Office makes it clear that moneys have from time to time been received by the Crown H without statutory authority for military protection. In 1846 from Malta and Ceylon and the Ionian Islands; from the old East India Co.; during the late war the service of dock battalions and transport workers' battalions were charged for, so also were soldiers released for civil work, and charges have been made for military fire brigades, regimental bands, for the use of troops employed by film companies, and for the guard at the Bank of England. It is stated that from time I to time almost every colony has in one way or another made payments to the British Exchequer in respect of British troops stationed in its territory. Payments have been made for the extra cost of British forces in Iraq and in Palestine, by the governments of those countries; by the Egyptian government, and by certain foreign commissions and boundary commissions. None of these payments was authorised directly or indirectly by statute. If the plaintiffs' argument is correct, the whole, or most of them, would be contrary to law. Indeed, until the present case, I do not know that it has ever been questioned that the Crown has the right to receive payments for the use of troops used in one way or another by private persons or foreign governments or Dominions of the Crown. It was at one time A suggested in argument that Parliament would lose its financial control if the Crown received these moneys, but it has been made clear to us that the provisions of the Appropriation Acts guard against any such contingency. All the receipts resulting from the use of the Army are brought into the appropriation account, and although the sums so received are not always paid directly into the Exchequer, the Treasury, acting under the authority of the Public Accounts and Charges Act, 1891, allows B the department, instead of paying such receipts into the Exchequer, to use them to defray the expenditure of the year so far as they suffice to meet it. Parliament, on being shown that the department requires to spend a certain sum but that receipts from fees, &c., will amount to a smaller sum, grants the difference, together with authority to use the sum received from the fees, and therefore the department is limited to the gross expenditure from the sums granted and the fees, C and is financially in exactly the same position as if they had asked Parliament for the whole sum and paid the fees into the Exchequer. The practice has varied from time to time, but the system of appropriation in aid, operating as I have described, removes all chance of the Crown receiving moneys which will not be under the control of Parliament: see MAY'S PARLIAMENTARY PRACTICE, 13th Edn., p. 396, et seq. D

For all these reasons, I am of opinion that, once Parliament has sanctioned the Army for a period of one year, there is no statutory limitation on the right of the Crown, acting under its prerogative of command and disposition of the forces, to make it a condition of the supply of troops for a particular purpose that a charge shall be made for them.

(b) In regard to the suggested influence of the Crown's discretion by considera- E tions of the possibility of the receipt or denial of money. On this matter there is little direct authority; the assumption that the Crown is entitled to make a stipulation that when a government steamer assists a merchantman it shall be reimbursed all expenses arising from damage to the government steamer is to be found in *The Lustre* (26), in which SIR JOHN NICHOLL, in the course of his judgment, said: F

> "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals merely to save them from expense."

This was clearly a case where the discretion whether the government steamer G would or would not be employed in a particular matter of salvage was decided upon an express stipulation that the owners and underwriters would be answerable for certain payments. So also in *The Ewell Grove* (27). Later authorities and statutes as to salvage, such as the case of *The Cargo ex Ulysses* (18), do not, in my view, affect the principle. If the argument of the plaintiffs here were right, such a consideration was improper, for, as was stated by LORD STOWELL in *The* H *Mary Ann* (17): "There is an obligation upon King's ships to assist the merchant vessels of this country." In that case, salvage remuneration was claimed after service had been rendered, but in *The Lustre* (26) a stipulation for payment to cover damage was made before the commander exercised his discretion to allow the use of the ship. In CHITTY ON PREROGATIVE OF THE CROWN, 1820, p. 6, it is said: I

> "In the exercise of his lawful prerogatives an undoubted discretion is, generally speaking, allowed to the King";

and at p. 44:

> "The King is at the head of his Army and Navy, is alone entitled to order their movement, to regulate their internal arrangements as may seem to his Majesty most consistent with political propriety."

A According to BLACKSTONE (8th Edn., vol. 1, p. 251):

> "In the exertion of those prerogatives which the law has given him, the King is irrefutable and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance and dishonour of the Kingdom, the Parliament will call his advisers to a just and severe account."

B

"Prerogative is the discretionary power for acting for the public good" (LOCKE ON GOVERNMENT, 2, para. 166), quoted by BLACKSTONE, ibid. "The King has the sole power of raising and regulating fleets and armies." "He is first in military command, within the kingdom" (BLACKSTONE, ibid., p. 262).

C

> "It is true that the prerogative is created and limited by the common law and that the Sovereign can claim no prerogatives except such as the common law allows"

(COMYN'S DIGEST, Prerogative).

D

> "But in so far as such prerogative includes the government of the Army, the court cannot consider the propriety of its exercise. Upon any doubtful point of prerogative the Crown and its Ministers must bow to the decision of the legal tribunals":

HALSBURY'S LAWS OF ENGLAND (1st Edn.), vol. 6, p. 382. But, in so far as, in my view, the powers here under consideration are within the prerogative, the function of the court is exhausted in so deciding. I am of opinion that a declaration cannot be made against the Crown if, in its discretion, it refuses the provision of military protection to a subject unless such protection is paid for by the subject.

E

(c) Lastly, I have to consider whether the Crown or its ministers can demand money from the subject colore officii as a term of the performance of the duty of protection.

F

To determine this matter it is necessary first to consider whether the Crown has a duty to protect the subject, and, if so, what is the nature of that duty. It is not suggested by counsel for the plaintiffs that the duty for which he contends is one directly enforceable by the subject by process of law. It is, he says, a duty of imperfect obligation. The best passage for his purpose is that of BRETT, L.J., in *A.-G.* v. *Tomline* (22) (14 Ch.D. at p. 66), in which he uses the phrase "duty of imperfect obligation." The duty there under consideration was the duty to protect the realm from the inroads of the sea. He says:

G

> "Supposing that the King were to neglect that duty, I know no legal means—that is, no process of law—common law or statute law—by which the Crown could be forced to perform that duty. It is a right which as against the Crown the subject has no means to enforce. Nevertheless, the right exists."

H In the *Isle of Ely Case* (23) COKE, C.J., said:

> "The King ought of right to save and defend his realm as well against the sea as against the enemies, protectio trahit subjectionem et subjectio protectionem, that it should not be drowned or wasted."

A declaratory statute, 23 Hen. VIII, c. 5, says:

I

> "By reason of our dignity and prerogative royal, we are bound to provide for the safety and preservation of our realm of England."

The right to protection is not necessarily limited to the realm.

> "The protection and government of the King is general over all his dominions. . . . Seeing power and protection draweth ligeance . . . extendeth out of England, that ligeance cannot be local, or confined within the bounds thereof":

per curiam in *Calvin's Case* (1); and see per COCKBURN, C.J., in *R.* v. *Keyn* (19) (2 Ex.D. at p. 236) and 1 BLACKSTONE, p. 364. But COTTON, L.J., in *A.-G.* v.

Tomline (22) expressly pointed out that the duty or obligation of the Crown was one which the subject could not enforce (14 Ch.D. at p. 70):

> "For this reason only, that the Crown is not amenable to the jurisdiction of the court, and any default of duty on the part of the Crown cannot be made the ground of an action."

The question then arises whether the many authorities which decide that money cannot be demanded colore officii have any application to a case where there is no enforceable duty, the performance of which can be refused unless payment is made. In *A.-G.* v. *Wilts United Dairies* (6) Lord Buckmaster pointed out that no enactment enabled the Food Controller to levy any sum of money on any of His Majesty's subjects. That was a case where the Food Controller, an official having power under the Defence of the Realm Acts to make orders regulating the supply of milk products, obtained an agreement from the subject that in consideration of the issue of a licence to deal in milk he would pay a certain sum to the Food Controller. In the Court of Appeal Bankes, L.J., said:

> "It is not disputed for the Crown that the Food Controller could not without Parliamentary authority impose the charge complained of."

Atkin, L.J., points out that by the Bill of Rights no money can be levied for or to the use of the Crown except by grant of Parliament: see also *T. and J. Brocklebank, Ltd.* v. *R.* (7), where the Shipping Controller was similarly held not to be entitled to charge for granting a licence. Other cases, such as *Wathen* v. *Sandys* (28) (a case of a sheriff being under a duty to erect hustings not being liable to charge candidates with expenses, being part of a duty upon him in executing a writ to return members to Parliament), *Morgan* v. *Palmer* (4) (in which a justice of the peace sought a fee for renewing a licence of publicans), *Steele* v. *Williams* (5) (where a parish clerk sought illegally to make charges for extracts from a register book), *Snowdon* v. *Davis* (29), all establish the proposition stated by Baron Martin in *Steele's Case* (5) that a person who illegally takes money under cover of an Act of Parliament is liable to be sued for it. All these cases depended upon a duty existing in some person arising from his office, which duty that person refuses to perform unless he receives payment. In so far as there is here no enforceable duty in the Crown or its officers to use the troops in any particular way or at all, these cases do not appear to me to assist the appellants.

In *Glasbrook Bros.* v. *Glamorgan County Council* (2) it was argued that, as there was a duty on the police to provide protection, the discretion as to the way that should be done was not to be bought or sold. Lord Cave ([1925] A.C. at p. 279) points out that power may exist where there is no absolute duty, that is the present case, and that where there is no absolute duty a demand for payment is not necessarily contrary to public policy. The duty here, being of imperfect obligation, is not so absolute as to preclude a charge. I would add that, in any event, I have grave doubts whether the duty of imperfect obligation to defend the subject from enemies by the use of troops extends to the suppression of piracy on the seas. By 11 & 12 Will. 3, c. 7, s. 11, an Act for the more effectual suppression of piracy, specific power is given to the judge of the High Court of Admiralty and other persons to raise and levy upon the owners of a ship and goods defended by officers, seamen, and mariners against pirates, enemies, or sea rovers, money to be distributed among the defenders, the widows and children. And, although for certain statutory purposes a pirate is to be deemed to be an enemy (Naval Discipline Act, 1866, s. 49), yet the definition of a pirate stated in Hawkins's Pleas of the Crown, c. 20, p. 251, still stands,

> "that a pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure. . . . A pirate, at the common law, is a person who commits any of those acts of robbery and depredation upon the High Seas, which, if committed on land, would have amounted to felony there."

Were there no other obstacle in the way in the argument of the plaintiffs in contending for the duty of the Crown, this consideration would have to be considered—whether the obligation of the Crown, such as it is, to protect the subject extends to a protection against pirates upon the high seas, and, if so, whether it is not a duty cast upon the Navy and not the Army. The duty of the King to protect his subjects is stated in CHITTY ON PREROGATIVE thus:

> "Protection, that is the security and governance of his Dominions, according to law, is the duty of the Sovereign."

BLACKSTONE, p. 262, indicates that monarchical government has for one of its purposes the protection of weakness of individuals by the united strength of the community. But as regards the duty of protection by sea, I do not know that such a duty can be put higher than is stated by LORD STOWELL in *The Mary Ann* (17), that there is an obligation upon King's ships to assist the merchant vessels of this country: see also the observations of SIR J. HANNEN in *The Cargo ex Ulysses* (18) (13 P.D. at p. 208), which indicate that the Admiralty is the normal protector of the subject against pirates. Piracy is robbery within the jurisdiction of the Admiralty: *A.-G. for Hong Kong* v. *Kwok-a-Sing* (25), *R.* v. *Dawson* (30). I can find no obligation upon the Army to protect merchant ships. If there be any such duty in the Crown, it would appear to be imposed not upon the Army but upon the sea forces of the Crown, for the use of which there is no complaint as to charge in the present case. In any event, in such a case it is for the Crown to decide what resources in its armoury, naval or military, it will employ. For all these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Thompson, Quarrell & Co.*; *Treasury Solicitor.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

THOMPSON (INSPECTOR OF TAXES) *v.* TRUST AND LOAN CO. OF CANADA

[COURT OF APPEAL (Lord Hanworth, M.R., Greer and Romer, L.JJ.), January 19, 20, 1932]

[Reported [1932] 1 K.B. 517; 101 L.J.K.B. 342; 146 L.T. 369; 48 T.L.R. 209; 16 Tax Cas. 394]

Income Tax—Profits—Computation of profits—Company dealing in stocks and shares—Treasury Bonds—Purchase cum coupon—Sale ex coupon—Encashment of coupon—Receipt of proceeds after deduction of tax—Exclusion of net proceeds in the computation of profits for purposes of Sched. D —Income Tax Act, 1918 (*8 & 9 Geo. 5, c.* 40), *Sched. C, r.* 1 (*b*), (*c*), *Sched. D, Case I.*

A loan and finance company in the course of its business dealt in stocks and shares and other securities. During the relevant years of assessment, the company on several occasions purchased cum coupon 5½ per cent. Treasury Bonds (1930), and on the day of each purchase sold ex coupon the same nominal amount as it had purchased. The company subsequently encashed the coupons and retained the money, being a half-year's interest on the bonds less the amount of income tax deducted under the Income Tax Act, 1918, Sched. C, r. 1 (b), (c). The Crown claimed that the net amount so received by the company on encashment of the coupons must be brought into account in computing the company's profits taxable under Case I of Sched. D.

Held: the proceeds of the coupons were income of the company taxed by A way of deduction under Sched. C, and, therefore, they could not also be taken into account in assessing the company to tax under Sched. D.

Notes. The Income Tax Act, 1918, Sched. C, r. 1 (b) and (c), were replaced by the Income Tax Act, 1952, s. 118 (1) (a).

Referred to: *Hughes* v. *Bank of New Zealand*, [1936] 3 All E.R. 975; *Multipar* B *Syndicate, Ltd.* v. *Devitt*, [1945] 1 All E.R. 298.

As to profits falling within two or more schedules, see 20 HALSBURY'S LAWS (3rd Edn.) 17, 18, para. 16.

Cases referred to:

(1) *I.R. Comrs.* v. *Roberts* (1927), 13 Tax Cas. 277, C.A.; Digest Supp. C

(2) *Ashton Gas Co.* v. *A.-G.*, [1906] A.C. 10; 75 L.J.Ch. 1; 93 L.T. 676; 70 J.P. 49; 22 T.L.R. 82; 13 Mans. 35, H.L.; 10 Digest (Repl.) 1253, *8827*.

(3) *Fry* v. *Salisbury House Estate, Ltd.*; *Jones* v. *City of London Real Property Co., Ltd.*, [1930] A.C. 432; 99 L.J.K.B. 403; 143 L.T. 77; 46 T.L.R. 336; 74 Sol. Jo. 232; 15 Tax Cas. 266, H.L.; Digest Supp.

(4) *Wigmore* v. *Thomas Summerson & Sons, Ltd.*, *I.R. Comrs.* v. *Oakley*, [1926] D 1 K.B. 131; 94 L.J.K.B. 836; 134 L.T. 408; 41 T.L.R. 568; 69 Sol. Jo. 679; 9 Tax Cas. 577; 28 Digest 63, *321*.

Appeal.

This was an appeal by the Crown from an order of ROWLATT, J., reported 146 L.T. 371 made on a Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion E of the King's Bench Division of the High Court of Justice. The Case Stated so far as relevant was as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on June 23, 1930, the Trust and Loan Co. of Canada (hereinafter called the company) appealed against the following assessments to income tax, namely: F

(a) An assessment in the sum of £250,000 for the year ending April 5, 1928.

(b) An assessment in the sum of £142,545 less £24 wear and tear for the year ending April 5, 1929.

(c) An additional assessment in the sum of £79,580 for the year ending April 5, 1929.

2. The company which was incorporated in Canada in 1843, carries on business G as a loan and finance company, and in the course of such business the company has dealings in stocks, shares and other securities. The head office of the company is in London and it was agreed that the company is assessable to income tax under Case I of Sched. D in respect of the profits arising to the company from its business, including profits from the realisation of or dealing in investments as hereinafter mentioned. H

4. . . . The issued capital of the company is £3,600,000 divided into 1,800,000 shares of £2 each and of this capital £1,350,000, being 15s. on each share, is paid up. At March 31, 1929, the company had outstanding debentures to the amount of £1,856,464. It is necessary for the company to have money in a liquid form in order that they might be in a position to pay off debentures, which fall due from time to time. The bulk of the company's money is in investments in Canada. I On March 31, 1928, Canadian investments (mortgages and land) stood at £3,602,314. On March 31, 1928, the company also held temporary investments amounting to £573,780. The amount of money held by the company in temporary investments at any one time varied from about half a million to one million pounds.

5. The company deals with the temporary investments and from time to time changes the form of the said temporary investments. It is admitted that any profits made by the company on the realisation of temporary investments falls to be included as part of the profits assessable under Case I of Sched. D.

6. The sole question arising in this case relates to certain 5½ per cent. Treasury Bonds (1930) forming part of the temporary investments of the company, which were purchased and sold by the company in the years material to this appeal under the following circumstances.

7. 5½ per cent. Treasury Bonds (1930) which were repayable on May 15, 1930, were dealt in on the Stock Exchange and quoted in the official lists. The market price was quoted in these lists at a certain figure from time to time and a purchaser of the bonds required to pay as an addition to the purchase price a sum equal to the amount of the accrued interest on the bonds from the last interest date to the day fixed by the contract for settlement. The interest on these Treasury Bonds was payable on May 15 and Nov. 15 in each year.

8. During the years material to this appeal the company had entered into a number of transactions through members of the London Stock Exchange for the purchase cum coupon and sale ex coupon of 5½ per cent. Treasury Bonds (1930). On every day on which a contract to buy bonds cum coupon was made, a contract was also made to sell bonds of the same nominal value ex coupon. Each of the two corresponding buying and selling contracts fixed the same date for settlement of the bargains, the settlement date being fixed by the company as near as possible to the date on which the coupon to be detached from the bond bought by the company was due for encashment. The settlement day in all cases was on a date before the due date of the payment of the interest on the bonds and where a purchase was effected through one broker the corresponding sale on the same day of a similar amount of bonds was effected through the same broker.

9. Every purchase was completed by the broker delivering to the company at its office bonds with coupons attached. The coupons next due to be paid were detached by the company and the sale ex coupon was completed by the company handing back the bonds to the broker with the coupons for subsequent interest still attached. The company subsequently encashed the detached coupons and retained the money, being a half-year's interest on the bonds less the amount of income tax deducted therefrom.

10. . . . In the years ending March 31, 1927 and 1928, the following transactions of purchase and sale of 5½ per cent. Treasury Bonds were entered into by the company:

	Purchases.		Sales.		Profit or loss on sale.	Interest before deducting tax.
	Nominal.	Cost.	Nominal.	Amount realised.		
1927	£293,000	£307,585 15 11	£293,000	£300,365 17 11	Loss £7,219 18 0	£8,057 10 0
	£2,500,000	£2,618,090 13 10	£2,500,000	£2,556,087 6 8	Loss £62,003 7 2	£68,750 0 0
	£250,000	£260,951 2 6	£250,000	£254,740 0 3	Loss £6,211 2 3	£6,875 0 0

In the year ending March 31, 1927, the company also purchased £350,000 5½ per cent. Treasury Bonds, which were not sold, but retained by the company.

	Purchases.		Sales.		Profit or loss on sale.	Interest before deducting tax.
	Nominal.	Cost.	Nominal.	Amount realised.		
1928	£568,000	£587,232 6 1	£568,000	£573,148 7 6	Loss £14,083 18 7	£15,620 0 0
	£2,000,000	£2,078,043 1 8	£2,000,000	£2,028,064 15 10	Loss £49,978 5 10	£55,000 0 0
	£400,000	£417,128 19 6	£450,000	£458,563 12 11	Loss £10,471 11 7	£28,875 0 0

11. In every case upon encashment of the coupons income tax was deducted from the proceeds by the bank encashing the coupon in accordance with Sched. C of the Income Tax Act, 1918, r. 1 (b) and (c).

12. It was contended on behalf of the appellant (H.M. Inspector of Taxes) inter alia:

(a) That the proceeds of the coupons detached by the company from Treasury

Bonds which had been bought and sold as before mentioned was not income of the company which had been taxed by way of deduction.

(b) That the net amount received on cashing the coupons (i.e., after deduction of income tax) was merely a receipt of the company's business which had to be added to the selling price of the bonds, in order to arrive at the profit or loss made on the purchase and sale of the bonds.

(c) In computing the profits arising to the company from the transactions above described for the purposes of Case I, Sched. D, the amounts realised by the company on the sale of the bonds ex coupon plus the net amount of the interest received by the company in respect of the coupons detached as aforesaid after deduction of income tax should be treated as receipts and there should be deducted therefrom in order to arrive at the profit (if any) arising from the transaction the amount paid by the company for the bonds cum coupon.

13. It was contended on behalf of the company that:

(a) The transactions were purchases and sales of Treasury Bonds.

(b) The company received interest in respect of the bonds purchased by them and that such interest was taxed in accordance with Sched. C.

(c) The tax paid by way of deduction on encashment of the coupons was paid on behalf of the company, who was the person entitled to the said interest and that such interest was income in the hands of the company.

(d) The interest having already been taxed under Sched. C could not again be taken into computation for the purposes of assessment under Case I of Sched. D.

(e) The net amounts received by the company in respect of interest on the said coupons should be ignored in computing the company's liability under Case I of Sched. D.

14. Having considered the arguments and evidence adduced before them the commissioners found that the sums received by the company in respect of the coupons represented interest upon which tax had been paid by the company under Sched. C and they allowed the appeal in principle. They therefore adjourned the case for the amounts of the assessments to be agreed between the parties.

15. The appellant immediately upon the determination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

16. The sole questions for the determination of the court in this Case are:

(i) Whether the coupons detached as aforesaid from the Treasury Bonds or the proceeds thereof are to be regarded as income of the company taxed by way of deduction; or

(ii) Whether in computing the profits of the company under Case I of Sched. D the net proceeds of the coupons (being the value thereof less the income tax deducted therefrom) should be added to the sale price of the bonds sold ex the coupon in order to arrive at the profit or loss arising from the purchase of the bonds cum coupon.

ROWLATT, J., held that the proceeds of the coupons should be regarded as income of the company taxed by way of deduction, and dismissed the appeal.

The Attorney-General (*Sir William Jowitt, K.C.*), *J. H. Stamp*, and *Reginald P. Hills* for the Crown.

A. M. Latter, K.C., and *Roland Burrows* for the taxpayer.

LORD HANWORTH, M.R.—In this appeal I agree with the decision of the commissioners, and with the decision of ROWLATT, J., and, as my colleagues concur, the appeal will be dismissed.

The case that is presented to us is one which, stripped really of detail, comes to this. Certain 5½ per cent. Treasury Bonds (1930), repayable on May 15 of that year, were dealt in on the Stock Exchange, and they are quoted in the official lists. The market price is quoted in these lists from time to time, and a purchaser of the bonds is required to pay, as an addition to the purchase price, a sum equal to

A that of the accrued interest on the bonds from the last date on which the interest has been paid, a date which is fixed by the contract for the settlement. As a matter of fact, the interest on these Treasury Bonds falls to be payable on May 15 and Nov. 15 in each year. It is quite true that, as the date on which a contract takes place approximates to May 15 or Nov. 15 in each year, the sum which will be paid for the bond will be larger, because the date of payment of the interest has B more nearly approached, or, in other words, the interest that has accrued, treating it as accruing from day to day, is larger. The taxpayer is a company which deals in securities. It has to render an account for the purposes of its trade, under Sched. D, of the profits that it makes in dealing with securities, and it bought bonds with the coupon attached which was due at the next date for payment. On the same day it contracted to sell bonds of the same nominal value, but the pur- C chase was made of the bonds cum coupon, while the sale was made of the bonds ex coupon. It kept the coupons, and after due date it encashed those coupons and took the money as and when paid; it retained the money, which was a half-year's interest on the bonds, less the amount of income tax which was deducted therefrom, and in every case when the coupons were cashed, the income tax was deducted in accordance with the Income Tax Act, 1918, Sched. C, r. 1 (b) and (c).

D If this transaction had been one in which the purchase was at one date and the sale was at another date, distant in point of time by some months, or it may be even by a year, so that it fell into a different income tax year, I think that the Crown would not be able to suggest that the taxpayer, in treating the realisation of the security which it had originally bought, was not entitled to set off the sum in fact received on the sale ex coupon against the sum which had been paid for E the bond cum coupon; that, for practical purposes, on realisation the nice adjustment of interest accruing from day to day would not be taken into account, but, just as in the illustration to which ROMER, L.J., called attention, as between a tenant for life and remainderman, the disadvantage which may be suffered by the one or by the other, according as a sale is made of a security full of dividend and a new security purchased not full of dividend, so, although there may be a dis- F advantage as between those two persons who are interested, an adjustment for practicable purposes is not made between them. So that the Crown's point is really that there is something in this case which arises on the fact that the purchase and the sale took place practically at the same time. As ROWLATT, J., said:

> "If the purchase and sale of the bonds had been separated by a reasonable interval of time, the accounts would properly have been made out as regards G the coupons cashed during that interval in the form that the respondents have adopted here. Why is a different result to follow because the interval has been one only of a few hours or of a few minutes?"

In truth and in fact, the answer if answer it be, can only be that the Crown wish to treat this as a case of purchasing coupons and coupons only, a transaction H apparently of dealing in coupons which is not permitted by the rules of the Stock Exchange.

I come to consider what is the result of this operation. The Income Tax Act, 1918, Sched. C, deals with tax which is to be

> "charged in respect of all profits arising from interest, annuities, dividends, and shares of annuities payable out of any public revenue,"

I and the rules which are attached to that schedule provide that the same is to be deducted by the Bank of England; it is to be retained for the purposes of the Act, and the retaining of the amount shall be deemed payment of the tax by the persons entitled to the interest, and shall be allowed by them on receipt of the residue thereof. The deduction which is made by the appropriate commissioners in respect of this matter, for they are neither the General nor the Special Commissioners, is received into the hands of those commissioners as a sum which is due and received from the person who is the holder of the coupon. In some cases, by the terms of the bargain between the parties, the beneficial interest in the coupon has passed to the purchaser, and the vendor would have to hand over the proceeds. But, primâ facie, the person who is entitled to receive the value of the coupon is the holder. In *I.R. Comrs.* v. *Roberts* (1), by direction of the person who was the legal and beneficial owner of the shares at the date when the dividend was declared, the dividend was paid to the respondent as a creditor for the purchase price of the shares which had been transferred by him, but it was held that the payment was not part of the purchase price; it was a sale and purchase ex-dividend, and so the dividend passed to the respondent as his income for supertax purposes.

The first question, therefore, that is propounded in this case is: Whose was this coupon? To whom did this cash for the coupon belong when the coupons were encashed? In order to make the matter plain, I asked junior counsel for the Crown to use these terms; the seller of the bond, the company, and the ultimate purchaser; and counsel took the view that when the money was received for the coupon, that money belonged, not to the person who encashed it, but to the person to whom the bond had passed. I cannot understand that. It was sold to him ex coupon at a price which provided for it being ex coupon, and I cannot understand how the ultimate purchaser could have any title at all to something which, by the very terms of the bargain, he had not bought.

That being so, on this first question, it seems plain that the answer must be that the coupons detached as aforesaid from the Treasury Bonds which were sold ex coupon, are to be regarded as the income of the taxpayer. But it is said that although these coupons have been cashed, although there has been a deduction from their cash value under Sched. C, yet some portion of that value must be brought into account again for the purpose of the trade of the taxpayer which is subjected to tax under Sched. D. It is said:

> "The taxpayer bought the bond cum coupon. It paid a larger price for it because it was bought cum coupon. It was sold ex coupon. It is not right in such a transaction, the two being immediately entered into the one after the other, to look at the value received for the bond ex coupon, without taking into account the value of the growing fruit, a term which may be applied to the coupon approaching its day of payment; and so, although the tax has been paid under Sched. C, there still remains a portion of this value attributable to the being of the coupon which ought to be brought into the trading account."

The second question that is propounded is this:

> "Whether in computing the profits of the company under Case I of Sched. D, the new proceeds of the coupon (being the value thereof less the income tax deducted therefrom) should be added to the sale price of the bond sold ex coupon, in order to arrive at the profit or loss arising from the purchase of the bond cum coupon."

That is the way in which the question is put; but I do not want to preclude the court from taking the real point if that is an imperfect way of propounding the question. Let me look, therefore, at para. 12 of the Case and the contentions (b) and (c) on behalf of the Crown. Contention (b) is this:

> "That the net amount received on cashing the coupons (i.e., after deduction of income tax) was merely a receipt of the company's business which had to be added to the selling price of the bonds, in order to arrive at the profit or loss made on the purchase and sale of the bonds."

Contention (c) is that:

> "In computing the profits arising to the company from the transactions above described for the purposes of Case I, Sched. D, the amounts realised by the company on the sale of the bonds ex coupon plus the net amount of the interest received by the company in respect of the coupons detached as aforesaid after deduction of income tax should be treated as receipts and there should be deducted therefrom in order to arrive at the profit (if any) arising from the transaction the amount paid by the company for the bonds cum coupon."

A In other words, the Crown seek to bring back into charge something which has already met its fate under the Income Tax Acts, something that has already been dipped into by the tax gatherer and something which has been depleted to the extent of the tax deducted under Sched. C. Pro tanto, that is to the extent to which a sum remains after deduction of tax under Sched. C, that sum, it is said by the Crown, ought to be brought back into consideration for the purpose of the B estimation of the tax under Sched. D.

It looks fair enough for the Crown to say that they would include in the computation only the net sum. They have no such power and no such right to make such a concession. The sum that is paid and received by the cashing of the coupon is one sum. Whether a portion of it is deflected for the purpose of payment of income tax or not, it is one sum. *Ashton Gas Co.* v. *A.-G.* (2) is a C sufficient authority, if authority be needed, for that, and what right has the Crown to separate the receipt of this cash for the coupon into two parts? One, a part which they have taken away under Sched. C, and another part which remains after that operation, but which still remains, if I may so describe it, as the value of the coupon, mutilated by the removal of the tax under Sched. C. I agree with the observation which is made by LORD MACMILLAN, that once one appreciates that D that is the offer of the Crown the illogicality of the whole proceeding is revealed. He says in *Fry* v. *Salisbury House Estate, Ltd.* (3):

> "The circumstances that the Crown has proposed, in assessing the company under Sched. D, to deduct the assessments under Sched. A affords to my mind strong evidence of the illogicality of the whole proceeding."

E I think the fallacy arises in this way: The Crown want to say that the taxpayer did not buy a bond, but bought two things: a bond plus a coupon not yet due, but I may call it a swelling coupon. What it bought was a bond, and the reason why it bought a bond was twofold. It may have a possibility of a rise in capital value, but the very nature of a bond is that it shall yield its fruit in the form of the payment of the coupon. In *Wigmore* v. *Thomas Summerson & Sons, Ltd.* (4), the F matter is put very simply by ROWLATT, J. He says in that case (I need not trouble to go through the facts—it was War Loan on which there was to be an interest payment, and so on) ([1926] 1 K.B. at p. 143):

> "To my mind it is absurd to say a person is paying £5,000 in March for £5,000 to be paid in June. He does not do it; therefore there will have to be in any case a valuation of the amount of the interest that is being sold. The truth G of the matter is that the seller does not receive 'interest,' and 'interest' is the subject-matter of the taxation. He receives the price of the expectancy of interest."

Treated, therefore, as a bond which in the ordinary course would bear fruit, he is entitled for the purposes of Sched. D to set down the price that he paid for that bond, and to set against it the price that he received for that bond. It would seem H at first sight as if there ought to be something more; that for the purposes of Sched. D that was too simple a way of looking at the matter; but the Income Tax Acts are the Acts which charge this tax on the subject. It may well be that it is not a perfect system, that it is not entirely a coherent whole, but we have to see whether or not the subject is brought into charge under the code which is provided in the Income Tax Acts. *Salisbury House Estate, Ltd.* (3) has been referred to, I not because the facts offer an analogy, but it is very important to look at the general aspect of the Income Tax Act, which was demonstrated in that case. I will not go through LORD DUNEDIN's speech again, but he makes it plain that income tax is imposed under this Act; it is one tax to be recovered in a particular manner in respect of particular property and under particular circumstances; but LORD ATKIN, dealing with it in a manner which is a little closer to this case, says ([1930] A.C. at p. 454):

> "In my opinion it makes no difference that the income so derived forms part of the annual profits of a trading concern. For the purpose of assessing such

> profits for the purpose of Sched. D the income so derived is not to be brought into account," A

and (ibid. at p. 456):

> "Similarly I am of opinion that income derived by a trading company from investments of its funds, whether temporary or permanent, in government securities must be taxed under Sched. C, and cannot, for the purposes of assessment under Sched. D, be brought into account." B

Then he says this (ibid. at p. 457):

> "I find no ground for assessing the taxpayer under Sched. D for any property or gains which are the subject-matter of the other specific schedules."

As I have said, it may be that the income tax schedules are not completely contiguous; it may be that they leave some area which is neither in one schedule nor the other. If that is so, it will be a matter for the legislature to remedy. As LORD MACMILLAN says (ibid. at p. 467): C

> "If the measure is an imperfect one and when applied does not ascertain the actual income derived from the property so much the worse for the revenue. Discrepancies one way or the other between actual income and statutory income for tax purposes are familiar features of income tax law." D

In the present case it is plain that this subject-matter of tax, government bonds and coupons payable out of the government funds, have to be taxed under Sched. C —they cannot be taxed anywhere else. When the total of the sum received as payable out of public revenue has been submitted as a totality to the incidence of tax, that total sum so received has been subjected to its duty under Sched. C, and is removed from being treated under Sched. D, for (I am merely reciting a truism) Sched. D, in its terms, expresses that it is only to apply under Case I (which is the Case invoked) in respect of a trade not contained in any other schedule. It is there and then the whole sum received for the coupon which belonged to the taxpayer; it is that whole sum received which was the taxpayer's income, and it cannot be separated under the *Ashton Case* (2); it is the whole sum received which has been submitted to the incidence of tax under Sched. C, and after that it is immune from the incidence of tax under Sched. D. To say that another system might be adopted, more perfect in its accountancy, more perfect in showing true profits or the like, is nihil ad rem. What is taxed, as so often has been pointed out, under the Income Tax Act is nothing that is real; it is the statutory income measured in a particular way; and many subjects are fully conscious of the fact that when the income tax has been charged against them it is on an income which, from a practical point of view, is one that has never reached their own hands. Therefore, the case is not to be tested by more perfect accountancy, but whether or not one can bring into charge under Sched. D something which has already paid its tax under Sched. C. When one comes to realise that, and that the offer made by the Crown is that they will only tax the net amount of this sum which is appropriately dealt with under Sched. C after deduction of tax, one sees that they are endeavouring to bring into the account something which falls entirely outside it, because it is within Sched. C and not within Sched. D. ROWLATT, J., said in the last part of his judgment: E F G H

> "But equivalence will not do. The Crown cannot treat a transaction which has its own character for income tax purposes, as if it were something of a different character, because in money result the two would come to the same thing." I

Here, in my judgment, there is the purchase of a bond; there is the sale of a bond; intervening, it may be, between those two transactions there is the appropriation to the company of a coupon; they have got their coupon, and that is a part of their assets; it is subject to tax in a particular way; and, having been subjected to tax, it is immune from the other schedules.

For these reasons it appears to me that the contention of the Crown cannot be upheld, and that the appeal must be dismissed with costs.

GREER, L.J.—I have come to the same conclusion, but not without having encountered considerable difficulties on the way.

As I understand the substance of the claim by the Crown, it is this: "By reason of the fact that we are entitled to tax the taxpayer under Sched. C on the total amount of the interest on the bond, we are relieved from considering any question as to whether he has been put to any loss or any expenditure in order to enable him to get that income." As I understand the contention on behalf of the subject, on behalf of the taxpayer, it is this: "Quite true, we are liable to be taxed under Sched. C for the total of the dividend payable on the coupon; not for the dividend less the tax, but for the total of that dividend; and we do not in any way quarrel with that tax, nor do we quarrel with the proposition that that sum of income is not to come into our accounts when we make up our accounts for the purpose of Sched. D. We are in business for the purposes of buying and selling securities. We buy and sell the securities, with the result that at a certain date we receive some income on them; but you cannot ascertain our income for tax purposes without taking into account the expenses of our business; and one of the expenses of our business is the sum of money that we have got to pay from time to time in order to get the right to those dividends for which we are taxed." To take a concrete case, it is said: "On a certain date we bought a bond, the face value of which was £100. In a day of two or, possibly, on the same day, we would be entitled to receive on that £5 by way of dividend, but we know quite well that the Treasury in paying that £5 for our benefit would deduct and pay for us the income tax that we are liable to pay on it. But, in order to put ourselves in a position of obtaining that income, we have bought the bond, and, as all we desire to have is the income on that bond, we have sold the bond and incurred a loss of £2; and if we had not sold the bond at the present time, but had taken the dividend less tax, as the owner of the bond, kept the bond, and sold it at a subsequent period at a loss, nobody could contend that that loss would not have been a deduction from the income which we would be entitled to receive for the purpose of Sched. D. It makes no difference that we in fact sold the bond and incurred a loss on the whole transaction before we received the income on the coupon." On consideration, I think that that is a sound argument; and it has this advantage, in my view, that the result is a just one, which prevents this company from being taxed on an income which they never have in fact had.

I agree that the income of £5 for tax purposes is not to be brought into the account for the purposes of Sched. D; but it does not follow that the losses and expenses which were incurred in this business to enable the taxpayer to earn that income of £5 which is taxed under Sched. C should not be taken into account when making their return under Sched. D.

Dealing with the case on those lines, I think the judgment of the learned judge below, following the views expressed by the commissioners, was right. In stating the case the learned judge says:

> "Under these circumstances they [the taxpayer], in making up their account for Sched. D, treated the cost of the purchase as an expenditure and the price obtained on the sale as a receipt. They do not bring in the sum of interest, less tax received on the coupons, which, of course (neglecting any charges for brokerage), was the same amount as the difference between their buying and selling prices."

I agree that they do not bring in the £5 which they received on the coupon; but they do bring in, and I think they are entitled to bring in, the expense they have been put to in their business in order to put them in a position to obtain that £5 from which the government have deducted tax. I am satisfied that the government have in this case got all the tax that they are entitled to. It may be that, in some instances, the result, if a full account be taken, is that the government have got more than the tax to which they are entitled; it may be that in some cases they have got less; but they have got that which the statute gives them, and they are not entitled to complain.

I would answer the two questions that are put in the Case in the same way as my Lord has answered them. I agree, if it is necessary to say so, that we are not necessarily concluded by the questions that have been put. We are entitled to say, taking the whole of the facts which are stated in the Case together: Ought the taxpayer to have imposed on him any further tax, or has he been sufficiently taxed? But I protest against the idea that it is right to go before the commissioners, to frame questions for the determination of the court, and then to come to the Court of Appeal and seek to make quite a different case. If it were thought reasonable for them to raise matters of that sort, one would be inclined to say that the result would be, not that there would be judgment for the Crown, but that the matter should go back to the commissioners in order that they might consider and deal with the different arguments, and the different facts that might be material on those arguments, in order to raise some other questions beyond those which have been raised by the Case. I agree that that is not conclusive, but I prefer, at any rate in this case, to say that the sole questions which have been raised are questions which ought to be answered in favour of the taxpayer, and the judgment of the learned judge below ought to be affirmed.

ROMER, L.J.—I have arrived at the same conclusion. The case that we have to determine arises out of transactions entered into by the taxpayer on the Stock Exchange in relation to the sale and purchase of Treasury Bonds of 1930, which transactions, to me at any rate, are mysterious and unintelligible. The transactions were of this nature. Shortly before the date on which the coupons attached to the bonds became payable, the taxpayer would buy a large block of those bonds with coupons attached and would, on the same day, and for all that I know to the contrary to the same ultimate purchaser, sell those bonds ex coupon, that is to say, without the coupon shortly to fall due. Those transactions took place in 1927 and 1928, and the figures relating to them are set out in the Case. The effect of the transactions that took place in 1927 has been very conveniently summarised for us by junior counsel for the taxpayer, and it appears that the gross value of the coupons which were retained by the company on the re-sale of the bonds amounted to £83,682 10s. The difference between the price paid for the bonds cum coupon and the price received for the bonds ex coupon was £75,434 7s. 5d., which was only £8,248 2s. 7d. less than the gross amount of the coupons. If the gross sums represented by the coupons had been paid without deduction of tax, there would have been a profit on the transaction of £8,248 2s. 7d. therefore; but the coupons are not paid free of tax, and income tax is deducted by the agent of the government before paying the coupons. The result of that is that the deduction in that case being some £17,000 from the £83,000, there is a net loss to the taxpayer on the transaction of about £9,000. That is the reason why I say the transaction is mysterious and, to me, unintelligible. There may be some explanation of it; there must be some explanation of it which is not present to my mind. But, however unintelligible and mysterious the transaction may be, we have to see what is the effect from the tax point of view on the taxpayer of those transactions. It appears that there are people whose business it is to deal in coupons, i.e., they buy coupons before they are due for payment (it may be many weeks before they are due for payment), and then they take those coupons which are detached for that purpose from the bonds and handed over to them by the owner of the bonds, and present those coupons for payment, and receive the net proceeds, that is to say, the face value of the coupons less tax. Junior counsel for the Crown says, and I am inclined to agree with him, that in such a case the coupon in the hand of the dealer in coupons is not in any sense his income at all. He has bought from the holder of the bond something which would represent the income of the holder of that bond, the income which is due to him at a future date. What he has really acquired

A from the holder of the bond is not income, but a sum of money which, in the hands of the holder of the bond, if received by the holder of the bond, would be his income, but which is really merely a sum of money ascertained by deducting from the face value of the bond the income tax payable in respect of it. In that case the government would be paid tax in respect of the coupon, not because it formed part of the income of the coupon dealer, but because it formed part of the income of the holder B of the bond. When it came to taxing the profits of the coupon dealer he would on one side of his account (the debit side) set out the sums he paid for the purchase of the coupons, and, on the other side, he would credit himself with the net amount received in respect of the coupons, and, subject to any question of interest and so on, the balance would be the profit derived by him from dealing in the coupons. That is one case.

C Take then the case of a company whose business it is to deal in the sale and purchase of bonds and other securities. A company makes a bona fide purchase of bonds cum dividend or cum coupon, and some time afterwards, before the coupon is cashed or the dividend is payable, sells the bond ex coupon or ex dividend. It has been held by this court that in such a case the company, when it receives the proceeds of the coupon or the dividend, receives them as its own income: D *I.R. Comrs.* v. *Roberts* (1). Therefore, for the purposes of its accounts it would treat itself properly as having received the gross amount of the coupons or dividend.

Let me give a simple illustration. A company buys a bond in respect of which a coupon will be paid on July 1. It buys that bond cum coupon on May 31 for £104, let us say, of which it may be said that £102 is the value of the bond ex coupon and £2 represents the accruing interest. It sells the bond ex coupon on E June 30 for £102. It receives on the following day the interest, and it is entitled primâ facie to distribute that amongst its shareholders as dividend subject to this, that it will be observed that the company has made a capital loss of £2. It is £2 out of pocket on its capital account. It has paid out £104 and has only got back £102. If a company could distribute as part of its profit among its shareholders that dividend received on July 1 without making any provision in relation to that F loss on capital it would, in effect, be paying a dividend out of capital, and, therefore, in its accounts it very properly debits itself with the £2 as being loss on sale and purchase of the bonds. Whether the sale ex dividend takes place in the same year as the purchase cum dividend takes place or not seems to me to be wholly immaterial. If the sale takes place in the following year (the year of assessment) the company would in the year in which it received the dividend very properly G treat that dividend as part of its profits and distribute it with others amongst its shareholders, but the next year when it sells at £102, say, it has to bring in and debit itself with £2 loss on capital. If the income tax remains the same the result to the Crown is precisely the same as though it had debited itself with that in the year in which it received the £2. Junior counsel for the Crown does not dispute that in a case such as that I have mentioned the company would be entitled for H the purpose of ascertaining its profits under Sched. D to debit itself with that capital loss represented by the difference between the £104 and the £102, but, as I understand his argument (and I think his case must rest on this), he says this is not a case of a bona fide sale and purchase of bonds at all; this is a case falling under the first category that I have already mentioned, the category of the case of the dealer in coupons. If he be right in saying that this is really nothing more or I less than the purchase by the company of a coupon, I think he would be right in his contention.

Within which category does this come? In my opinion, it is impossible on this case to arrive at the conclusion that this is a mere dealing by the taxpayer with the coupon and not a bona fide transaction of sale and purchase of bonds. It is true that the fact that the sale ex coupon takes place on the very day on which the purchase cum coupon is effected gives rise, at any rate, to the suspicion that that may have been the object of the whole transaction, but there is nothing in the Case, and no evidence stated in the Case from which I think we are justified in drawing the conclusion that these transactions are not bona fide, but are mere cloaks to enable the taxpayer to deal in coupons. It is not stated in the Case, but we are informed that a small capital profit is made in this sense. Take the case that I have mentioned of the purchase of a bond of £104. Of that £104, £102 may be taken to represent the purchase price of the bond without the coupon and £2 the purchase price of the coupon. But when the re-sale takes place ex coupon the sale very often takes place at, say, £102 10s., the reason being that people are very anxious to buy, just before dividend days, bonds ex coupon, and are very anxious to sell bonds cum coupon, and in that way it is suggested to us that the taxpayer makes some profit on the sale and purchase of the bonds regarded as bonds alone without any reference to the coupons. In my opinion, we are not justified by anything which is stated in the Case in coming to the conclusion that such a profit does not in fact accrue to the taxpayer; in other words, I do not think we are justified on anything stated in the Case in coming to the conclusion that this is a mere coupon transaction and not a bona fide sale and purchase of bonds.

For that reason it seems to me that it is impossible for this court to answer the first question that is submitted in the Case except by saying that the coupons detached from Treasury Bonds, or the proceeds thereof, are to be regarded as income of the taxpayer taxed by way of deduction.

For these reasons I agree that this appeal must fail.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue*; *Holmes, Son, & Pott.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

WESLEYAN AND GENERAL ASSURANCE SOCIETY *v.* ATTORNEY-GENERAL

[CHANCERY DIVISION (Luxmoore, J.), December 15, 21, 1932]

[Reported [1933] Ch. 591; 102 L.J.Ch. 145; 148 L.T. 403; 49 T.L.R. 140; 77 Sol. Jo. 48]

Insurance—Life assurance—Industrial assurance—Profits—Allocation of profits of industrial assurance for the benefit of ordinary life policy holders—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *s.* 3—*Industrial Assurance Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *s.* 12—*Wesleyan and General Assurance Society's Act*, 1914 (4 *&* 5 *Geo.* 5, *c. clxvii*), *s.* 25, *s.* 66.

The plaintiff society was established in 1843 and had, for a considerable period, carried on life assurance business and industrial assurance business. In 1914 the plaintiff society was incorporated by the Wesleyan and General Assurance Society Act, 1914, which was made subject to, inter alia, the Assurance Companies Act, 1909. By the Industrial Assurance Act, 1923, s. 12, industrial assurance business had, for the purposes of the Act of 1909, to be treated as a separate class of business. From 1927 to 1930 the plaintiff society made large profits on its industrial assurance business, of which part was allocated for the benefit of ordinary life policy holders in pursuance of s. 25 and s. 66 of the private Act of 1914. The Industrial Assurance Commissioner, having informed the plaintiff society that their allocation of profits violated s. 3 of the Act of 1909, directed it to re-transfer this part of the profits to the industrial assurance fund. The plaintiff society brought the present action claiming that it had not infringed s. 3 of the Act of 1909, and that it was entitled to act as it had under the provision of the private Act of 1914.

A **Held:** on the true construction of the Act of 1909, as applied to industrial life assurance by the Act of 1923, there was nothing to prevent the distribution by the plaintiff society among its members of such part of the surplus of the industrial life assurance fund as it might determine to distribute in accordance with its rules, and there was no obligation on the plaintiff society to comply with the direction of the Industrial Assurance Commissioner.

B **Notes.** As to separation of funds of life assurance companies, see 22 HALSBURY'S LAWS (3rd Edn.) 427–428, paras. 858–859; and for cases on the subject see 10 DIGEST (Repl.) 1154, *8029–8031*. As to complying with directions of the Industrial Assurance Commissioner, see 21 HALSBURY'S LAWS (3rd Edn.) 114, para. 265; for the Assurance Companies Act, 1909, s. 3, see 3 HALSBURY'S STATUTES (2nd Edn.) C 377; and for the Industrial Assurance Act, 1923, s. 12, see 10 HALSBURY'S STATUTES (2nd Edn.) 602.

Action for declarations by the plaintiff society.

The plaintiff society, which was established in 1843, had for its objects to provide by mutual assurance for the relief of its members in cases of sickness, accident and infirmity; to secure annuities, and for ordinary life assurance. The ordinary D and sickness businesses were kept separate, the latter being discontinued in 1901. The plaintiff society was incorporated by the Wesleyan and General Assurance Society's Act, 1914. It carried on business in recent times as insurers on ordinary life policies and also under policies of industrial, fire, accident and employers' liability. Very large profits were made between 1927 and 1930 in the industrial section, of which three-fifths were allocated for the benefit of that class of policy E holders under s. 65 of its private Act, one-fifth for the outdoor staff, and one-fifth for the ordinary life policy holders divided as bonus. The point which arose was whether such allocation was permitted, having regard to s. 3 of the Assurance Companies Act, 1909, and s. 12 of the Industrial Assurance Act, 1923. In 1931 the Industrial Assurance Commissioner informed the plaintiff society that the allocation violated the provisions of s. 3 of the Act of 1909. This the plaintiff F society denied. In 1932 he directed that the sum of £61,353 should be retransferred to the industrial fund. The plaintiff society brought this action claiming (a) that this direction was ill-founded and that it was not obliged to comply with it, and (b) that it was entitled (i) to carry amounts from the industrial assurance fund surplus to common reserves either specially or generally in pursuance of s. 25 of their private Act, and (ii) to divide the balances of that fund G among the members of the plaintiff society by way of bonus under s. 66 of the same Act.

Gavin Simonds, K.C., *Gordon Brown* and *Blanco White* for the plaintiff society.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *Crossman* for the Attorney-General.

H *Cur. adv. vult.*

Dec. 21. **LUXMOORE, J.,** stated the facts and continued: It was agreed before the writ was issued that no objection would be taken to the constitution of the action. It was admitted at the Bar on behalf of the Attorney-General that no complaint could properly have been made in respect of the matters dealt with in I the direction of the Industrial Assurance Commissioner if the Industrial Assurance Act, 1923, had not been passed. That Act provided that industrial assurance business should not be carried on except by certain specified companies and societies. It was admitted that the plaintiff society was within that class. Industrial assurance business was defined as being the business of effecting assurances on human life, premiums in respect of which were received by means of collectors, with certain specific exceptions. It was common ground that the plaintiff society was carrying on industrial assurance business, and was entitled so to do under the Act.

Section 2 of the Act constituted the Chief Registrar of Friendly Societies as the Industrial Assurance Commissioner, and invested him with certain powers and duties. Section 12 (1) provided that industrial assurance business should, for the purposes of the Assurance Companies Act, 1909, be treated as a separate class of assurance business, and that, accordingly, a separate deposit should be made in respect of the business as required by s. 2 of that Act. Subsection (3) of the same section provided that, in its application to industrial assurance business, the Assurance Companies Act, 1909, should have effect with certain modifications. The modifications material to be considered in the present case were contained in paras. (a) and (b) of s. 12 (3). Paragraph (a) was as follows:

> "The provisions relating to life assurance business shall apply also to industrial assurance business with the substitution of references to 'industrial assurance business' and 'the industrial assurance fund' for references to 'life assurance business' and 'the life assurance fund.'"

Paragraph (b) provided that, where any expenses of management, or interest or dividends from investments, or sums on account of depreciation of securities were apportioned between the industrial assurance business and any other business transacted by the company, the auditor should include in his report a special report as to the propriety of the apportionment. The only other section of the Act to which it was necessary to refer was s. 14, which provided that the provisions of the Act should have effect notwithstanding anything in the memorandum or articles of association or rules or special Act of any industrial assurance company. The result of the Act was to add industrial assurance business to the five special classes of insurance business specified and dealt with in the Assurance Companies Act, 1909.

It was contended on behalf of the Attorney-General that the effect of that provision was to prohibit the distribution in the present case among the members of the plaintiff society of any part of the annual surplus in the industrial life assurance department.

The solution of the question whether this contention is well founded or not depends mainly on the construction to be placed on s. 3 of the Assurance Companies Act, 1909. Subsection (1) of that section provides that:

> "In the case of an assurance company transacting other business besides that of assurance or transacting more than one class of assurance business, a separate account shall be kept of all receipts in respect of the assurance business or of each class of assurance business, and the receipts in respect of the assurance business, or, in the case of a company carrying on more than one class of assurance business, of each class of business, shall be carried to and form a separate assurance fund with an appropriate name; provided that nothing in this section shall require the investments of any such fund to be kept separate from the investments of any other fund."

Subsection (2) provides that:

> "A fund of any particular class shall be as absolutely the security of the policy holders of that class as though it belonged to a company carrying on no other business than assurance business of that class, and shall not be liable for any contracts of the company for which it would not have been liable had the business of the company been only that of assurance of that class, and shall not be applied, directly or indirectly, for any purposes other than those of the class of business to which the fund is applicable."

The argument put forward on behalf of the Attorney-General is that the section requires all receipts of an assurance company from one class of assurance business to be segregated, at any rate in the books of the company, and that nothing may be debited against those receipts except claims in respect of policies issued in respect of that class of business and the proper proportion of expenses of management attributable to that particular class of business, and, in particular, that nothing can be taken from, or debited to, those receipts, or the fund constituted thereby, in respect of profits earned in carrying on the particular class of business, except for the purpose of bonus addition or benefit to holders of policies issued in respect of that class. If this contention is correct, it is plain that, in the case of an insurance company with liability limited by shares and carrying on more than one class of insurance business, no part of the profits earned in carrying on a particular class of business affected by s. 3 of the Assurance Companies Act, 1909, could ever be made available for payment to its shareholders by way of dividend, because dividend can only be paid out of profit, and profit, in the case of an insurance company, can only be ascertained after deducting outgoings, expenses, and estimated liabilities from receipts, whether from premiums or from the income derived from, and accretions to, invested funds.

There can be no difference, in the case of an insurance company carrying on several kinds of assurance business, including ordinary life assurance business and industrial life assurance business, between the position of the receipts from life assurance business and those from industrial life assurance business. The whole argument is based on the contention that the section requires all the receipts from a particular class of insurance business to be segregated.

I agree that, if the section is taken by itself, and the words in it are strictly construed in their primâ facie literal meaning, there is much to be said for this view, but I do not think that this is the correct method of construing the Act. To arrive at the true construction of an Act of Parliament, it is necessary to consider the whole Act and not only the words used in a particular section.

It is also necessary to consider what was the object to be effected by the Act. The object of the Assurance Companies Act, 1909, was

> "to consolidate and amend and extend to other companies carrying on assurance or insurance business the law relating to life assurance companies. . . ."

At the time of the passing of the Act, and for many years before, assurance companies were, and had been, carrying on insurance business for profit, and were, and had been, distributing those profits among their shareholders or constituents according to their constitution. The object of the Act was not to prevent assurance companies from distributing profits; it was to provide security for the policy holders in each particular class.

The Act itself clearly contemplates that profits may be distributed; for it provides how an insurance company's accounts shall be kept, and for the actuarial valuation of its liabilities. Section 4 of the Act provides that every assurance company shall, at the expiration of each financial year, prepare a revenue account, a profit and loss account, and a balance sheet. Each of these accounts is to be in the appropriate prescribed form and such forms are set out in detail in the Schedules to the Act. Section 5 provides for an actuarial investigation, report and valuation, and again there is a prescribed form set out in Sched. IV to the Act. Subsection (2) of this section provides that the actuarial investigation, valuation and report shall be made whenever an investigation into the financial condition of an assurance company is made with a view to the distribution of profits. The Act also contains provisions under which shareholders and policy holders are entitled to have copies of accounts, balance sheets, and the abstract of the actuarial report and statement.

A careful consideration of the forms of account set out in the Schedules to the Act makes it clear that the ascertainment of surplus or profit in respect of each particular class of business is contemplated by the Act, and that profit and loss is clearly provided for. Moreover, in the statement applicable to life assurance business to be made by the actuary respecting the valuation of policies set out in Sched. IV to the Act, it is expressly provided that the statement should show the principles on which the distribution of profits among shareholders and policy holders is made, and that there should also be a statement of the results of the valuation showing the total profit made by the company and how it is to be A allocated as between policy holders, shareholders and reserve fund, and how much is carried forward unappropriated. I refer particularly to paras. 8 and 9 of Form A in Sched. IV.

Moreover, it is to be observed that there is no express prohibition in the Act against deducting from any assurance fund any profit which it is desired to distribute among those entitled to profits. All that is said is that each particular B fund is to be the security of the policy holders interested in the particular class of assurance business to which it is applicable. The Act provides for valuation of liabilities and assets, and it is, I think, obvious that one of the purposes is to ascertain whether the security is sufficient or not. If it is found to be sufficient, the Act, as the forms of account show, contemplates a distribution out of any surplus among shareholders and policy holders in accordance with the constitution C of the particular company concerned.

In my judgment, it would be entirely contrary to the object of the Act and its true construction, when read in conjunction with the forms of account and other forms set out in the Schedules, to hold that the surplus or profit in respect of a particular assurance fund, ascertained in the manner required by the Act, which it is determined to distribute, forms any part of that fund. I hold that, on the true D construction of the Act of 1909, as applied to industrial life assurance by the Industrial Assurance Act, 1923, there is nothing to prevent the distribution by the plaintiff society among its members of such part of the surplus of the industrial life assurance fund as it may be determined to distribute in accordance with the provisions of its rules.

I further hold that the Industrial Assurance Commissioner was not, and is not, E entitled to require the plaintiff society to repay to its industrial life assurance fund the sum of £61,353 13s. 4d. referred to in his direction of March 4, 1932, or any part thereof, and that there is no obligation on the plaintiff society to comply with that direction.

No question arises as to the costs of the action, because it has been agreed between the parties, without prejudice to the legal position, that this action shall F be treated here and elsewhere on the footing that the Attorney-General is neither to receive nor to pay costs. There will be the appropriate declaration.

Solicitors: *Field, Roscoe & Co.*, for *A. H. Coley*, Birmingham; *Treasury Solicitor.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* ARTS THEATRE OF LONDON, LTD.

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), November 11, 14, 1932]

[Reported [1933] 1 K.B. 439; 102 L.J.K.B. 105; 148 L.T. 266; 49 T.L.R. 38; 76 Sol. Jo. 831]

Entertainments Duty—Lump sum—Payment for other rights besides admission to entertainment—Proportion allocated to right to admission not full payment therefor—Finance (New Duties) Act, 1916 (6 *Geo.* 5, *c.* 11), *s.* 1 (4).

A club provided its members with the usual amenities of a London club and in addition there was included in the club premises a theatre in which from time to time plays were produced and lectures given. On these occasions members of the club and their guests were admitted to the theatre on payment being made for the seats they occupied. Entertainments duty was paid on these payments. The public were not admitted to the theatre.

Held: under s. 4 (1) of the Finance (New Duties) Act, 1916, the proprietors of the club were liable to pay entertainments duty on such amount of the members' subscriptions as appeared to the Commissioners of Customs and Excise to represent payment for the right of admission to entertainments in the theatre, although the amount so allocated by the commissioners represented part of the payment for such admission and not the whole.

Notes. Considered: *A.-G.* v. *London Casino, Ltd.*, [1937] 3 All E.R. 858.

As to entertainments duty, see 28 Halsbury's Laws (2nd Edn.) 352–355, and for cases see 39 Digest 300, 301. For Finance (New Duties) Act, 1916, see 21 Halsbury's Statutes (2nd Edn.) 813.

Case Stated by the Commissioners of Customs and Excise.

The Case Stated as follows: "1. The defendants (hereinafter called 'the company') are a limited liability company incorporated under the Companies Acts, 1908–1917, on Dec. 7, 1925. 2. The company are the proprietors of a proprietary club called the Arts Theatre Club (hereinafter called 'the club') situate at 6 and 7, Great Newport Street, in the county of London. 3. The club was established in the early part of 1927. Its objects are as follows: (A) To create a social rendezvous with the amenities of a London club and bring together those interested in the theatre from both sides of the curtain. (B) To found and support its own theatre in the club premises. (C) To supply its members with food and refreshments and wines and spirits at reasonable prices. (D) To produce, or to co-operate with others in producing regularly at the theatre, with professional casts, for short runs of a week or a fortnight (including Sundays) new plays and revivals with change of cast for each production, and also to hold concerts, lectures and debates. (E) To encourage the work of new playwrights, composers and of those associated with broadcasting. (F) To foster an interchange of ideas between players and playgoers. (G) To promote a high standard of dramatic art and entertainment. 4. The premises of the club at 6 and 7, Great Newport Street aforesaid are constituted as follows: In their rear is built a fully equipped modern theatre with an auditorium consisting of stalls, circle, and boxes to accommodate approximately 350 people. The ground floor of the premises consists of a lounge hall with recess for writing, booking and inquiry office, a writing compartment, and the approaches to the stalls, circle, and boxes, and at a lower level the theatre foyer and buffet, and theatre cloakrooms. On the first floor are situated the club cloakrooms and large lounge (with reading and writing accommodation). On the second floor is a large dining and grill room and kitchen. On the third floor is also a large dining room. The theatre comprises a compact portion of the premises separated from the rest by doors.

"6. Under r. 3 all entrance fees, subscriptions, and other payments by members (other than payments for wines, spirits, and intoxicating liquors) become the property of the company, and the company shall be solely responsible for the provision of the premises and all things necessary for carrying on the club, except wines, spirits, and intoxicating liquors, and shall have entire control of all matters of finance in connection with the club, and the only liability of members is for such payments to the company as are provided for by the rules. 7. Rules 4, 7, 8, 10 and 11 are as follows: '4. The club shall consist of members of both sexes, the number of whom shall, from time to time, be determined by the committee. Such persons as the committee may from time to time appoint shall be admitted as honorary members. The committee may elect, upon such terms as to subscriptions as they may from time to time determine, associate members of the club; such members shall have the right, upon payment of the same prices of admission as ordinary members, to attend performances in the theatre, and may use such portions of the club premises as are not reserved exclusively for full members of the club. Members must produce their membership cards on the request of servants of the club in the execution of their duty. . . . 7. Subscription and entrance fee for full or associate membership shall be such as the committee with the assent of the directors may from time to time decide. 8. Subscriptions are payable upon election, and subsequently on Feb. 1 or May 1 or Aug. 1 or Nov. 1 in each year. The membership of persons elected between any of the aforesaid dates will run for one year from whichever of the dates aforesaid next precedes election. If any member's subscription is in arrear, or other money due to the club be unpaid for fourteen days after becoming due, all rights and privileges of membership will be withheld from that member until the amount due is fully paid. . . . 10. The theatre of the club shall, except as to persons performing therein and those admitted upon complimentary tickets, be reserved exclusively for members, associate members, and their guests upon such terms and conditions as from time to time the directors shall consider necessary or desirable. Provided always that no member, associate member, or guest shall be entitled to enter the theatre of the club except upon payment of the price of admission and the appropriate entertainments duty upon such payment. The payment of the annual subscription confers no right of admission to the theatre of the club. 11. Every member of the club may introduce guests at such times and upon such conditions as the committee may determine. Such fee as fixed from time to time by the committee shall be charged for each visitor so introduced. At the discretion of the committee, the number of guests for each member may at any time be limited, and the admission fee altered or eliminated. Members, before introducing guests into the club, must enter their names in the book kept for that purpose. The club committee reserve the right of refusing admission to any visitor, without giving any reason for such refusal. No visitors may order or pay for refreshments. Should they do so, or attempt to do so, they will at once be ejected from the club and the member who introduced them may have his membership cancelled. Visitors must leave the club at the same time or prior to the member introducing them. Members may purchase for themselves and their guests tickets for admission to the theatre in accordance with the terms and conditions fixed by the directors from time to time. The directors shall have power, as and when they may deem necessary, to close or reserve any portion of the club premises, including the club theatre.' 8. During the period Jan. 17, 1931, to Nov. 30, 1931, the rates of annual subscriptions fixed under r. 7 were for full members at various rates which differed according to the circumstances of the case as follows: £1 1s., £2 2s., £3 3s., £4 4s., and £5 5s., and for associate members at various rates which differed according to the circumstances of the case as follows: 5s. and 10s., and after Sept. 15, 1931, also 12s. 6d.

"9. The club is, in fact, a social rendezvous, and, apart from the theatre, does provide its members with the amenities of a London club, including the provision of meals and refreshments, and these amenities are largely used by the members and their guests. 10. Throughout the said period—Jan. 17, 1931, to Nov. 30, 1931—lectures and dramatic and other similar performances, being entertainments such as are defined by the Finance (New Duties) Act, 1916, were given by the club at the said theatre. Admission to these entertainments was reserved to members and associate members of the club and their guests only, except as to persons performing therein and those admitted upon complimentary tickets, and such entertainments were well attended by members and associate members and their guests. The directors of the company advertised the forthcoming productions of these entertainments to the members and associate members from time to time, and fixed the prices to be paid for tickets for the stalls, circle, and boxes at amounts varying from 3s. 6d. to 12s. 6d. with special charges for the boxes. 11. Each play is produced either for a single night or for a few nights only. No play has ever been produced for longer than twelve nights. The intention of the company in producing a play at the theatre is that the play shall be in the nature of a demonstration production by way of encouragement to the authors and actors who are very ready to have produced or to take part in new or unusual plays before an audience including a large number of persons interested professionally in the drama. The result of such productions is to introduce to the notice of the public new authors, new plays, and actors, some of whom are not well known. These considerations, not involving the necessity for elaborate scenery and effects, but at the same time involving very much lower salaries paid to the actors than would otherwise be the case, allow of the productions at prices charged for the seats in the theatre comparable with, but on the whole lower than, those charged in theatres open to the public. The prices charged may vary according to the cost of production of each play and are calculated accordingly so as to cover the cost throughout each year of the productions. 12. No member or associate member could or did obtain admission to any of the said entertainments unless he had previously obtained a ticket and paid the appropriate price charged for it. Entertainments duty under s. 1 of the Finance (New Duties) Act, 1916, was duly paid upon all payments so charged for any such tickets issued during the period aforesaid, but no entertainments duty has been paid in respect of the amounts paid by members and associate members for annual subscriptions.

“13. Full members of the club, including lady members, who had paid their annual subscriptions during the period aforesaid were entitled generally and subject to the said rules to enjoy all the amenities of the club and the right to purchase tickets issued for any of the entertainments before referred to. 14. The associate members of the club who had paid their annual subscriptions during the period aforesaid possessed under r. 4 the right upon payment of the same prices of admission as ordinary members to attend performances at the theatre and to use such portions of the club premises as were not reserved exclusively for full members of the club. During the period aforesaid the associate members were permitted to use the following portions of the club premises, namely, the whole of the ground floor of the club premises which includes the use of the lounge and writing rooms, the inquiry office, and the foyer of the theatre where light buffet luncheons and teas were served and telephones, cloakrooms, &c., and to enjoy therein the usual amenities of a club.

“15. During the said period from Jan. 17, 1931, to Nov. 30, 1931, the full members and associate members of the club paid subscriptions at the following rates:

From the period Jan. 17, 1931, to Sept. 14, 1931:
965 full members at £4 4 0
477 ,, ,, ,, £3 3 0
185 ,, ,, ,, £2 2 0
1,752 associate ,, ,, 10 0
From the period Sept. 15, 1931, to Nov. 8, 1931:
12 full members at £5 5 0
166 ,, ,, ,, £4 4 0
25 ,, ,, ,, £3 3 0
52 associate ,, ,, 12 6
58 ,, ,, ,, 10 0

From the period Nov. 9, 1931, to Nov. 30, 1931: A

16	full members	at	£5 5 0
50	,,	,, ,,	£4 4 0
4	,,	,, ,,	£3 3 0
18	associate ,,	,,	12 6
108	,,	,, ,,	10 0

From the period Jan. 17 to Nov. 30, 1931: B

76	associate members	at	5 0

"Subscriptions were also paid by a number of supernumerary members.

"16. Upon being furnished by the defendant company with particulars of the amounts paid by members and associate members during the said period Jan. 17, 1931, to Nov. 30, 1931, as set out in para. 15, the Commissioners of Customs and C Excise, by their order dated Dec. 28, 1931, purporting to be made in exercise of the powers conferred on them by sub-s. (4) of s. 1 of the Finance (New Duties) Act, 1916, determined that the amount of each subscription to the Arts Theatre Club which represents the right of admission to entertainments in respect of which entertainments duty is payable is as set out below and that entertainments duty is payable on each such amount:

D

Subscriptions paid before Sept. 15, 1931:

			Dutiable amount Inclusive of Duty s. d.
Men	at	£5 5 0	3 4
,,	,,	£4 4 0	3 4
,,	,,	£3 3 0	3 4
,,	,,	£1 1 0	Nil
Women	,,	£5 5 0	3 4
,,	,,	£4 4 0	3 4
,,	,,	£3 3 0	3 4
,,	,,	£2 2 0	3 4
,,	,,	£1 1 0	Nil
Associates	,,	10 0	3 4
,,	,,	5 0	1 8

E

F

Subscriptions paid on and after Sept. 15, 1931:

			Dutiable amount Inclusive of Duty s. d.
Men	at	£5 5 0	4 2
,,	,,	£4 4 0	4 2
,,	,,	£3 3 0	4 2
,,	,,	£1 1 0	Nil
Women	,,	£5 5 0	4 2
,,	,,	£4 4 0	4 2
,,	,,	£3 3 0	4 2
,,	,,	£2 2 0	4 2
,,	,,	£1 1 0	Nil
Associates	,,	12 6	4 2
,,	,,	10 0	3 4
,,	,,	5 0	1 8

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"17. On Dec. 28, 1931, by letter this decision was communicated to Messrs. Bartlett & Gluckstein, the solicitors acting for the company, and formal demand made for the payment by the company of £115 4s. 1d. as the amount of duty due in respect of the period Jan. 17, 1931, to Nov. 30, 1931, according to such decision in respect of the subscription paid by full members and associate members as set out in para. 15. No payment of duty was demanded in respect of subscriptions paid by supernumerary members. By their letter of Dec. 29 Messrs. Bartlett & Gluckstein, on behalf of the company, intimated that their client had decided to decline to pay and to contest the claim upon the ground that it was not liable to pay the amount of the duty claimed. 18. The question for the opinion of the court is whether the said payments made by full members and associate members of the club for annual subscriptions or any part thereof are legally chargeable with entertainments duty under s. 1 of the Finance (New Duties) Act, 1916. 19. If the court pronounce in the affirmative judgment shall be entered for His Majesty for the sum of £115 4s. 1d. If the court pronounce in the negative judgment shall be entered for the company."

Finlay, J., answered the question put forward in the Case Stated in the affirmative and entered judgment for the Crown for £115 4s. 1d. The company appealed.

Comyns Carr, K.C., and *Cyril King* for the company.

The Solicitor-General (Sir Boyd Merriman, K.C.) and *W. Bowstead* for the Attorney-General.

By s. 1 (4) of the Finance (New Duties) Act, 1916:

> ". . . where the commissioners are of the opinion that the payment of a lump sum . . . represents payment for other privileges, rights or purposes besides the admission to an entertainment . . . [entertainments duty] shall be charged on such an amount as appears to the commissioners to represent the right to admission to entertainments in respect of which entertainments duty is payable."

LORD HANWORTH, M.R.—This appeal fails. By the Finance (New Duties) Act, 1916, a new duty was imposed on payments for admission to entertainments. It was a tax imposed ad valorem. By s. 1 it was declared:

> "There shall . . . be charged, levied, and paid on all payments for admission to any entertainment"

an entertainments duty. By sub-s. (3) of that section it was enacted:

> "Entertainments duty shall be charged in respect of each person admitted for payment, and, in the case of admission by stamped ticket, shall be paid by means of the stamp on the ticket and, in the case of admission otherwise than by stamped ticket, shall be calculated and paid on the number of admissions."

That is the simple case, and one must bear in mind that the charge is direct, and it is levied and paid on all payments for admission. Subsection (4) dealt with certain more complex payments. The first part of sub-s. (4) deals with the case where a lump sum is paid for a series of entertainments, a lump sum paid before the entertainments have taken place and before the opportunity of admission to those entertainments has arisen. If a lump sum is paid it is subjected to tax and the right of admission to the series of entertainments draws to it the imposition of the tax which is to be estimated and paid, although, indeed, the owner of the right never exercises that privilege and never goes near the entertainment at all. Another case which is quite separate is provided in the latter part of sub-s. (4). It is introduced by the word "but." It is wholly separate from the case to which I have referred where a lump sum is paid for a series of entertainments. It is a case where you find that there has been a payment of a lump sum, a composite sum which embraces privileges, rights and purposes besides the admission to an entertainment. Where you find that a lump sum has been paid in such circumstances, the commissioners are entitled to disintegrate the composite sum paid, and to consider the several privileges, rights and purposes for which the composite payment has been made, and, if they find that in this disintegrated sum there is a payment to be made for admission to an entertainment, they may set aside all those portions of the composite sum which are properly appropriated to privileges, rights and purposes other than admission to an entertainment, and leave those parts of the composite sum untaxed. But the duty shall be charged on such an amount as appears to the commissioners to represent any payment for the right of admission to entertainments in respect of which entertainments duty is payable. As

Romer, L.J., has pointed out, one must read in between the words "represent" and "the right" the three words "any payment for," because no sum of money can represent a right of admission. One must read the words as if they stood "such an amount as appears to the commissioners to represent any payment for the right of admission." When one reads the section in that way one has a clear declaration that the commissioners are to split up a composite sum, to leave on one side the payments which are made for the privileges, rights, and purposes other than admission to an entertainment, and the duty is to be charged and collected by them on such an amount as appears to them to represent any payment for the right of admission. But it is said: "Unless you have got the whole and complete right of admission no tax can attach." It is, perhaps, of use to call attention to the definitions in sub-s. (6) only for this purpose (for the one to which I am going to refer does not apply to the present case), that when defining the expression "admission," and so on, the definition does indicate that there may be cases where there are successive payments made for admission to the ultimate source of enjoyment of the spectator. It connotes something more than one single payment, and, more than that, going back to the charging section, s. 1 (1), the tax is to be levied and paid on all payments for admission. It does not exclude successive payments for admission.

Having made those observations generally about the statutes, I come to the facts of this case. We are dealing with a club which has premises at 6 and 7, Newport Street. It has a fully equipped modern theatre with an auditorium built with stalls, circles, and boxes to accommodate some 350 persons. Then it has on the ground floor a lounge hall, and it has at a lower level a theatre foyer and buffet and theatre cloakrooms. On the first floor of these premises are situated the club cloakrooms and a large lounge; on the second floor, a dining room, grill room, and kitchen; and, on the third floor, a dining room, with the result that, while a compact portion of the premises, separated from the rest by doors, provides a fully equipped modern theatre, the rest of the structure provides premises in which the ordinary purposes of a social club can be fulfilled. Taking the dates that we have, we find that for the nine months from January to September, 1931, there were 965 full members at a higher fee, or a gross total of full members at varying fees of something like 1,650 or thereabouts. There were 1,752 associate members who paid only 10s. The associate members have a limited right of user of the premises. They are permitted to use certain portions—the ground floor of the club premises, which includes the lounge, and the writing rooms there, the inquiry office, and the foyer of the theatre where light buffet luncheons and teas are served, and where the telephone is, and in those places to enjoy the amenities of the club—but they could not go either to the first floor or to the second floor, where is the dining room, and so on, nor to the third-floor dining room. Their right is a limited right.

What was the value of an associate membership? The associate members had a privilege which belonged to the full members, and that was that they were able to go into the theatre whenever there was a play or production in the theatre, provided that they, like the full members, paid their proper quota for the seats which they engaged. We are told that the price for the seats was so calculated as, in the course of a year, and throughout each year, to pay for the cost of the productions. That obviously connotes that the prices of the tickets for the seats must have, or probably, varied from time to time. With a very full house for a particular performance there might be a balance carried over to the next production; with a sparse house at another production there might possibly be a deficit carried to the next production; but if the success, greater or less, of the productions is estimated for, the probability is that there would be some variation in the price of the tickets.

Who could get the tickets? No member of the public could get a ticket. The privilege of obtaining a ticket exclusively belonged to the associate and full members. The reason for this is that the club was founded for the purpose of having a private theatre outside and excluding the powers of the Lord Chamberlain and his censorship of plays and for excluding the dangers of the attachment of the Copyright Acts. Bearing in mind that, as has been presented to us with force, each of the members paid for his actual seat which he has obtained when he goes to an entertainment, is that payment for that admission to the theatre the only price which the member has paid when he sits down in his seat to watch one of these productions? It would seem that the reason why he joined the club, in many cases, particularly in the case of the associate members, and the value of membership to him, was that he should enjoy the privilege and right to secure admission by a further payment, to the theatre. In other words, when he reached the theatre he had made two payments; an aliquot part of his subscription and the direct payment for the particular place which he chose in the theatre.

It is said upon those facts that it is not possible that the charge should attach, because the attachment in the second part of sub-s. (4) refers to a payment for admission, not to a part payment for admission. But I have already called attention to the fact that the duty is charged upon all payments for admission to any entertainment, and that in the case of entertainments for which admission is by ticket, or by passing through a turnstile, there are particular methods of collecting the tax. When I come, therefore, to consider whether this second part of sub-s. (4) is excluded, because it does not say "a part payment for the right," I think it is proper to bear in mind the passages to which I have referred, which have indicated that there may be payments of different sorts, and, indeed, as in the interpretation section, successive payments in respect of the admission.

Going back then to the second part of sub-s. (4) I find the words

> "where the commissioners are of opinion that the payment of a lump sum [in the present case that would be the subscription to the club] represents payment for other privileges, rights, or purposes besides the admission to an entertainment . . . the duty shall be charged on such an amount [that is, of this composite payment] as appears to the commissioners to represent a payment for the right of admission."

In other words, the commissioners are charged with the duty of breaking up this lump sum to see whether there is contained in it a sum which represents any payment for the right of admission, and, if it does, then a tax falls to be paid. Subsequently, or successively, there may have been a direct payment for the ticket which is used by the member, but not less has he paid the totality of the two sums because he had paid the first sum in a portion of his subscription, and a second portion directly in the purchase of his ticket.

For these reasons it appears to me that the tax does attach, and that the appeal fails, and must be dismissed with costs.

LAWRENCE, L.J.—I agree. Subsections (1) and (3) of s. 1 of the Act deal with a duty leviable upon all payments made for what I may term specified performances, such as payments made for tickets for admission to a particular play, or such as are paid on going through a turnstile into a place of general entertainment. In those cases the duty is charged in respect of each person admitted to the entertainment. If admitted by ticket it is to be stamped on the ticket. If it is by payment of cash the proprietor responsible for the entertainment has to account to the Revenue for the number of persons admitted. In fact, this is a duty which is chargeable in the present case on the price paid by each member for the right to attend any specified performance given at the club. Subsection (4), however, deals with a different kind of subject-matter. There the statute is dealing with a lump sum paid by way of subscription to a club, or payable for a season ticket, or for the right of admission to a series of entertainments, or to any entertainment during a certain period of time. In other words, it is dealing with the prepayment made irrespective of any particular entertainment, but conferring the right to attend such entertainments as may be given during the period covered by the lump sum. In those cases it is obvious, and so appeared to the legislature, that the payment might include some other privileges, rights, and purposes besides the right of admission to the entertainment. Particularly is that so in cases of clubs. Therefore, by the latter part of the section, the commissioners were charged with the duty in such cases of dissecting the subscription to the club, or the other lump sum payable, and of finding out whether any, and what part of it represented the right of admission to the entertainment.

It is said here (this seems to me the sole point in the case) that unless the commissioners are able to find that the part so dissected covers the whole right of admission to the entertainment, then the proprietor is not taxable in respect of any part of the subscription to the club. In my view, that is not the right construction of the section. It is obvious that under the earlier parts of the Act, sub-ss. (1) and (3), the payment for admission may be by two or three, or more sums. It is the totality of the sums paid for admission which determines the amount of duty payable. So, in the case of a subscription to a club, it may very well be that each member of the club is charged some additional sum for admission besides that proportion of his subscription which represents his right as a member to attend the entertainment, and I think the aggregate of what he so pays by way of subscription and by way of price of admission is the sum which is taxable under the Act. It has been strenuously argued that the words in the Act do not permit of such a construction, but, I think, if they are carefully considered they do bear the meaning which I have expressed. The latter part of the section enacts that, if the commissioners are of opinion that the payment of a lump sum represents a payment for other privileges besides the admission to an entertainment (that must mean, I think, "besides the right to admission to an entertainment"),

> "the duty shall be charged on such an amount as appears to the commissioners to represent the right of admission to entertainments."

As an amount cannot strictly speaking represent the right of admission the words must be construed to mean "to represent a payment in respect of the right of admission." In other words, the commissioners have to ascertain which part of the subscription represents a payment in respect of the right of admission, which part when added to the price charged to the member for admission to any specified performance represents the total payment made by him for admission to the entertainment. So far from doing any violence to the language of the section I think that the construction which I have indicated is the natural construction of the words used, though, perhaps, their purport might have been better expressed. For these reasons I agree that the appeal fails and ought to be dismissed.

ROMER, L.J.—I agree. For the reasons that have been given by my Lords, I am of opinion that the second part of sub-s. (4) should be read as follows: ". . . where the commissioners are of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the right of admission to an entertainment . . . the duty shall be charged on such an amount as appears to the commissioners to represent a payment for the right of admission to entertainments in respect of which entertainments duty is payable." The price paid for admission to an entertainment may consist of several sums of money paid at different times, and at different places. Each one, in my opinion, is rightly described as a payment for admission, or for the right of admission, and those payments when added together constitute the payment for admission or the right of admission. As in the present case there was abundant evidence on which the commissioners could form the opinion, as they did, that the subscriptions paid by full members and associate members did include, or represent, a payment for the right of admission to the entertainment within the meaning of sub-s. (4) it follows that the subsection is applicable.

Appeal dismissed.

Solicitors: *Bartlett & Gluckstein*; *Solicitor of Customs and Excise.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re BRITISH TRADE CORPORATION, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Greer and Romer, L.JJ.), March 16, 17, 1932]

[Reported [1932] 2 Ch. 1; 101 L.J.Ch. 273; 147 L.T. 46]

Promissory Note—Presentation for payment—Note made payable "in the body of it" at particular place—Request to third party to pay payee—Address of third party at bottom of document after signature—Statute of Limitations, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Bills of Exchange Act*, 1882 (45 *&* 46 *Vict.*, *c.* 61), *s.* 87 (1).

On March 23, 1920, the Batoum branch of the British Trade Corpn. addressed a document in the following form to their head office requesting it to pay £1,000 to M. at sight: "At sight pay this sole exchange to the order of Mr. B. L. Mailoff the sum of £1,000 sterling value received which place to account No. 2." The document was signed by the manager and accountant of the branch and at its foot were the words: "To the British Trade Corpn., 13, Austin Friars, London, E.C." The respondent became the holder of the document which he presented for payment at the office of the corporation at 13, Austin Friars on Dec. 23, 1923. Payment was refused. On Nov. 23, 1926, a special resolution was passed for the voluntary winding-up of the company. The respondent then sought to prove in the winding-up for the £1,000 specified in the document.

Held: the document did not fulfil the requirements of s. 3 of the Bills of Exchange Act, 1882, which defined a bill of exchange, nor did it fulfil those of s. 83 which defined a promissory note; under s. 5 (2) the respondent, as holder, had an option to treat the document either as a bill of exchange or as a promissory note; treating it as a promissory note, s. 87 (1) provided that where a promissory note was "in the body of it" made payable at a particular place, it must be presented for payment at that place in order to render the maker liable; the words: "To the British Trade Corpn., 13, Austin Friars, London, E.C.," being at the foot of the document, below the signatures, were not "in the body of it" within s. 87 (1), but were mere extraneous words of address; and, therefore, there was no need to present the document for payment at that place, the statute of limitation began to run on March 23, 1920, and the respondent's claim was out of time.

Notes. For the present statute of limitations, see s. 2 of the Limitation Act, 1939, by which Act s. 3 of the Act of 1623 was repealed.

As to bills of exchange and promissory notes generally, see 3 HALSBURY'S LAWS (3rd Edn.) 144 et seq., and for cases see 6 DIGEST 9 et seq. For Bills of Exchange Act, 1882, see 2 HALSBURY'S STATUTES (2nd Edn.) 505.

Cases referred to:

(1) *Price* v. *Mitchell* (1815), 4 Camp. 200, N.P.; 6 Digest 241, *1542*.

(2) *Sanderson* v. *Bowes* (1811), 14 East. 500; 13 R.R. 299; Digest Supp.

(3) *Exon* v. *Russell* (1816), 4 M. & S. 505; 105 E.R. 921; 6 Digest 242, *1549*.

(4) *Williams* v. *Waring* (1829), 10 B. & C. 2; 5 Man. & Ry.K.B. 9; L. & Welsb. 48; 8 L.J.O.S.K.B. 7; 109 E.R. 351; 6 Digest 242, *1546*.

(5) *Stevenson* v. *Brown* (1902), 18 T.L.R. 268; sub nom. *Stevenson* v. *Childs and Brown*, 46 Sol. Jo. 232; 6 Digest 239, *1520*.

(6) *Miller* v. *Thomson* (1841), 3 Man. & G. 576; 1 Dowl.N.S. 199; 4 Scott.N.R. 204; 11 L.J.C.P. 21; 133 E.R. 1271; 6 Digest 37, *260*.

Appeal from an order of EVE, J.

The facts are set out in the headnote and the judgment of the Master of the Rolls.

Wilfrid Greene, K.C., and *Harold Murphy* for the appellant, the liquidator.

Wilfrid M. Hunt for the respondent.

LORD HANWORTH, M.R.—This appeal raises an interesting point. The facts can be quite shortly stated. On Nov. 23, 1926, the British Trade Corpn., Ltd., went into voluntary liquidation for the purpose of amalgamation with another company, and that date—Nov. 23, 1926—is the date upon which the special resolution was confirmed. On April 6, 1931, at a time when the liquidation had not been concluded, a claim was made on behalf of the present respondent for the payment in the liquidation of £1,000 due upon a note. The note is in a form to which our attention has been drawn, and the claim made is that it was a promissory note and that it was payable at sight, but was presented for payment on Dec. 23, 1923, that is to say, at a time when the statute of limitation had not run to bar the claim, the relevant date for that purpose being the date of the commencement of the liquidation. The note was presented by the respondent as the holder for value of the note.

The point that arises is this. The document is dated March 23, 1920. It is payable at sight, and, by s. 10 of the Bills of Exchange Act, 1882, a note payable at sight is equivalent to a note payable on demand. Therefore, the six years down to which there would be a right for payment, not barred by the statute of limitation, would be down to March 23, 1926, with the consequence that it would have been barred at the time of the commencement of the liquidation unless the right to payment did not arise until after it had been presented for payment, namely, on Dec. 23, 1923, and from that date down to the date of the commencement of the liquidation the full six years had not run.

The question that we have to determine, therefore, is: Was it necessary that this document should be presented for payment? On its face it appears to be more nearly a bill of exchange than a promissory note, and it is, perhaps, of interest to observe that when it was presented for payment the bank through whom it was presented, that is to say, Lloyds Bank, treated it as being a bill of exchange, and put upon it the proper stamp suitable for a bill of exchange payable on demand. But I will leave that point and go to the main proposition which has been put before us. It is, apparently, not a promissory note, for it does not appear to fulfil all the requirements of s. 83 of the Act of 1882. But whether it be a bill or whether it be a note, it is said that there was an option given by s. 5 (2) of the Act to the holder, which he could exercise as he was best minded to do. Section 5 (2) says:

> "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or as a promissory note."

Without determining the question, let it be accepted that there was an option, and that the option was exercised by the holder of treating this document as a promissory note. If that be so, we have to determine whether or not it was necessary to present it for payment. Section 87 (1) is in these terms:

> "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable."

EVE, J., has come to the conclusion that the terms of this note place it within the earlier portion of s. 87 (1) and not in the later portion. In other words, he held that those terms did provide that payment was to be made at a particular place and that that requirement was in the body of the promissory note. He thus held that the applicant's claim was not barred by the Statute of Limitations, and he reversed the decision of the liquidator, who had determined that the claim was barred.

The point, therefore, is quite a short one. Is it to be held that in the body of this document it is made payable at a particular place? What is relied upon is that it is addressed to the British Trade Corpn., 13, Austin Friars, London, E.C., and it is said that those words are within the body of the document and, hence, that it fulfils the terms of s. 87 (1). That brings me to determine what is the meaning of "in the body of" the note. I feel that I am in agreement with the observation made by GREER, L.J., in the course of the argument that "in the body of" the note must mean in the terms of the actual contract to pay which is contained in the note. You may have some additional

A matter or a memorandum added to the note. But if a term is to be in the body of the note, it must be a part of the actual terms of the contract made by the maker of it.

We have had our attention called to a number of cases which were decided before the Act was passed and, as we all know, the Act was intended to embody the result of the cases which had been decided upon bills and notes. Turning now to two or three cases which make quite plain what is the meaning of "in the body of" the note, in *Price* v. B *Mitchell* (1) which was decided in 1815, SIR VICARY GIBBS decided that an addition in the corner or on a part of the note where a place is indicated, "at Messrs. Veres, Smart, & Co., 77, Lombard Street, London," was no part of the contract, but was a mere memorandum, and he quotes the words from BAYLEY, J.'s, Book on Bills (3rd Edn. at p. 96):

> "If a note be made payable at a particular place, and that place be mentioned in C the body of the note, presentment for payment must be made at that place: but where the place is mentioned in the margin, it does not appear that such presentment is necessary."

It would seem that s. 87 (1) was intended to carry out the statement referred to by the Lord Chief Justice, and if one contrasts that case with a case which had been decided otherwise, *Sanderson* v. *Bowes* (2), one will find in that case that the place was indicated D in the manner to which I have already referred, the document being a promissory note to the defendants promising to pay so much at their banking house at Workington and it was held that a demand for payment was necessary to give the holder a cause of, action. In other words, where you find that the note is made payable at a place named and embodied in the actual terms of the contract, it is in the body of the note and presentment for payment is required. The illustration which I have taken from *Price* v. E *Mitchell* (1) is confirmed by the further cases such as *Exon* v. *Russell* (3), decided in 1816, and *Williams* v. *Waring* (4), decided in 1829. From those illustrations it would seem that early in the course of the last century it had been plain to practitioners that what was intended by the body of the bill was something equivalent to the contract, whereas words which appeared in the corner, in the margin, or by way of a memorandum, F were not within the terms of the body of the bill.

With those illustrations before us it is possible to interpret what is meant by s. 87 (1), and it appears to me that this note, taken as a note, did not require in the body of it payment to be made at a particular place, and the result is that the presentment for payment was not required and the statute had run before ever the claim was made in the liquidation. I would only add one word on a point which appealed to EVE, J., and that was that the measurement of the amount of the note or bill was in sterling. In G the circumstances I cannot find any assistance from that. It seems quite possible that the parties might draw a bill or make a note that was payable anywhere in a sum in sterling without necessarily giving any special characteristic to the document in which that amount is so described. For those reasons the appeal must be allowed with costs and the decision of the liquidator must be restored.

H **GREER, L.J.**—I agree. I think the decision of the liquidator is right and the decision of the learned judge is wrong. I cannot help feeling that economy in the argument in the court below with regard to the reference to the old cases has had something to do with the decision of the learned judge.

The question arises whether or not the period of limitation in respect of the debt created by the document dated March 23, 1920, had or had not run at the time of the I liquidation. If this document is regarded as a bill of exchange, it is conceivable that the time had run because there is nothing in the form of the document to indicate that it was payable only at 13, Austin Friars, London, E.C.2. If the document is regarded as a promissory note, then the time has run unless, in interpreting the document, you say it was merely a promise to pay £1,000 at the British Trade Corpn. offices, 13, Austin Friars, London, E.C.2. The document was evidently drawn by the British Trade Corpn. representatives in Batoum in the form applicable to a bill of exchange, but unfortunately those who drew it do not seem to have had regard to the definition of a bill of exchange which is contained in the Bills of Exchange Act, 1882, s. 3: "A bill of exchange is an unconditional order in writing addressed by one person to another." I have very little doubt that the branch in Batoum thought they were one person, different from the head office, and were addressing a bill to the head office, and, therefore, the form of the document is the form adopted in order to create a bill of exchange and is not the form which is used for the purposes of a promissory note. A promissory note is defined in s. 83 as an unconditional promise in writing made by one person to another and signed by the maker. By reading this document you cannot get out of the words used that there is a promise by the British Trade Corpn. to pay Mr. D. L. Mailoff. By its words it is a request by the branch in Batoum to the head office to undertake a liability to Mr. D. L. Mailoff, and, in my judgment, taking the document by itself and apart from the provisions of s. 5 of the Bills of Exchange Act, it would neither be a bill of exchange nor a promissory note. As a result of decisions which had been given previously, s. 5 (2) of the Act provides as follows:

> "Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note."

I understand that to mean that, where it is neither one thing nor the other, it has come to be decided, and afterwards settled by statute, that it may be treated by the holder as either a bill of exchange or a promissory note.

Treating it as a bill of exchange, it is conceivable that the period of the statute of limitation had expired at the time the liquidation began. But, treating it as a promissory note, the argument which succeeded before the learned judge is that it has to be interpreted as a promissory note to pay the sum of £1,000 at the office of the British Trade Corpn. in London. The first observation I have to make about this is that the words of the address at the bottom of the document, "To the British Trade Corpn., 13, Austin Friars, London, E.C.," were inserted for the necessary purpose of treating this document as a bill of exchange and that they have really no place in it, and instead of treating it as what it was intended to be, namely, a bill of exchange, it is treated as a promissory note. But, apart from that, assuming for the moment that that is wrong and that these words are to have some effect given to them when we deal with the document as a promissory note, it seems to me that it has been decided that words in that position in a promissory note are not to be treated as if they were in the body of the note. That I take to be the result of the decisions in *Sanderson* v. *Bowes* (2), *Price* v. *Mitchell* (1), and *Exon* v. *Russell* (3). That view was acted upon by DARLING, J., in *Stevenson* v. *Brown* (5), where the words which were alleged to be part of the terms were not written in the corner at the bottom of the document but were written across the face of the document. I regard this case as decided by the old cases. It is said that, according to the reports of those cases the addresses were in the corner of the documents and that in this case the address is not in the corner of the document. But I fail to see the importance of that distinction, because in this case the words are in a part of the document which it would not be wrong to describe as in the corner of the document, and in any event they are a side-note which is put aside from the signature to the document. I think those cases compel us to hold that in the present case, treating this as a promissory note, it cannot be said to have in its body a promise to pay at the office of the British Trade Corpn. in London. That is decisive of the case.

But some reliance was placed in argument by the respondent on *Miller* v. *Thomson* (6), and especially on the observation in the course of his short judgment which was made by MAULE, J., when he said (3 Man. & G. at p. 580):

> "This is a bill drawn by the whole company, acting by their directors, upon the whole company. It is a promise made by one partner acting on behalf of the company, under the order of the directors, that the company shall pay. It is a promise made by the company, at Dorking, to pay in London. It is, therefore, in effect, a promissory note."

It is to be observed that the only question there was whether that document could be declared on as a promissory note, and no question arose for decision whether it was

A payable in London or elsewhere, and if that question had arisen I have very little doubt that the other cases to which our attention has been called would have been cited before the court. Therefore, I do not think that we ought to attach very much weight to that obiter observation of MAULE, J. For those reasons I think the appeal should succeed.

I find it unnecessary to decide the extremely interesting question which was raised by the second argument of counsel for the liquidator, namely, whether, when there are B two alternative methods of putting into litigation the right to payment of a sum of money, the party who is entitled to the payment can say: "I select that view which will enable me to keep the debt alive for forty or fifty years and then make a demand which would be necessary in order to create the obligation." That is a question of very considerable importance and great difficulty, upon which there is no authority, and on which I do not propose to express any opinion.

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ROMER, L.J.—I have arrived at the same conclusion, and were it not for the fact that we are differing from the decision of EVE, J., I should content myself by saying that I agree with what has fallen from the other members of the court. But as it is, I will endeavour to state very shortly my reasons for differing from the decision of EVE, J.

The document with which we have to deal here is, in my opinion, neither a bill of D exchange nor a promissory note. It is not a bill of exchange because it is not an unconditional order in writing addressed by one person to another within the meaning of s. 3 of the Bills of Exchange Act, 1882. It is not a promissory note within the meaning of s. 83 because it is not an unconditional promise made by one person to another to pay a sum of money. The document is intended to be a bill of exchange and was not ever intended to be an unconditional promise to pay. That being so, one has to have E recourse to s. 5 of the Act. That section means, in my opinion, that where there is a document in the form of a bill of exchange, but which is not a bill of exchange for the reasons therein mentioned, that is to say, because the drawer and the named intended drawee are the same person, or because the drawee is a fictitious person or a person incapable of contracting, the holder may, at his option, treat it as though it were a bill of exchange, that is to say, in a case like the present, as though the drawee was a separate F person from the drawer, or he may treat it as what it is not, namely, a promissory note. If he treats it as a promissory note it means that he is entitled to treat it as an unconditional promise by the drawer to pay. If that is the case, the fact that when it is drawn up in the form of a bill of exchange it is addressed to somebody else who was intended to be the drawee, appears to me a wholly immaterial circumstance. Take the case of a bill drawn against a fictitious drawee—a fictitious name with an existing G address. For the purpose of s. 5, if the holder treats it as a promissory note he must treat it as containing an unconditional promise to pay by the drawer, which it is not. In other words, as it seems to me, he treats it as an unconditional promise by the drawer and disregards altogether the fact that it is addressed to a drawee, whether fictitious or otherwise. So I should have thought that in a case like the present, the fact that it was addressed to the British Trade Corpn., 13, Austin Friars, can be dis- H regarded, and that you treat the document as though those words were not there at all. In that case there is no place named at which the promissory note is payable. On the other hand, if the words can be treated as the place at which the promissory note is payable, for the reasons already mentioned by the Master of the Rolls and GREER, L.J., I think it is impossible to say that they occur in the body of the note. On the other question about the statute of limitation, I do not think it is necessary to add anything to I what has already been said.

Appeal allowed.

Solicitors: *Freshfields, Leese, & Munns*; *Sheard, Breach, & Co.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

ABERCROMBY *v.* MORRIS

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), July 19, 1932]

[Reported 147 L.T. 529; 96 J.P. 392; 48 T.L.R. 635; 76 Sol. Jo. 560; 30 L.G.R. 407; 29 Cox, C.C. 553]

Motor Vehicle—Licence—Use of vehicle without licence—Liability of owner—Use by person other than owner—Authority of owner to use provided licence renewed—Roads Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 72), *s.* 13—*Road Vehicles* (*Registration and Licensing*) *Regulations,* 1924 (*S.R. & O.,* 1924, *No.* 1462), *reg.* 1.

The owner of a motor car, before going abroad, gave permission to one P., who was not his servant or agent, to use the car during his absence abroad on condition that P. renewed the excise licence. P. used the car after the expiration of the licence, while the owner was still abroad.

Held: the owner was not the person using or responsible for the use of the vehicle within the meaning of s. 13 of the Roads Act, 1920, and could not be convicted of an offence under that section.

Notes. The Roads Act, 1920, s. 13, has been replaced by s. 15 of the Vehicles (Excise) Act, 1949, and reg. 1 of the Road Vehicles (Registration and Licensing) Regulations, 1924, by reg. 1 (3) of the Road Vehicles (Registration and Licensing) Regulations, 1955.

As to the licensing of motor vehicles, see 31 HALSBURY'S LAWS (2nd Edn.) 766 et seq., and for cases see 39 DIGEST 238 et seq. For Vehicles (Excise) Act, 1949, see 42 HALSBURY'S STATUTES (2nd Edn.) 1282.

Cases referred to:

(1) *Griffiths* v. *Studebaker, Ltd.,* [1924] 1 K.B. 102; 93 L.J.K.B. 50; 130 L.T. 215; 87 J.P. 199; 40 T.L.R. 26; 68 Sol. Jo. 118; 21 L.G.R. 796; 27 Cox, C.C. 565, D.C.; 34 Digest 153, *1202.*

(2) *Strutt and Parker* v. *Clift,* [1911] 1 K.B. 1; 80 L.J.K.B. 114; 103 L.T. 722; 74 J.P. 471; 27 T.L.R. 14; 8 L.G.R. 989, D.C.; 39 Digest 243, *224.*

Case Stated by Sussex justices.

An information under s. 13 of the Roads Act, 1920, was preferred by the respondent, Morris, on behalf of the West Sussex County Council, against the appellant, Abercromby, and one Percival, alleging that on July 1, 1931, at Billingshurst, Sussex, the appellant unlawfully used a motor vehicle for which a licence under the Finance Act, 1920, was not in force, and that Percival aided and abetted him to commit the offence. On Nov. 27, 1931, the justices convicted Percival of aiding and abetting the appellant, but, as the appellant was not then present, they adjourned the case against him to Dec. 11.

It was then proved or admitted that the motor vehicle in question was registered in the name of the appellant as the owner. The excise licence was duly taken out and the duty paid by the appellant up to March 24, 1931. The appellant went abroad on Jan. 27, 1931, and did not return to England till July 22, 1931. Before going abroad he gave Percival permission to use the car during his (the appellant's) absence abroad on condition that Percival renewed the excise licence. Percival renewed the excise licence on behalf and in the name of the appellant on April 10, 1931, for the period expiring on June 30, 1931. On July 1, 1931, Percival was driving the motor vehicle on a public road at Billingshurst, and no excise licence for it was in force on that date. On Aug. 14, 1931, an excise licence was taken out by the appellant for the period from Aug. 11 to Dec. 31, 1931.

For the appellant it was contended that he had not committed an offence as he was not using the motor vehicle on July 1, 1931. It was contended for the respondent that the appellant had committed the offence charged as he was the registered owner of the vehicle and was the person using the vehicle within the meaning of the Act, notwithstanding that he had given Percival permission to use it during his absence abroad. The justices were of opinion that the appellant was the person keeping the motor vehicle within the meaning of the Finance Act, 1920, and was the person responsible for the use of it on July 1, and they convicted him accordingly, fined him £2, and ordered him to pay £3 7s. 6d. costs.

By reg. 1 of the Road Vehicles (Registration and Licensing) Regulations, 1924:

> "The expression 'owner' means the person by whom the vehicle . . . is kept and used. . . ."

By s. 13 (1) of the Roads Act, 1920, it was provided:

> "If any person uses any vehicle for which a licence under the Finance Act, 1920, as amended by this Act is not in force . . . he shall be liable to an excise penalty. . . ."

The Finance Act, 1920, provides for licences subject to duties to be paid annually by the person keeping the vehicle, with a provision for quarterly licences if desired at slightly higher proportionate rates.

Laurence Vine for the appellant.
Hubert Hull for the respondent.

LORD HEWART, C.J.—In my opinion, the appeal ought to be allowed. The facts which are found make it clear that at the time of the alleged offence the appellant was abroad and had given Mr. Percival permission to use the car on condition that he renewed the excise licence. It was renewed up to June 30, but not after that date. The use referred to was on July 1, when no excise licence was in force. Nevertheless, the justices have held the appellant liable. Cases have been cited in which the relation of employer and employee existed. No such relation existed here. Mr. Percival was not the servant of the appellant. He was a friend to whom the appellant had lent the car subject to the condition that he should renew the licence. There is no authority to justify the conclusion that the appellant was the person responsible for the use of the vehicle. If Mr. Percival had been the servant or agent of the appellant, other considerations would apply, but it seems to me that the appellant was no more responsible for using that vehicle without a licence than he would have been in an action for damages if the vehicle had come into collision on that day with a pedestrian and caused damage.

AVORY, J.—I agree. I do not think that the cases where a master has been held liable for the act of his servant have any application. In *Griffiths* v. *Studebaker, Ltd.* (1), the real argument was whether mens rea was a necessary ingredient in the offence. In the earlier case of *Strutt and Parker* v. *Clift* (2), the question was as to the liability of a man for the act of a bailiff in charge of a farm generally, and, therefore, acting within the scope of his authority. In the present case the question is whether, on July 1 Mr. Percival could be said to be acting within the scope of any authority from the appellant. In my view, the position was the same as if Mr. Percival had been authorised to use the car up to June 30, with an express prohibition against using it after that date. In those circumstances I do not think that the appellant can be held responsible for the circumstances in which Mr. Percival was driving the car on that day.

HUMPHREYS, J.—I also agree. I see in the statute nothing which requires the court to give a strained and unnatural meaning to the word "use." The offence is "using" the car without a licence. The authority given by the appellant to Mr. Percival might be taken as an authority to use the car while there was an excise licence in force, and when the licence expired the authority expired. I see nothing to justify the conclusion that the appellant used the car contrary to the Act.

Appeal allowed.

Solicitors: *Amery-Parkes & Co.*; *J. E. Dell & Loader,* Southwick.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

JONESCO *v.* EVENING STANDARD CO., LTD.

[Court of Appeal (Scrutton, Greer and Romer, L.JJ.), February 19, 1932]

[Reported [1932] 2 K.B. 340; 110 L.J.K.B. 447; 147 L.T. 49]

Solicitor—Costs—Agreement assigning property to secure payment of costs—Need to be in writing—Solicitors Act, 1870 (33 *&* 34 *Vict.*, c. 28), *s.* 4.

The agreements between solicitor and client referred to in s. 4 of the Solicitors Act, 1870, are those which fix a measure of payment of the solicitors' remuneration which is different from that which would otherwise obtain—viz., the amount of the taxed costs—either by amount, or by manner, e.g., by salary. The section does not refer to agreements between solicitor and client by which the client gives a lien on, or an assignment of, property to secure payment of costs.

Accordingly, an agreement between solicitors and a client, who owed them a sum for costs, by which the client agreed that, if the solicitors would continue the conduct of two libel actions in which he was plaintiff, they could "deduct all the costs I owe you from the damages I receive," **held,** not to be an agreement within s. 4 of the Act of 1870, and so was valid, though not in writing.

Court of Appeal—Undertaking given to the court—Power to enforce.

The Court of Appeal have jurisdiction to deal with the enforcement of an undertaking given to that court.

Note. The Solicitors Act, 1870, s. 4, was replaced by ss. 59 and 60 of the Solicitors Act, 1932, which are superseded by ss. 59 and 60 of the Solicitors Act, 1957. See also s. 13 (2) of the Solicitors (Amendment) Act, 1956.

As to agreements as to and security for costs, see 31 Halsbury's Laws (2nd Edn.) 164 et seq. and 233, 234. As to a solicitor's liability on undertakings, see ibid., 264–269. For cases see 42 Digest 126 et seq., 228 et seq., and 329 et seq. For Solicitors Act, 1957, see 37 Halsbury's Statutes 1053 (2nd Edn.)

Case referred to:

(1) *Philby* v. *Hazle* (1860), 8 C.B.N.S. 647; 29 L.J.C.P. 370; 2 L.T. 433; 7 Jur.N.S. 125; 141 E.R. 1320; sub nom. *Philby* v. *Hayle*, 8 W.R. 611; 42 Digest 153, *1524.*

Further Consideration of a motion by one, Mrs. Jonesco, for an order that Messrs. Wingfield, Halse and Trustram, a firm of solicitors, do fulfil an undertaking, given by them, and embodied in an order of the Court of Appeal.

In September, 1929, one, Jonesco, owed the solicitors a large sum for costs, partly for contentious and partly for non-contentious business. In that month he made a verbal agreement with Mr. Wingfield senior, acting on behalf of the firm, that, if the firm would continue the conduct of two libel actions in which they were then acting for him, as plaintiff, they could "deduct all the costs I owe you from the damages I recover." On Feb. 10, 1930, Mr. Jonesco assigned to his wife, Mrs. Jonesco, all sums awarded to him as damages in the libel actions "subject to the lien of" the solicitors "being preserved." On Feb. 20, 1930, judgment was given for Mr. Jonesco in one of the libel actions for £12,000, and this sum was paid into court. On April 16, 1930, on the application of Mrs. Jonesco that £8,000 of the £12,000 in court should be paid out to her, the Court of Appeal ordered that on the solicitors

> "undertaking to proceed with the taxation of the plaintiff's costs herein with all diligence and to account for the balance, if any, to the proper parties,"

the sum of £4,500 be paid out to the solicitors. On March 25, 1931, Mrs. Jonesco moved the Court of Appeal that the solicitors should pay out to her the balance in their hands of the £4,500, and the Court of Appeal referred the motion to a master to inquire who were the proper parties to receive the balance, and in what proportions. Further consideration adjourned. The master found (a) that the verbal agreement between Mr. Jonesco and the solicitors of September, 1929, was, in fact, made; (b) that the balance to be either retained by the solicitors or paid out to Mrs. Jonesco was £980 14s. 10d. (taxation of the solicitors' costs in the action having been waived by Mr. and Mrs.

Jonesco); (c) that the costs referred to in the agreement of September, 1929, were (untaxed) £2,100, of which the solicitors had received £1,036 17s. 8d., leaving a balance claimed by them of £1,060—more than £980, the subject of the application to the Court of Appeal. The master expressed the view that the verbal agreement of September, 1929, which the solicitors claimed to have created either an equitable lien on, or an equitable assignment of, the damages to be recovered which prevailed over the assignment of these damages to Mrs. Jonesco of Feb. 10, 1930, was invalid as not being in writing.

By s. 4 of the Solicitors Act, 1870 (33 & 34 Vict., c. 28);

> "A solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such solicitor, whether as solicitor or as an advocate or conveyancer, either by a gross sum or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated, subject to the provisions and conditions in this part of this Act contained: Provided always that when any such agreement shall be made in respect of business done or to be done in any action at law or suit in equity the amount payable under the agreement shall not be received by the solicitor until the agreement has been examined and allowed by a taxing officer of a court having power to enforce the agreement; and if it shall appear to such taxing officer that the agreement is not fair and reasonable, he may require the opinion of a court or a judge to be taken thereon by motion or petition, and such court or judge shall have power either to reduce the amount payable under the agreement or to order the agreement to be cancelled and the costs, fees, charges and disbursements in respect of the business done to be taxed in the same manner as if no such agreement had been made."

By s. 9 of the Solicitors Remuneration Act, 1881 (44 & 45 Vict., c. 44): "The Solicitors Act 1870 shall not apply to any business to which this Act relates" (i.e., non-contentious business).

Conway, K.C., and *Sandlands* for Mrs. Jonesco.
Croom-Johnson, K.C., and *Bensley Wells* for the solicitors.

SCRUTTON, L.J.—This matter, which has at times proved extremely complicated, now presents one interesting but comparatively simple question. Messrs. Wingfields, Halse, and Trustram had been acting in a number of affairs as solicitors for Mr. Jonesco, who was not a good payer, and, consequently, there were continual difficulties as to how Messrs. Wingfields were to get the costs of the numerous legal transactions—there is a list of about thirty of them—that they were carrying out for Mr. Jonesco. But Mr. Jonesco had a stroke of luck. Certain newspapers published statements of him which he considered defamatory, and he brought an action, and on Feb. 20, 1930, he recovered £12,000 damages. When the question was whether the £12,000 should be paid to him or to his wife—to whom on Feb. 10, 1930, he had assigned the damages subject to the lien of Messrs. Wingfields—an order was made on April 16, 1930, in this court—the £12,000 being in court—that

> "On Messrs. Wingfields, Halse, and Trustram undertaking to proceed with the taxation of the plaintiff's costs therein with all due diligence and to account for the balance, if any, to the proper parties,"

the sum of £4,500 should be paid out to Messrs. Wingfields, solicitors for Mr. Jonesco. Messrs. Wingfields undertook to proceed with the taxation of the plaintiff's costs. Mr. and Mrs. Jonesco waived that taxation, so the solicitors have been relieved from fulfilling their undertaking in that respect. Then the order provided that they were "to account for the balance, if any, to the proper parties." Mrs. Jonesco asserted that there was a balance, and that she was the proper party to receive it. Messrs. Wingfields in effect said: "If there is a balance of this sum, having regard to the costs of the libel actions, we are entitled to receive it because we have a verbal agreement made with A Mr. Jonesco in September, 1929, which gives us either an equitable assignment of, or an equitable lien on, that balance, and, therefore, it ought to come to us."

This matter came before this court on March 25, 1931, by way of motion by Mrs. Jonesco to require Messrs. Wingfields to fulfil their undertaking and to pay over the balance, whatever it was, to her as the proper party. The question was then raised, I think in the first instance by the court, whether or not this court was the proper tribunal B to enforce an undertaking which had in fact been given in this court. Messrs. Wingfields desired to argue that this court was not the proper tribunal when this point was raised, and according to the correspondence they still desire to raise the point before the House of Lords. We made an order, and, therefore, I assume we had jurisdiction, and we are making this order on the view that we have jurisdiction to deal with the enforcement of an undertaking given to this court. We then said in effect: "This C question seems to raise a number of findings of fact which the Court of Appeal cannot go into," and we made an order referring the matter to a master of the King's Bench Division to inquire who were the proper parties to receive the balance referred to in the order of this court dated April 16, 1930, and further consideration was adjourned to this court.

The matter now comes before this court on the very careful report of the master. D He finds that certain people's claims have been satisfied. He was, apparently, not told, because, it is said, the solicitors for Mrs. Jonesco did not know, that there might be other claims to this amount made by persons to whom Mrs. Jonesco is said to have given charges, and, therefore, he does not deal with them. He deals with the matter as between Mrs. Jonesco and the solicitors, Messrs. Wingfields:

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> "With regard to the balance referred to in the order of the Court of Appeal, it is agreed by the parties that the amount of the balance to be accounted for, to be paid by Messrs. Wingfield to Mrs. Jonesco or to be retained by them, is to be taken at the sum of £980 14s. 10d."

He then makes a number of other findings which reduces the question which this court has to decide to this. Messrs. Wingfields say: F

> "True there is a balance of £980 14s. 10d. out of the £4,500 paid to us, but in September, 1929, before the assignment to Mrs. Jonesco subject to our lien, Mr. Jonesco had made a verbal agreement with Mr. Wingfield, senior, acting on behalf of his firm, that 'Wingfields can deduct all the costs I owe you from the damages I recover'."

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Messrs. Wingfields say that the effect of that was to assign these damages for the costs which "I owe you," apart from the costs of the libel action for which there would obviously be a solicitor's lien on the damages recovered. There was a balance of over £1,000 costs owed by Mr. Jonesco to Messrs. Wingfields, partly for contentious and partly for non-contentious matters. Messrs. Wingfield's contention was that the effect of this agreement of September, 1929, to "deduct all the costs I owe you from the damages H I recover" was to create either an equitable lien on, or an equitable assignment of, that amount which prevails over the subsequent assignment to Mrs. Jonesco, that being in terms made subject to the lien of Messrs. Wingfields.

The first answer of Mrs. Jonesco to that contention was that there was not such an agreement. The master heard the evidence given by Mr. Wingfield and he heard the evidence given by Mr. Jonesco, and he found that that agreement was made. But he I then said, though he did not give his reasons for so saying: "I find that, not being in writing, this agreement is not enforceable," and he must have meant not enforceable by reason of the provisions of the Solicitors' Acts. If that be the right view as to the validity of this agreement between Mr. Jonesco and Messrs. Wingfields, their claim to the balance fails, and Mrs. Jonesco is entitled to it. If it be the wrong view, Mrs. Jonesco fails to establish that there is any part of the £4,500 for which Messrs. Wingfields are liable to account to her or anyone else. That is the question, and the only question, raised by Messrs. Wingfields' counsel, which the court is now considering.

Before the Solicitors Act, 1870, many agreements by a solicitor could be made not in writing. For instance, he could, not in writing, agree to charge nothing for his services. In *Philby* v. *Hazle* (1), ERLE, C.J., said (8 C.B.N.S., at p. 652):

> "The inclination of the cases is that an agreement whereby the attorney was to get a larger sum than the ordinary allowance cannot be enforced"

—leaving the position where he was going to get a less sum than he ordinarily would enforceable, though not in writing. Then came the Solicitors Act, 1870, which originally applied to contentious and non-contentious business, but from which non-contentious business was excluded by the Solicitors Remuneration Act, 1881. In my view, s. 4 of the Act of 1870 is dealing with the amount of payment. I think when one comes to read the language of that section:

> "A solicitor may make an agreement in writing with his client respecting the amount and manner of payment . . . either by a gross sum or by commission or percentage or by salary or otherwise and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated . . ."

subject to supervision by the court to see whether the agreement was fair and reasonable, it is not dealing with securities for the amount of payment properly to be made. If the agreement by the solicitor with the client is this: "You are to pay me the proper amount found due on taxation, but you give me this security for the payment of that amount"—either as has been suggested a promissory note when the amount has been ascertained, or, as in this case, "a lien on, or assignment of, a sum which I may receive on your behalf"—if the agreement is one giving security for an amount otherwise properly ascertained by the court on taxation, if necessary, it does not come within the provisions of s. 4 of the Solicitors Act, 1870, requiring agreements there mentioned to be in writing and subject to consideration by the court. In my opinion, therefore, this agreement of September, 1929, which the master finds to have been made between Mr. Jonesco and Messrs. Wingfields, though not in writing, is enforceable, and the question submitted by the master for the opinion of the court must be decided in favour of Messrs. Wingfields. As the master finds that in that event there is no balance left to which Mrs. Jonesco is entitled, the master's decision, so far as it is a decision, must be varied, and it must be held that Messrs. Wingfields have accounted according to their undertaking to the proper persons. The motion, therefore, fails.

GREER, L.J.—The only question surviving for the purposes of the decision of this court to-day out of the complicated questions that have arisen with respect to the large sum of damages recovered by Mr. Jonesco for libel against the "Evening Standard" is whether or not the agreement which the master has found to have been made, and which he has set out in his report, is or is not binding. It is said on behalf of Mrs. Jonesco that that agreement is not binding by reason of the provisions of s. 4 of the Solicitors Act, 1870. If it is binding it seems clear that the £980 14s. 10d. remaining in the hands of Mr. Jonesco's solicitors out of the sum of £4,500 which this court ordered to be paid to them will be exhausted by the deduction provided for by the agreement in question. The master found that a verbal agreement was made in September, 1929, between Mr. Jonesco and Mr. Wingfield, senior, acting on behalf of his firm, that, if his firm would go on with the conduct of two libel actions in which they were then acting for him, they could "deduct all the costs I owe you from the damages I recover." There can be no question that as regards the costs actually incurred on behalf of Mr. Jonesco in the litigation itself, apart from any agreement, they had the usual solicitor's lien. The question is whether they were given an additional lien in respect of the costs which were owing in September, 1929, when this agreement was entered into. They included costs which were incurred in the course of litigation, and also costs in non-litigious matters. If this agreement created a lien by Mr. Jonesco it is binding, even though it is only an equitable lien. It is not suggested that it is not binding on Mrs. Jonesco, who took an assignment of the damages afterwards subject to the lien of the solicitors. The sole question is whether it is unenforceable by reason of s. 4 of the Solicitors Act, 1870.

It is common knowledge that before the Act of 1870 a solicitor had been held incapable of holding a client to a bargain that the client should pay more than the taxed costs. There might be an effective bargain that less than the taxed costs should be payable; but there could not be a bargain that more than the taxed costs should be payable. Section 4 of the Act deals with the situation which has been created by decisions to that effect. My Lord has read the section, and I should like to read again the words necessary to illustrate my view of its construction:

> "A solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services fees charges or disbursements in respect of business done . . . either by a gross sum or by commission or percentage or by salary or otherwise."

Three methods are referred to expressly and in particular—gross sum, commission or percentage, and salary. Those methods of payment are methods which vary the amount which a solicitor is to receive, and I regard the words "or otherwise" as also relating to some manner in which the amount of the costs payable by the client is to be ascertained. The section continues:

> "And either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated subject to the provisions and conditions in this part of this Act contained."

Taking all these words together it seems to me clear that the section is confined to agreements which in some way or other fix a measure of payment of the solicitor's bill which is different from that which would otherwise obtain, namely, the amount of his taxed costs, and that it has no application to an agreement to give a lien on some of the client's property in respect of costs due.

I think the only way in which the agreement of September, 1929, can be made effective is to treat it as an agreement for a lien on the amount recovered in the two libel actions in respect of the costs due at the date of the agreement, because it is a fact which cannot be denied that damages, when damages are awarded by a verdict and judgment, are not payable to the solicitor. They are payable to the client. This court has often refused to provide that moneys in court shall be paid out to the solicitor, but the solicitor may have, and usually has, a lien upon them for his charges, and he is entitled to enforce that lien. If he has an additional lien given to him by agreement, this court ought to enforce that lien also, and the way in which the master is called upon to deal with this matter entitled him, and I think bound him, to say that in this case the £980 14s. 10d. which was left should be retained in the hands of the solicitors to meet their lien. There being no question that the sum will be less than what is necessary to satisfy his lien, there is no reason why he should not retain it altogether. I should have been quite content to say that I agree with everything my Lord has said, but as the question at issue is one of first impression with regard to this section, and the meaning of the section is a matter of considerable importance, I have thought it desirable also to give expression to my opinion.

ROMER, L.J.—I agree. In my opinion, s. 4 of the Solicitors Act, 1870, has no application to the agreement which the master found was made between Mr. Jonesco and Mr. Wingfield, senior, acting on behalf of his firm, in September, 1929. In my opinion, the true effect of that section is that where a solicitor and his client desire that the solicitor shall be remunerated for past or future services, not in the normal way, but by being paid, say, a fixed sum (in which case they will enter into an agreement as to the amount) or by being paid, say, by means of a salary or commission or percentage (in which case they will enter into an agreement as to the manner of payment) such agreement must be in writing. The section has no application at all to a case like the present where the solicitor is remunerated in the normal way, but an agreement has been made between the solicitor and client as to the payment of the solicitor's remuneration, when it has been ascertained, from a particular source.

I desire to add this, so that there may be no misapprehension as to what it is we are here deciding. In April, 1930, as SCRUTTON, L.J., has stated, the solicitors received, out of the £12,000 paid into court representing damages, a sum of £4,500. That was paid to them for this reason. They were entitled to a lien on the £12,000 as the fruits of the judgment that they had recovered for their client. No one knew at the time the exact amount of their claim for costs against Mr. Jonesco, that is to say, costs as between solicitor and client, and so £4,500 was paid out to the solicitors, they undertaking to account for the balance that might remain of the £4,500 after the solicitor and client costs had been deducted and ascertained, to the persons who might be entitled thereto. For the purposes of this case the parties have agreed that that balance is the sum of £980 14s. 10d. That being so, the only question is whether that sum should be paid to Mrs. Jonesco and those persons to whom, apparently, she has given charges on the balance since the undertaking was made, or should be retained by the solicitors in consequence of a lien or equitable charge or equitable assignment made in their favour on or of that sum for the purposes of securing payment to them of costs incurred, not in this action, but in respect of other matters, contentious and non-contentious, for which they had previously been acting for Mr. Jonesco. It appears that these solicitors have been paid in respect of the costs of the action a sum of money—over £1,000—from another source; but that has been paid to them by virtue of the judgment which was obtained by Mr. Jonesco against the "Evening Standard" in respect of costs, and the benefit of that judgment was never assigned to Mrs. Jonesco. The effect of that payment to them in consequence of the judgment in respect of costs may be to give some rights to Mrs. Jonesco by way of marshalling of securities or otherwise, but that is not a right with which we have anything to do, because it does not arise under or by virtue of the undertaking given in April, 1930, or the order that was then made. I only say that, as I say, for the purpose of avoiding any misconception as to what it is that this court has decided.

Motion dismissed.

Solicitors: *Taylor, Jelf & Co.*; *Wingfields, Halse, & Trustram.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

HAMPTON *v.* WEST CANNOCK COLLIERY CO., LTD. AND ANOTHER

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Hawke, JJ.), April 8, 1932]

[Reported [1932] 2 K.B. 293; 101 L.J.K.B. 366; 147 L.T. 76; 96 J.P. 197;
48 T.L.R. 387; 30 L.G.R. 257; 29 Cox, C.C. 458]

Coal Mine—Checkweigher—Interference with management of mine—Acts done by checkweigher in capacity of trade union official—Acts not unlawful—Coal Mines Regulation Act, 1887 (50 *&* 51 *Vict., c.* 58), *s.* 13 (3).

A checkweigher may be removed from office on the ground that he has interfered with the management of the mine, contrary to s. 13 (3) of the Coal Mines Regulation Act, 1887, although the acts complained of have been done by him in his capacity as a trade union official and not as checkweigher and were not unlawful acts.

Notes. As to the position of checkweigher, see 22 HALSBURY'S LAWS (2nd Edn.) 755 et seq., and for cases see 34 DIGEST 732, 733. For Coal Mines Regulation Act, 1887, s. 13, see 16 HALSBURY'S STATUTES (2nd Edn.) 62.

Cases referred to:

(1) *Sykes* v. *Barraclough*, [1904] 2 K.B. 675; 73 L.J.K.B. 920; 91 L.T. 560; 68 J.P. 561; 53 W.R. 205; 20 T.L.R. 680; 48 Sol. Jo. 642, D.C.; 34 Digest 733, *1124*.

(2) *Prentice* v. *Hall* (1877), 37 L.T. 605; 26 W.R. 237; 42 J.P.Jo. 4, D.C.; 34 Digest 733, *1123*. A

(3) *Date* v. *Gas Coal Collieries, Ltd.*, [1915] 2 K.B. 454; 84 L.J.K.B. 1529; 113 L.T. 205; 31 T.L.R. 341, C.A.; 34 Digest 745, *1199*.

(4) *Ex parte White* (1897), 13 T.L.R. 580, C.A.; 34 Digest 733, *1126*.

Case Stated by Staffordshire justices.

The respondents, the West Cannock Colliery Co., Ltd., and William Allen, their B manager, preferred a complaint under the Coal Mines Acts, 1887 to 1930, against the appellant, Joseph Hampton, a checkweigher. The complaint charged Hampton that he, being a checkweigher at the No. 5 pit of the colliery company at Brindley Heath, on April 10 and 11, 1931, unlawfully did interfere with the management of the said mine, and it was prayed that Hampton might be called on to show cause why he should not be removed from his office as a checkweigher at the mine. C

On the hearing of the complaint it was proved or admitted: (i) That the appellant was on April 10 and 11, 1931, a checkweigher employed at No. 5 pit of the West Cannock Colliery Co., Ltd., at Brindley Heath. (ii) That the appellant, in addition to being a checkweigher, was secretary of the local branch of the Miners' Union, of which the men employed at No. 5 pit were members. (iii) That on April 1, 1931, a notice was posted up by the respondents at the said No. 5 pit containing the following words and D figures:

> "No. 5 pit. Monday to Saturday. Until further notice the time of lowering and raising men at this pit will be as follows. . . ."

[The times set out in the notice allowed for the working of a full shift of seven-and-a-half hours on Saturday.] (iv) That it had been the custom of Cannock Chase to work a short shift on a Saturday for many years, but that on a previous occasion (in March, E 1929) a full shift had been worked on a Saturday. (v) That on April 8 and 10, 1931, conversations took place between the appellant and the respondents' assistant agent and their certified manager at which the latter explained to the appellant the respondents' reasons for working a full shift of seven-and-a-half hours on Saturday, April 11, 1931, and the appellant tried to persuade the respondents' assistant agent and their certified manager to work only a three-quarter shift on such Saturday, but the latter would not F agree to this. (vi) That on Friday, April 10, 1931, the appellant chalked on pavements in the neighbourhood of the colliery words to the effect that the workmen at No. 5 pit had decided at a mass meeting not to work on Saturday unless a three-quarter shift should be worked. (vii) That on Saturday, April 11, 1931, at 6.45 a.m., about 400 miners in pit clothes, with their water-bottles filled and a day's food, were at No. 5 pit, but after the respondent Allen had told the appellant that the mine would work a full G shift instead of a three-quarter shift, the appellant went to them and said: "It's a full shift; come on, lads," and walked away, and the men did the same and did not work at all that day. (viii) That a full shift of seven-and-a-half hours was worked on Saturday, April 11, 1931, at the respondents' other pits.

On the part of the appellant it was contended: (a) That he persuaded the men to attend at No. 5 pit on Saturday, April 11, 1931, on the chance that the management H might at the last moment be persuaded to work a three-quarter shift only. (b) That at a mass meeting of the men a resolution was passed that the men should work on Saturday only if the management allowed them to work the usual short shift. (c) That at the said meeting he told the men that they must decide the matter themselves and that he would take no responsibility for their decision. (d) That there was no evidence that he had interfered with the management of the colliery. I

On the part of the respondents it was contended: (a) That the appellant had, at interviews with Mr. Archie Robert Latham (the respondents' assistant agent) and Mr. Allen (one of the respondents) on April 10, 1931, actually threatened to prevent a full shift from being worked at No. 5 pit on Saturday, April 11, 1931. (b) That there was ample evidence of interference by the appellant in the working of the colliery. The justices' attention was directed to *Sykes* v. *Barraclough* (1).

The justices, being of opinion that there was evidence that the appellant had unlawfully interfered with the management of the said mine on April 10 and 11, 1931, made an

A order dismissing him from the post of checkweigher. The question upon which the opinion of the court was desired was whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law.

H. H. Joy (*H. H. Maddocks* with him) for the appellants.—An act by a checkweigher cannot amount to interference with the management of the mine, unless the act was done by him in his capacity as checkweigher, or was in itself unlawful. [He referred to B *Prentice* v. *Hall* (2), *Sykes* v. *Barraclough* (1), *Date* v. *Gas Coal Collieries, Ltd.* (3), and *Ex parte White* (4).]

Edgar Dale, for the respondents, was not called on to argue.

LORD HEWART, C.J.—This is a Case Stated by justices, and it arises out of a complaint preferred by the respondents under the Coal Mines Acts, 1887 to 1930, against the C appellant, for that he, being a checkweigher at the No. 5 pit of the West Cannock Colliery Co., Ltd., at Brindley Heath, on April 10 and 11, 1931, unlawfully did interfere with the management of the mine, and it was prayed that the appellant might be called on to show cause why he should not be removed from his office as a checkweigher. That complaint was heard by the justices on June 11, and the justices found that the appellant had unlawfully interfered with the management of the mine, contrary to the D provisions of the Act, and ordered that he should be removed from his office as checkweigher at the mine. The appellant appeals from that decision.

Counsel, in the course of an elaborate and attractive argument, has directed our attention to four cases—*Prentice* v. *Hall* (2), *Sykes* v. *Barraclough* (1), *Date* v. *Gas Coal Collieries* (3), and *Ex parte White* (4). Speaking for myself, I do not observe any such difference between those decisions as has been suggested, and I think the only question E for us in this case is whether there was any evidence upon which the justices were entitled to come to the opinion to which undoubtedly they came.

The facts are set out in the Case, and it appears clearly that, after conversations on April 8 and 10, the appellant on Friday, April 10, chalked on pavements in the neighbourhood words to the effect that the workmen at No. 5 pit had decided at a mass meeting not to work on Saturday unless a three-quarter shift should be worked, and, finally, F that on Saturday, April 11,

> "about 400 miners in pit clothes, with their water bottles filled and day's food, were at No. 5 pit, and, after the respondent Allen had told him that the mine would work a full shift instead of a three-quarter shift, the appellant went to them and said, 'It's a full shift. Come on, lads,' and walked away and the men did the same and did not work at all that day."

G I am not prepared to say that, those materials being before the justices, there was not evidence upon which they were entitled to find as they did, and I think that this appeal fails.

AVORY, J.—I agree that, on the facts found, there was evidence upon which the justices could properly convict the appellant under s. 13 (3) of the Coal Mines Regulation H Act, 1887. It is necessary, I think, to observe the exact words of that subsection in view of the argument which has been addressed to us:

> "A checkweigher shall not be authorised in any way to impede or interrupt the working of the mine, or to interfere with the weighing, or with any of the workmen or with the management of the mine."

Counsel for the appellant has taken two points: first, that what was done in this case I by the appellant was not done by him qua checkweigher, but was done by him qua secretary of the local branch of the miners' union, of which the men employed at this pit were members, and counsel says that, even if he is precluded from relying upon that point in consequence of a decision in *Sykes* v. *Barraclough* (1), his second point is that what was done was something that was not unlawful. Whether that means that it is not unlawful because it is not in breach of any statute or not in breach of the common law, it is difficult quite to understand.

In my opinion, the first point is not open, in view of the decision in *Sykes* v. *Barraclough* (1)—that is to say, it is not open to the appellant to say that in what he did he

A was not acting qua checkweigher. Reliance has been placed upon a passage in the judgment of KENNEDY, J., in *Sykes* v. *Barraclough* (1), which is in these words ([1904] 2 K.B. at p. 679):

> "I desire, for my part, to say that I should by no means be prepared to justify an order of magistrates removing a checkweigher from his place merely because either as an official of a miners' association or as a private individual the checkweigher B took some part in the legitimate work of a miners' association, and was present or spoke or presided at meetings called together to resolve upon matters affecting the miners' interests or action."

It appears to me that those words have no application to what was done by the appellant in this case. It is not suggested that he was an official of a miners' association taking part in the legitimate work of a miner's association, nor is it suggested that he was, in C what he did, merely speaking or presiding at meetings called together to consider and resolve upon matters affecting the miners' interests or action. The passage in the judgment of the learned judge which appears to me to be directly applicable to this case, namely, that he was not doing what he did in his capacity as checkweigher, is to be found upon the same page of the report where the learned judge said:

> "But I am equally convinced that the mere fact that the checkweigher charged D with the unlawful interference is also an official of the local miners' association and that the acts charged were done by him when purporting to act as such official, and not when claiming to use authority or perform duties as a checkweigher, does not necessarily constitute an answer to such a charge."

The same view is, I think, apparent in the judgment of BRAY, J., in *Date* v. *Gas Coal Collieries, Ltd.* (3), which has been referred to, particularly for a certain passage in the E judgment of SWINFEN EADY, L.J., about which I will say a word in a moment. In that case BRAY, J., said, referring to the Act which is now in question ([1915] 2 K.B. at p. 463):

> "Subsection (4) gives the owner of the mine power to appeal to a court of summary jurisdiction for the removal of the checkweigher on certain specified grounds, and F this has been held, and rightly held, to apply to the checkweigher's conduct when off duty as well as when on duty, because the words used are wide, and there is nothing to limit them to his conduct when on duty."

He then proceeds to deal with the real point which arose in that case, namely, whether there was anything in the two statutes which were in question to prohibit the checkweigher from being appointed an inspector. BRAY, J., says that the duty of the G inspector being merely to inspect,

> "does not seem to me to involve any impeding or interruption of the working of the mine, or interference with the weighing, or with any of the workmen, or with the management of the mine within the meaning of sub-s. (3) or sub-s. (4) of s. 13 of the Act of 1887; nor does it entail any giving of information, or the doing of any act to the detriment of the owner, agent, or manager of the mine within sub-s. (4). The H mere fact that it is necessary for him to go down and come up the mine in order to make his inspection need not impede the working of the mine."

I read that only to show that, in my opinion, the decision of the court in *Date* v. *Gas Coal Collieries, Ltd.* (3), has really no application to the present case at all, and, in my opinion, the one observation which has been relied upon, made by SWINFEN EADY, I L.J., must be read in view of the question which was then before the court, and does not, in my opinion, and was never intended to, cover any such question as is now before the court. Following on that passage he says ([1915] 2 K.B. at p. 460):

> "It was urged, however, that the duties of an inspector must necessarily involve some interference with the management of a mine, and that s. 13 (3) of the Act of 1887, contains an express prohibition against a checkweigher's interference; but, in my opinion, this subsection cannot be construed as applying to occasions when the person is acting in some capacity other than that of checkweigher."

A In my view, the learned lord justice was there referring only to the occasions upon which a person might be acting as an inspector although he was at the same time a checkweigher, and the judgment of BRAY, J., says that his duties as an inspector would not involve any interference with the management of the mine.

In the present case what the appellant did, as was at all events open to the judges to find, was something amounting to an interference with the management of the mine, B and I see no ground in any of these cases for saying that what he did, if it does interfere with the management of the mine, must be something unlawful, either in the sense that it is in breach of some statute or that it is unlawful according to the common law. Therefore, I think both points fail and there is no ground for interfering with the decision at which the justices arrived.

C **HAWKE, J.**—I agree.

Appeal dismissed.

Solicitors: *R. A. Willcock, Taylor & Co.*, Wolverhampton; *Johnson, Weatherall, Sturt, & Hardy*, for *Parker, Rhodes, Cockburn & Co.*, Rotherham.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

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Re CONTAL RADIO, LTD.

[CHANCERY DIVISION (Maugham, J.), April 25, May 9, 1932]

[Reported [1932] 2 Ch. 66; 101 L.J.Ch. 377; 148 L.T. 109; 48 T.L.R. 458; 76 Sol. Jo. 359; [1931] B. & C.R. 255]

G *Company—Winding-up—Arrangement with creditors by "company about to be wound-up"—Result of composition that company solvent—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 251 (1).

A composition by a company with its creditors as a result of which the company will be solvent, is not an arrangement by a "company about to be wound-up" within s. 251 (1) of the Companies Act, 1929 [now s. 306 of the Companies Act, H 1948].

Per MAUGHAM, J.: "Arrangement" in the sub-section was not intended to include a compromise. The sub-section was only applicable if there was a voluntary winding-up, the words "about to be wound-up" being necessary because the arrangement might be entered into before the passing of the resolution for voluntary winding-up. "Creditors" must be taken to include I secured as well as preferential creditors though there was no provision for the valuation of securities.

Notes. Section 251 of the Companies Act, 1929, has been replaced by s. 306 of the Companies Act, 1948, and s. 153 by s. 206, s. 191 (1) (e) by s. 245 (1) (e), s. 237 by s. 292, and s. 246 by s. 301 respectively.

As to arrangements with creditors in a voluntary winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 748, and for cases see 10 DIGEST (Repl.) 1126, 1127. For Companies Act, 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Petition.

The company was registered in 1925 with a capital of £1,000, divided into 1,000 shares of £1 each, 990 of which were held by the managing director and ten by his wife, Two debentures were issued, each for £500, on Oct. 6, 1928, and Jan. 19, 1932. Later an action was brought by a creditor for a debt of £205 19s. The assets were then valued at £3,165 and liabilities £8,006, including £1,150 11s. 9d. due to the present petitioner. Thereupon there was a meeting of creditors, when it was proposed that (i) there should be a deed of arrangement under which the trustees would pay to the creditors a sum equal to a composition of 5s. in the pound by agreed instalments; (ii) the final payment to be secured by deposit of the debentures; (iii) no increase in debenture issue until such payment was made. The managing director guaranteed the payment of the composition. In February, 1932, the committee appointed to consider this scheme recommended it to be adopted. A general meeting of the company was held on March 3, and on the 8th the petitioner served notice on the company to pay the £1,150 11s. 9d. Three-fourths of the creditors in number and value assented to the scheme. On the 15th the deed of arrangement was executed, the second debenture was deposited with the company's solicitor, and a cheque for £1,000 sent to the trustee for the payment of the first instalment of the composition. No application had been made to the court under s. 251 (2) of the Companies Act, 1929. The petitioner was a non-assenting creditor, and he now applied for an order for the compulsory winding-up of the company.

Turnbull, for the petitioner, submitted that the scheme of arrangement was not binding, that the company was insolvent, and the order ought to be made.

H. S. G. Buckmaster, for the company, contended that the arrangement was binding, as there was no appeal under sub-s. (2) of the section. There was no answer to the claim for £205 19s. and the creditor might have petitioned for an order to wind-up. The company was therefore about to be wound-up within the meaning of the section.

Cur. adv. vult.

May 9.—**MAUGHAM, J.,** read the following judgment. This petition raises a question, which has not hitherto been submitted to the court, as to the true construction of s. 251 of the Companies Act, 1929. That section replaces s. 191 of the Companies (Consolidation) Act, 1908, which in its turn replaced ss. 136 and 137 of the Companies Act, 1862. The section thus has a long history, but, for reasons which will become clear in what I shall say, has never been construed in any case before the court. It now appears in a series of nine sections which, by s. 246 of the Act, are stated to ". . . apply to every voluntary winding-up. . . ." That, no doubt, is the reason why the word "voluntary" was not inserted in the section, in re-enacting s. 191 of the Companies (Consolidation) Act, 1908, after the words "wound-up," but it is clear that the section applies to "every voluntary winding-up," and is not applicable to cases of a compulsory winding-up.

A number of difficulties arise as to the true meaning of the section. First, what does the word "arrangement" mean? The phrase used in s. 153 (1) is as follows:

> "Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the court may, on the application in a summary way of the company or of any creditor or member of the company, or, in the case of a company being wound-up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the court directs."

The same phrase is used also in s. 191 (1) (e), which gives power to the liquidator of a company in a winding-up by the court to make any "compromise or arrangement" with creditors or persons claiming to be creditors or having or alleging themselves to have any claim against the company. It seems primâ facie that the word "arrangement" in s. 251 was not intended to include a compromise, properly so-called, for the word "compromise" is deliberately omitted.

A Next arises the question: When can a company be said to be "about to be wound-up"? My view is that the section is primarily applicable, as are the eight sections following s. 237, to every voluntary winding-up, and is not applicable if there is no voluntary winding-up. Section 237 provides as follows:

> "The provisions contained in the eight sections of this Act next following shall B apply in relation to a creditors' voluntary winding-up."

The reference in s. 191 (1) of the Companies (Consolidation) Act, 1908, and in s. 251 of the Companies Act, 1929, to "a company about to be . . . wound-up," was necessary, because it might be that the arrangement was entered into before the passing of the special resolution or extraordinary resolution for voluntary winding-up. I must come to the conclusion that a composition by a company with its creditors, as a result of C which the company will be solvent, is not an arrangement by a company about to be wound-up within the meaning of s. 251 of the Companies Act, 1929. I may add that the section presents a certain number of practical difficulties. It says nothing about, and makes no provision for, a meeting of creditors, and "creditors" must be taken to include secured as well as preferential creditors, though there is no provision for a valuation of securities. The legislature seems to have thought that three-fourths in D number and value of the creditors secured and unsecured ought to be able to bind a minority of creditors who may never have heard of the proposed arrangement. The court, if applied to within three weeks, according to sub-s. (2) of the section, has power only to "amend, vary, or confirm the arrangement"; the draftsman seems to have left out any words showing that the court may set it aside, though by sub-s. (1) the arrangement is ". . . subject to the right of appeal under this section. . . ." Nor is it easy to E construe the words "the completion of the arrangement."

In my opinion, the section does not apply to the present case. The so-called "arrangement" is therefore, in my view, not valid or binding on the company's creditors, and the petitioner is entitled to present the petition as an unsecured creditor. But it is clear that a large majority of the creditors do not wish that the company should be wound-up, but prefer an arrangement under which a large shareholder will guarantee F the composition. I think that I am bound to have regard to those creditors' wishes, and that I ought not to disregard them just because a mistake has been made as to the circumstances in which a majority can bind a minority. An opportunity ought to be given to the creditors to pass a scheme of arrangement, if they can do so, under s. 153 of the Act, and the proper course is to let the petition stand over for a period which will enable that to be done. If a scheme is not passed, a compulsory order will be G made upon the petition.

[It was ordered that the petition should stand over for a fortnight to enable the creditors to pass such a scheme of arrangement. The court was informed that a summons had been taken out for leave to convene a meeting of creditors under s. 153 of the Companies Act, 1929. It was thereupon ordered that the petition should be adjourned until the first petition day of the following sittings, to enable the creditors to H consider a proposed scheme under that section.]

Solicitors: *Cochrane & Cripwell*; *G. Edmund Hodgkinson.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

TEMPERANCE LOAN FUND, LTD. *v.* ROSE AND ANOTHER

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), May 12, 13, 1932.]

[Reported [1932] 2 K.B. 522; 101 L.J.K.B. 609; 147 L.T. 330]

Moneylender—"Contract for repayment of money"—Promise by borrower to repay balance of previous loan—"Security given by borrower"—Guarantee given by third party—Admitted debt—Memorandum—Effect of clerical error—Moneylenders Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 21), s. 6 (1), (2).

Moneylenders lent a borrower £200 on Jan. 30, 1929, repayable on July 30, 1929. The loan was not repaid, and the two parties agreed that the borrower should pay the moneylender in respect of the principal and £48 interest five consecutive monthly payments of £8, the first on Aug. 30, 1929, and £208 on Jan. 30, 1930, and that the borrower and one C. as surety should sign a joint and several promissory note for repayment on these terms. This was done. In the note or memorandum signed by the borrower there was no statement of the date on which the loan was made. This document was dated July 30, 1929, and included a recital that "the borrower is indebted to" the moneylenders "in the sum of £200," and a statement that the borrower acknowledged "that the abovementioned sum of £200 is owing by the borrower" to the moneylenders, and that "the above-mentioned contract was personally signed by me before the said money was lent or paid and before the security was given." On an action by the moneylenders against the surety on the promissory note,

Held: the note or memorandum did not contain a statement of the date when either the original or the new loan was made, within s. 6 (2) of the Moneylenders Act, 1927: a "contract for the repayment of money" in s. 6 (1) of the Act included a promise by a borrower to repay the balance of money previously lent to him, and the "security given by the borrower" might take the form of a guarantee given by a third party; the provisions of s. 6 applied to the case of an admitted debt; and, therefore, the security was not enforceable.

Per SCRUTTON, L.J.: A clerical error will not necessarily invalidate a memorandum. In each case it must depend on the nature of the error.

Per GREER, L.J.: In my judgment, the only way in which this statute can be complied with in dealing with the renewal of the balance of an old loan is for the old loan to be treated as paid off and a new loan granted. The memorandum must be signed before a notional loan of that kind is made, otherwise s. 6 is not complied with.

Notes. Referred to: *Dunn Trust, Ltd.* v. *Feetham,* [1935] All E.R.Rep. 280.

As to the form of moneylenders' contracts, see 23 HALSBURY'S LAWS (2nd Edn.) 190–192, and for cases see DIGEST Supps, tit. Money and Moneylending, case 353a et seq. For Moneylenders Act, 1927, see 16 HALSBURY'S STATUTES (2nd Edn.) 377.

Cases referred to:

(1) *Gaskell, Ltd.* v. *Askwith* (1929), 45 T.L.R. 566; 73 Sol. Jo. 465, C.A.; Digest Supp.

(2) *Reading Trust, Ltd.* v. *Spero, Spero* v. *Reading Trust, Ltd.,* [1930] 1 K.B. 492; 99 L.J.K.B. 186; 142 L.T. 361; 74 Sol. Jo. 12; 46 T.L.R. 117, C.A.; Digest Supp.

(3) *B. S. Lyle, Ltd.* v. *Chappell* (1931), 146 L.T. 236; 47 T.L.R. 562; 75 Sol. Jo. 511; reversed, [1932] 1 K.B. 691, C.A.; Digest Supp.

(4) *Eldridge and Morris* v. *Taylor,* [1931] 2 K.B. 416; 100 L.J.K.B. 689; 145 L.T. 499; 47 T.L.R. 516; Digest Supp.

Appeal from an order of HAWKE, J.

The plaintiffs, the Temperance Loan Fund, Ltd., were registered moneylenders, and they sued the defendants, Rose and Comins, for £232, balance alleged to be due on a joint and several promissory notes signed by the defendants and dated July 30, 1929, which was in these terms:

> "We jointly and severally promise to pay the Temperance Loan Fund, Ltd., or order the sum of £248 for value received payable at 12A, Station Parade, Balham High Road, S.W.12, by five consecutive monthly payments of £8 each, the first instalment to be due and payable on Aug. 30, 1929, and the sum of £208 on Jan. 30, 1930. The interest is to be at the rate of 48 per cent. per annum."

On Jan. 30, 1929, the plaintiffs had lent the defendant Rose the sum of £200, to be repaid on July 30, 1929. By that date the defendant Rose had not repaid the loan, and the plaintiffs and the defendant Rose made an agreement, the terms of which were set out in the following memorandum, a copy of which was received by Rose:

> "Moneylenders Act, 1927.—Memorandum of the contract between the Temperance Loan Fund, Ltd. (hereinafter called the lenders), whose registered office is 12A, Station-parade, Balham, in the county of Surrey, and Philip William Rose . . . (hereinafter called the borrower) in respect of a loan to the borrower of the undermentioned sum upon the following terms: The borrower is indebted to the Temperance Loan Fund, Ltd., in the sum of £200. The borrower is to pay interest on the said sum at the rate of 48 per cent. per annum. Repayment of the said sum of principal and interest is to be by five consecutive monthly payments of £8 each, the first of such payments to be made on the 30th day of Aug., 1929, and the sum of £208 on the 30th day of January, 1930. The borrower shall secure that Mr. Thomas R. Comins . . . shall guarantee the repayment of principal and interest. As witness the hands of the parties this 30th day of July, 1929."

There followed the signature of Rose, the borrower, and a signature on behalf of the plaintiffs, and the document continued:

> "To be filled up and signed when the loan is completed."
>
> "I, the above-named borrower hereby acknowledge (a) that the above-mentioned sum of £200 is owing by the borrower to the said the Temperance Loan Fund, Ltd.; (b) that I have on the undermentioned date subsequent to the said loan being made, received a copy of the above contract; (c) that the above-mentioned contract was personally signed by me before the said money was lent or paid and before the security was given."
>
> "Dated this 30th day of July, 1929."

There followed the signature of Rose, the borrower.

A promissory note was signed by Rose and Comins and was handed to the moneylenders, but it was not met on Jan. 30, 1930, and the plaintiffs sued both Rose, the borrower, and Comins, the surety, thereon. Rose did not defend the action, and judgment was entered against him. At the trial of the action HAWKE, J., gave judgment for the plaintiffs against Comins.

By s. 6 of the Moneylenders Act, 1927:

> "(1) No contract for the repayment by a borrower of money lent to him . . . by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower . . . in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.
>
> "(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent. per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of Sched. I to this Act."

The defendant Comins appealed.

Wallington for the defendant.

Croom-Johnson, K.C., and *C. Bray* for the moneylenders.

SCRUTTON, L.J.—The Moneylenders Act, 1927, upon a section of which the question A in this case arises, placed restrictions upon the way in which moneylenders might carry on their business, and one of the ways in which this was done was by providing that before a moneylender lent money to a borrower he should give him a memorandum of the terms upon which the money was lent. [His Lordship read s. 6 (1) of the Act.] More than one case has come before the court in which the question at issue has been whether the memorandum signed by the borrower was such as to comply with the terms of s. 6 B of this Act; and in some of these cases the question has arisen whether clerical mistakes in the memorandum render it insufficient. It appears from the headnote of the report of *Gaskell, Ltd.* v. *Askwith* (1) that if the memorandum

> "states the date of the loan incorrectly, the contract is unenforceable, even though the inaccuracy has caused no deception and is due merely to a clerical error." C

This headnote does not, in my opinion, correctly state the effect of the decision in that case. I can find nothing in the judgment of HUMPHREYS, J., which supports the latter part of the headnote, nor was there anything in the judgment of this court, as it is reported, about a clerical error. Apparently, the Court of Appeal has no power to amend the memorandum, but I do not wish it to be taken that a clerical error will necessarily invalidate the memorandum; in each case the question must depend upon D the nature of the error. *Gaskell, Ltd.* v. *Askwith* (1) was not a case of a clerical error. From the facts of that case it appears that the moneylender found it difficult to fit the memorandum into the events that had happened. He expected the transaction to be carried out on Aug. 9, and he drew up the memorandum on that footing, expecting to get the signature on that day. As it happened the borrower was away on that date, and his signature was not obtained till Aug. 17. On the question, therefore, of when the E loan was made, the moneylender was in this difficulty; if the loan was made on Aug. 9, there was no memorandum in writing before it was made, but if the loan was made on Aug. 17, the date of the memorandum was wrong. There was no clerical error. On either of the two hypotheses there was a real error in drawing up the memorandum, and the decision in *Gaskell, Ltd.* v. *Askwith* (1) must not be taken as deciding anything about clerical errors. In *Reading Trust, Ltd.* v. *Spero* (2), I said that the difference there F relied upon was too trivial for notice. Each case must turn upon what the particular variation is.

In the present case the plaintiffs, the moneylenders, lent one Rose, £200 by cheque on Jan. 30, 1929, the amount to be repaid on July 30, 1929. The loan was not repaid on that date, but apparently the plaintiffs were ready to continue it on terms which they stated in a memorandum, namely, that five consecutive monthly payments were to be G made of £8 each and the sum of £208 was to be repaid on Jan. 30, 1930. They might have done this in the way that was adopted in *Lyle, Ltd.* v. *Chappell* (3) by lending the borrower money to repay his debt and making that new loan commence on July 30. In *Lyle, Ltd.* v. *Chappell* (3) I said this ([1932] 1 K.B. at p. 700):

> "When the time for payment of the original loan has expired without complete H repayment, and the time for repayment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period. The draftsmanship of s. 6 might be better, but I cannot think that Parliament intended to render renewals impossible. As to the second point, I see no objection to the procedure of wiping off the old loan by treating it as a new loan, on the altered terms, when the fact that this is being done is shown on the face of the second memorandum." I

In the present case the facts show that it is probable that I was right in saying that it ought to be shown on the face of the second memorandum what was being done. The moneylenders here had a form which was obviously intended for a transaction where some money was still owing when the fresh loan was to be made, and where the total amount of the second loan was to be repaid by a series of instalments which in the end would repay the principal and interest on the two loans. Someone in the moneylenders' office took that form; there was a statement in it printed:

A "I, the above-named borrower, hereby acknowledge (a) that the above-mentioned sum of £200 is owing by the borrower to the said the Temperance Loan Fund, Ltd., and lent to me on the undermentioned date."

These last words, "and lent to me on the undermentioned date," he struck out. If he had left them in, the document would have shown the date, July 30, 1929, as the date B of the loan. The memorandum was signed by Rose, the borrower, and the plaintiffs received a promissory note signed by Rose and the present defendant, and gave a copy of the memorandum to Rose.

The money not having been repaid, the moneylenders sued Rose and the defendant. Rose did not appear, and judgment was signed against him. The defendant appeared, and took various points. One of them was that the action being on a promissory note C given as security for money lent was unenforceable, because no note or memorandum in writing complying with the Moneylenders Act, 1927, had been signed. The Act requires inter alia that the note or memorandum must show the date on which the loan was made. On the facts, which I have stated, the note or memorandum should show either the date when the original cheque was given—namely, Jan. 30, 1929—or, if the loan was to be treated as made, not on that date, but on July 30, 1929, by the transaction D of paying-off the old loan, and starting a new loan, it should show that date. The note or memorandum shows neither date. It merely states that the borrower acknowledges "that the above-mentioned sum of £200 is owing by the borrower," and the reference to the date of the loan has been struck out. There is, therefore, no compliance with the requirement of the Act that the date of the loan must be stated. The memorandum does not, as was suggested in *Lyle* v. *Chappell* (3) might be done, set out the real facts, E namely, that there was a loan of £200 on Jan. 30, 1929, which was to be repaid by a series of instalments by July 30, 1929, and a new loan made on different terms as to repayment, which new loan was made on July 30. The note or memorandum merely states that the borrower is indebted to the plaintiffs in the sum of £200. The memorandum, therefore, is not in compliance with the statute, and this point taken by the defendant succeeds, subject to the contention taken on behalf of the plaintiffs, that F even if, as against Rose, the borrower, the memorandum is bad, it is good as against the surety.

This contention is supported on the ground that in several cases connected especially with companies it has been decided that there may be a surety liable for the debt of a company, which the company is not liable to pay. A sum may be borrowed by a company, and the lender may say: "I must have someone to guarantee the debt," and G thereupon a guarantor guarantees that the company will pay. In such a case where the borrowing was ultra vires the company, and so the principal was not liable, it has been held that the surety is liable. And a father has been held liable who guaranteed a debt of his infant son, which the son was not liable to pay. These cases, however, do not affect this question under s. 6 of the Moneylenders Act, 1927. I am relieved from considering these authorities, because this action is brought upon a promissory note; H that note is a security given by a borrower to moneylenders; that security includes a promise by a third party that he will pay, and this Act provides that that security shall be unenforceable unless a memorandum complying with the statute has been signed. That is a sufficient answer to this point taken by the moneylenders. As a result the defendant is discharged of the debt, and the appeal must be allowed.

GREER, L.J.—I agree. The contention for the defendant was that the moneylenders I should have failed in their action against him, because the promissory note upon which it was brought was a security for the repayment of money lent, and was rendered unenforceable by the terms of s. 6 of the Moneylenders Act, 1927. It was argued that the memorandum of the contract was insufficient in several particulars. Counsel for the moneylenders put forward two further considerations to those which were argued before HAWKE, J. He said first that s. 6 had no application to a case which was concerned with the payment of an admitted debt, even though that admitted debt happened to be the balance of a sum due for money lent. If that were right, the moneylenders would not be affected by the Act and would be entitled to succeed. Counsel for the moneylenders contended further, that, although the section might make the promissory note unenforceable as against Rose, the principal, it did not make it unenforceable against Comins, the guarantor.

In my opinion, both of those contentions fail by reason of the express words of s. 6, and also by reason of the decisions which have been given in this court in cases where not only the borrower was concerned, but also the person signing as surety. But, even if there had been no authority on the subject, I should have come to the same conclusion, because the language of the section is express that every contract which can be described as a contract for the repayment of money lent, and that includes a promise to pay the balance of money previously lent, is brought within the purview of the section. If the second contention urged by counsel for the moneylenders, namely, that the Act makes the contract unenforceable only as against the borrower—were sound, the effect would be that the statute would give a defence to the borrower who has no merits and who has had the money, but refuses a similar defence to a person who signs merely as guarantor and who has not had the money. I decline to construe the section in that way. The section is not confined in its operation to a contract for the repayment of money lent. It provides that any security given shall be unenforceable unless certain conditions are complied with. Section 6, it is clear, applies to a promissory note, bill of exchange, or any other security given by a third party and received by the moneylenders as security for the payment of the money lent. Even if I had had any doubt about the meaning of s. 6, I should hold myself bound by the decisions of this court in *Eldridge and Morris* v. *Taylor* (4), *Gaskell, Ltd.* v. *Askwith* (1), and *Lyle, Ltd.* v. *Chappell* (3), which are quite inconsistent with this contention of counsel for the moneylenders.

The other objection to this claim is not so easy, because of the difficulty in applying s. 6 to the renewal of a loan. In *Lyle, Ltd.* v. *Chappell* (3) there was an agreement whereby there was to be a new loan of a sum which was to be used in part for the payment off of the balance of the old loan. Part of the money lent was to be returned to extinguish the balance of the old loan. Not only was there an agreement to this effect, but the agreement was carried out by a cheque being handed over by the moneylender to the borrower after a memorandum of the contract was signed, and by the borrower endorsing it and handing it back to the moneylender. In the course of my judgment I said this ([1932] 1 K.B. at p. 704):

> "If the money to be borrowed was intended to be used for the extinction of the debt, agreed by the parties at £200, it seems to me unnecessary that the parties should go through the idle form of passing the cheque backwards and forwards. If the contract had provided for the borrowed money to be paid over to the defendant and then repaid to the plaintiffs, it would according to the authorities have been unnecessary to go through the form of handing over the money."

In the present case there was no evidence except the signature on the memorandum form, and we do not know whether the document is an agreement in respect of money which had been borrowed previously or whether it is an agreement for the repayment of money which was notionally deemed to be lent at the time of the signature; but if there was no loan until the agreement was signed, it is impossible to say that the contract was personally signed before the money was lent, and the statute requires that this shall be done. In my judgment, the only way in which this statute can be complied with in dealing with the renewal of the balance of an old loan is for the old loan to be treated as paid off and a new loan granted. The memorandum must be signed before the notional loan of that kind is made, otherwise s. 6 is not complied with. In my opinion, this memorandum does not contain one of the essential elements, namely, the date when the loan was made. For these reasons I think the appeal should be allowed.

SLESSER, L.J.—It has been argued on behalf of the plaintiffs that the Moneylenders Acts, 1900 and 1927, are an invasion of the common law, or, as counsel put it, are penal statutes and, as such, should be construed more strictly than would otherwise be the case. That argument, in my opinion, is ill-founded. It is based upon the assumption that at common law the right to make agreements for the lending of money at interest was unrestricted, whereas the fact is directly to the contrary. At common law such a contract constituted one of the forms of what was called "usury." The word was not used in a derogatory sense, but it was the technical name given to this particular class of transaction. Two authorities laid it down quite clearly that usury at common law was unlawful. In Coke's Institutes, vol. 3, p. 151, we find this statement:

> "And it is also enacted by Parliament that all usury is unlawful—that is to say, against the laws of the realm";

and in Comyn's Digest, tit. "Usury," it is said that "usury was an offence by the common law." It is, therefore, clear that transactions such as are dealt with by the Moneylenders Act, 1927, were forbidden by the common law. A series of statutes from the time of Hen. 8 to 17 & 18 Vict., c. 90, permitted the lending of money at varying rates of interest. These restrictions on the right to lend money at interest were abolished by the Usury Laws Repeal Act, 1852 (17 & 18 Vict., c. 90), that it is true to say that between the passing of that Act and the passing of the Moneylenders Act, 1900, a moneylender was free to lend money on such terms as he thought fit, subject to the equitable jurisdiction of the Court of Chancery to interfere in particular cases. But to say that the legislature did not think fit to impose statutory restrictions on moneylenders between 1854 and 1900 is a very different thing from saying that the restrictions now imposed are an invasion of the common law. The language of s. 6 of the Moneylenders Act, 1927, is to be construed in the same way as any section in any other Act.

As to the point taken as to the liability of the surety, counsel for the moneylenders has argued that, even if the borrower is not liable, the surety is liable, his argument being that s. 6 (1) of the Moneylenders Act, 1927, which provides that "no security given by the borrower . . . shall be enforceable," applies only when the security is given by the borrower himself. He contends that in this case the security was not given by the borrower, but was given by the surety. Therefore, he argues that this security does not fall within the language of the section. The first observation I make upon that contention is that two persons—the borrower, Rose, and the surety, Comins—became jointly and severally liable on a promissory note, so that the security was given by the borrower jointly and severally with the surety, thus bringing the security within the very terms of the section. Moreover, a security "given by the borrower" may take the form of a guarantee given by a third party; it is a security given to the moneylender in order that he may lend money to the borrower. This point was not directly taken in *Eldridge and Morris* v. *Taylor* (4); but, be that as it may, I have come to the conclusion that on the proper interpretation of s. 6 it is not necessary to consider the cases which decided that where a company acts ultra vires in incurring a debt the surety who guaranteed the debt may be liable, although the company may not be liable. In the present case it is sufficient to say that s. 6 specifically provides that "no security given by the borrower . . . shall be enforceable" unless certain conditions are fulfilled, and a security is given by the borrower when he produces the guarantee of a surety.

Appeal allowed.

Solicitors: *Parfitt, Creswell, & Williams*; *Webster, Butcher, & Sons.*

[*Reported by* C. G. Moran, Esq., *Barrister-at-Law.*]

Re JACKSON. BEATTIE *v.* MURPHY

[CHANCERY DIVISION (Farwell, J.), October 21, 1932]

[Reported [1933] Ch. 237; 102 L.J.Ch. 1; 148 L.T. 238; 49 T.L.R. 5; 76 Sol. Jo. 779]

Will—Evidence—Solution of ambiguity—Illegitimate relative preferred to legitimate relative.

A testatrix gave a share of the residue of her property to "my nephew A.M." Evidence was given to show that she had three nephews, each named A.M., one of whom was illegitimate.

Held: the evidence as to the existence of the three nephews was clearly admissible; that evidence resulted in an ambiguity in that it appeared that more than one nephew answered the description in the will; in those circumstances the court was entitled to hear evidence of the state of the family generally and to be put to some extent in the position of the testatrix in order to ascertain, not what she intended, but what the words which she used were intended to mean; from the evidence it was clear that the illegitimate nephew was the person intended and designated by the words "my nephew A.," and, therefore, the share of the residue was to go to him.

Notes. As to the evidence which is admissible in construing a will, see 34 HALSBURY'S LAWS (2nd Edn.) 165 et seq., and as to the inclusion as beneficiaries of illegitimate relatives, see ibid. 292 et seq. For cases see 44 DIGEST 627 et seq. and 807 et seq.

Cases referred to:

(1) *Re Fish, Ingham* v. *Rayner*, [1894] 2 Ch. 83; 63 L.J.Ch. 437; 70 L.T. 825; 42 W.R. 520; 38 Sol. Jo. 307; 7 R. 434, C.A.; 44 Digest 629, *4607*.

(2) *Re Wolverton, Mortgaged Estates* (1877), 7 Ch.D. 197; 47 L.J.Ch. 127; 37 L.T. 573; 26 W.R. 138; 44 Digest 634, *4666*.

(3) *Re Ofner, Samuel* v. *Ofner*, [1909] 1 Ch. 60; 78 L.J.Ch. 50; 99 L.T. 813, C.A.; 44 Digest 616, *4437*.

Adjourned Summons

The testatrix, Mrs. Mary Jackson, by her will gave all the residue of her property to her two brothers and her two sisters and "my nephew Arthur Murphy" in equal shares. At the death of the testatrix it was found that she had three nephews named Arthur Murphy, two of whom were the legitimate sons of brothers of the testatrix, while the third was the illegitimate son of a sister. One of the legitimate nephews resided in Australia, but he occasionally came to England and visited the testatrix. The other legitimate nephew was the son of a brother of the testatrix who had a gift of residue under her will, and, as his father had died in the lifetime of the testatrix, he was by the terms of the will entitled to an interest in his father's share. The illegitimate nephew was recognised by the testatrix as her nephew. He had married one of her nieces, and had managed the affairs of the testatrix during the latter part of her life. Moreover, evidence was admitted to show that in a previous will the testatrix had devised a share in her residuary estate to "my nephew Arthur, son of my sister Margaret Murphy." A summons was taken out to determine the question which of the three nephews was entitled to a share of the residuary estate, and whether the gift as to such share was void for uncertainty and was undisposed of.

L. F. Mumford for the trustee of the will.

A. H. Droop for Arthur Murphy, one of the legitimate nephews.—The illegitimate Arthur is excluded because of his illegitimacy, and, therefore, the gift must go to one of the legitimate Arthurs. On the evidence this Arthur should get the gift. [He referred to *Re Fish, Ingham* v. *Magner* (1).]

L. B. Tillard for Arthur Murphy, the other legitimate nephew, adopted the above argument as to the exclusion of the illegitimate nephew, but submitted that on the evidence his client should take the gift.

C. J. Parton for Arthur Murphy, the illegitimate nephew.—The words of the will being ambiguous, extraneous evidence should be allowed to be given that the illegitimate

Arthur was meant by the words used by the testatrix. On the evidence it is clear that the words used meant the illegitimate Arthur. [He referred to *Re Woolverton Mortgaged Estates* (2), and *Re Ofner, Samuel* v. *Ofner* (3).]

FARWELL, J.—This summons raises a question of some difficulty, and, having regard to the nature of that question, it is somewhat curious that it is not the subject of any reported case. The will is a short one, and on the face of it presents no difficulty. The testatrix gave her residuary estate to her two brothers and two sisters, and "my nephew Arthur Murphy," in equal shares. Evidence is undoubtedly admissible as to the existence of her brothers and sisters, and whether she had a nephew whose name was Arthur Murphy, and that evidence shows that she had in fact two legitimate nephews both named Arthur Murphy, each being the son of a brother, and both answer the description exactly. That state of affairs gives rise at once to an ambiguity as to which nephew the testatrix intended to benefit, and, in order to solve that problem evidence of the state of the family generally is admissible, and I have received evidence from which it appears as follows. One of these two nephews lives in Australia, and had some communication with his aunt in her lifetime. There is some evidence of a quarrel between his father and the testatrix, but no weight can be attached to this. Had he been the only legitimate nephew he would undoubtedly have taken. The other legitimate Arthur Murphy lives in this country, and there is evidence as to his having been in communication with the testatrix, but he is the son of the testatrix's brother, Arthur Murphy, to whom she gave a share of her residuary estate, and it does not seem very likely that she would give a further share to his son. On that evidence alone I should have come to the conclusion that it is impossible to tell which of these two nephews was intended by the testatrix, and had the matter ended there I must have found that there was an intestacy on the ground of uncertainty. But the matter does not end there, because the evidence shows that one of the testatrix's sisters had a son born out of wedlock who was also named Arthur Murphy, that he was in close relationship with the testatrix and had married one of her nieces, and, that therefore, in some sense he may be called a nephew.

In the circumstances what course ought I to adopt? If there had been one legitimate nephew only named Arthur Murphy, that nephew would undoubtedly have been entitled to the legacy and no evidence as to the existence of the illegitimate nephew would have been admissible: see WIGRAM ON EXTRINSIC EVIDENCE, Prop. II. But as soon as it appears from the evidence that there is more than one nephew who exactly answers the description in the will, the court is entitled to hear evidence of the state of the family generally, and to be put to some extent in the position of the testatrix in order to ascertain, not what the testatrix intended, but what the words which she has used were intended to mean. If from that evidence it appears that neither of the legitimate nephews was intended by the words which the testatrix has used, but the words were used to describe the illegitimate nephew, I am, I think, bound to give effect to that evidence as a whole. I cannot disregard it, and if it convinces me that the testatrix intended by the words, "my nephew, Arthur Murphy," her illegitimate nephew, in my judgment, I must give effect to it. But it is said that, if I hold that the illegitimate nephew is entitled, an illegitimate person will take in preference to a legitimate person, and that is not permissible: see *Re Fish* (1). In my judgment, however, that case has no application here. In that case there was only one legitimate claimant, and consequently no ambiguity, whereas in this case, as I have already pointed out, there is clearly an ambiguity, and I do not understand that decision to mean that in such a case as the present an illegitimate person must necessarily be disregarded. Looking at the whole evidence in this case, I can have no doubt that the illegitimate nephew was the person intended and designated by the words "my nephew Arthur Murphy," and in those circumstances, in my judgment, I am bound to hold that he is the person who is entitled to the share of the residue, and I so decide.

Solicitors: *Speechly, Mumford, & Craig,* for *Saul & Lightfoot,* Carlisle.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

GLASSBROOK BROS. *v.* LEYSON

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), November 30, December 1, 2, 5, 6, 1932]

[Reported [1933] 2 K.B. 91; 102 L.J.K.B. 598; 148 L.T. 439]

Minerals—Right to work—Condition precedent to order—Determination of question whether objector's refusal to grant right unreasonable—Question of law—Demand that applicants covenant diligently to work minerals—Reasonableness—Mines (Working Facilities and Support) Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 20), *s.* 4 (1).

A condition precedent to the grant under s. 6 of the Mines (Working Facilities and Support) Act, 1923, of the right to work minerals is a determination of the question whether any limitation on the power to grant the right exists by reason of s. 4 (1) of the Act, which provides that no right shall be granted unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement. It must first be found, for instance, as an independent matter under s. 4 (1) (d), whether or not the objector against whom the order is asked for has demanded terms for the grant of the right which are unreasonable. That is a question of law on which the Court of Appeal could review the decision of the Railway and Canal Commission under s. 17 of the Railway and Canal Traffic Act, 1888.

In the present case, **held,** that the objector had not acted unreasonably within s. 4 (1) (d) in refusing to grant the applicants a right to work his minerals unless they entered into a covenant diligently to work them.

Statute—Construction—Encroachment on private rights.

Statutes which encroach on the rights of subjects should be interpreted, in the absence of clear words or necessary implication to the contrary, so as to respect such rights.

Notes. Under the Coal Industry Nationalisation Act, 1946, the National Coal Board have the exclusive duty of working and getting coal in Great Britain: s. 1 (1) (a); and the Board have the duty of searching and boring for coal: s. 1 (2) (a). By s. 43 (4) a right to search and bore may be conferred on the Board under the Mines (Working Facilities and Support) Act, 1923, and s. 4 of the latter Act is extended to include references to searching and boring for coal. The Railway and Canal Commission was abolished by the Railway and Commission (Abolition) Act, 1949, its functions being transferred to the High Court: s. 1 (1) (a).

Referred to: *Consett Iron Co.* v. *Clavering*, [1935] 2 K.B. 42.

As to statutory facilities for working minerals, see 22 HALSBURY'S LAWS (2nd Edn.) 675 et seq., and for cases see 34 DIGEST 635, 636. For the Acts of 1923, 1946, and 1949 mentioned above, see HALSBURY'S STATUTES (2nd Edn.), vol. 16, 191, 276, and vol. 42, p. 1190, respectively.

Cases referred to:

(1) *Re Tilmanstone (Kent) Collieries, Ltd.*, [1928] 1 K.B. 599; 97 L.J.K.B. 169; 138 L.T. 452; 44 T.L.R. 167; 19 Ry. & Can. Tr. Cas. 26, C.A.; Digest Supp.

(2) *Bunbury* v. *Fuller* (1853), 9 Exch. 111; 1 C.L.R. 893; 23 L.J.Ex. 29; 23 L.T.O.S. 131; 17 J.P. 790; 156 E.R. 47, Ex. Ch.; 22 Digest (Repl.) 271, *2741*.

(3) *Pease* v. *Chayter* (1863), 3 B. & S. 620; 32 L.J.M.C. 121; 8 L.T. 613; 27 J.P. 309; 9 Jur.N.S. 664; 11 W.R. 563; 122 E.R. 233; 38 Digest 93, *694*.

(4) *R.* v. *Bradford*, [1908] 1 K.B. 365; 77 L.J.K.B. 475; 98 L.T. 620; 72 J.P. 61; 24 T.L.R. 195; 6 L.G.R. 333, D.C.; 16 Digest 423, *2834*.

(5) *R.* v. *Lincolnshire, JJ., Ex parte Brett*, [1926] 2 K.B. 192; 95 L.J.K.B. 827; 135 L.T. 141; 90 J.P. 149; 28 Cox, C.C. 178, C.A.; Digest Supp.

(6) *Liverpool Gas Co.* v. *Everton* (1871), L.R. 6 C.P. 414; 40 L.J.M.C. 104; 19 W.R. 412; sub nom. *R.* v. *Liverpool Recorder, Re Everton Township, Liverpool United Gas Light Co.* v. *Everton Overseers*, 23 L.T. 813; 35 J.P. 186; 33 Digest 398, *1085*.

A (7) *Shotts Iron Co., Ltd.* v. *Fordyce*, [1930] A.C. 503; 99 L.J.P.C. 101; 143 L.T. 200; 46 T.L.R. 354; 74 Sol. Jo. 400; 23 B.W.C.C. 73, H.L.; Digest Supp.

(8) *King* v. *Port of London Authority*, [1920] A.C. 1; 88 L.J.K.B. 889; 121 L.T. 587; 35 T.L.R. 622; 63 Sol. Jo. 661; 12 B.W.C.C. 260, H.L.; 34 Digest 434, *3548.*

(9) *Cox* v. *English, Scottish and Australian Bank*, [1905] A.C. 168; 74 L.J.P.C. 62; 92 L.T. 483, P.C.; 30 Digest (Repl.) 287, *580.*

B (10) *Re Cuno, Mansfield* v. *Mansfield* (1889), 43 Ch.D. 12; 62 L.T. 15, C.A.; 27 Digest (Repl.) 116, *856.*

(11) *Great Western Rail. Co.* v. *McCarthy* (1887), 12 App. Cas. 218; 56 L.J.P.C. 33; 56 L.T. 582; 51 J.P. 532; 35 W.R. 429; 3 T.L.R. 374, H.L.; 8 Digest (Repl.) 66, *443.*

C (12) *Jegon* v. *Vivian* (1866), L.R. 1 C.P. 9; 35 L.J.C.P. 73; 13 L.T. 769; 14 W.R. 227; on appeal, sub nom. *Vivian* v. *Jegon* (1867), L.R. 2 C.P. 422; 36 L.J.C.P. 145; 16 L.T. 236; 15 W.R. 457, Ex. Ch.; on appeal, sub nom. *Jegon* v. *Vivian* (1868), L.R. 3 H.L. 285; 37 L.J.C.P. 313; 19 L.T. 218, H.L.; 34 Digest 640, *377.*

(13) *Strelley* v. *Pearson* (1880), 15 Ch.D. 113; 49 L.J.Ch. 406; 43 L.T. 155; 28 W.R. 752; 34 Digest 671, *679.*

D **Appeal** from an order of the Railway and Canal Commission in the following terms:

"Upon reading the application of Glassbrook Bros., Ltd. (hereinafter called 'the applicants') filed herein on April 29, 1932, and upon hearing counsel for the applicants and for the objector, Robert Thomas Leyson, the commission being of opinion that it is expedient in the national interest that the rights applied for by the applicants should be granted to them, it is ordered that the applicants be granted E the right to work the minerals and other rights specified in the schedule hereto subject to and in accordance with the terms and conditions and for the period therein mentioned. Liberty for the applicants and the objector to apply as they may be advised. The commission may review and rescind or vary this order."

The objector appealed.

W. H. Upjohn, K.C., and *W. Blake Odgers* for the objector.

F *J. W. Manning, K.C.*, and *P. G. Bamber* for the applicants.

LORD HANWORTH, M.R.—This appeal must be allowed. It is, I think, the first time that a question arising under s. 4 of the Mines (Working Facilities and Support) Act, 1923, has come before this court, and I, therefore, think it right, before coming to the facts in this case, to say a few words about the Act of 1923 as amended by the G Mining Industry Act, 1926.

First of all, it must be observed that these Acts are passed for the purpose of overriding in the national interest some private rights which exist. It is important to remember that if private rights are invaded and surpassed the Act which gives the right so to do must be strictly conformed with. The structure of the 1923 Act is this. Section 1 opens with giving a power to grant a right to work minerals which would H otherwise be left unworked and remain permanently unworked by reason of the difficulties which arise, or would arise, from the complexity of ownership, or from the fact that they lie in such small parcels that they cannot be worked separately, It is provided that this right to work may be given. By s. 3 there is a power to grant ancillary rights, rights which may be useful, ancillary to the working of the mine to make that working more efficient. It may be observed that by the decision which was reached in *Re* I *Tilmanstone (Kent) Collieries, Ltd.* (1), in the Court of Appeal there is to be a generous interpretation of, I think, the right to work, and I think of the ancillary rights. Those ancillary rights are clearly intended to embrace a number of rights, because by sub-s. (2) of s. 3 they are particularly set out so as to enlarge the generality of the foregoing provision.

To those powers under s. 1, the Act of 1926, by s. 13, has given a still further enlargement, and now

"Any person who is desirous of searching for or working, either by himself or through a lessee, any coal, may . . . make an application to search for or work the coal," A and the Railway and Canal Commission

> "may, subject to the provisions of the Act of 1923 grant the right if they consider it is expedient in the national interest that the right should be granted to the applicant."

B So that in addition to the more limited sphere of s. 1, the wider area covered by s. 13 is added. But s. 4 of the Act of 1923 imposes a certain limitation on the power of granting the rights. It is, I think, important to look at s. 5 to see how an application for the rights, be they a right to work or an ancillary right, is to be brought before the court. The application is to be made and sent to the Board of Trade, and then the Board of Trade, unless they think that a primâ facie case is not made out, are to send it on to the Railway and Canal Commission. I think that counsel's analogy that the C action of the Board of Trade is analogous to that of a grand jury is a happy one. If a primâ facie case is made out, then the matter goes, as of course, to the Railway and Canal Commission. By s. 6 it is provided that:

> "Where a matter is so referred to the commission, the commission, if satisfied that the requirements of this Part of this Act are complied with in the case of the applicant, and that it is expedient in the national interest that the right applied for should be D granted to him, may, by order, grant the right on such terms and subject to such conditions, and for such period, as the commission may think fit. . . ."

It will be observed that under s. 6 (1), before ever the commission starts to consider the expediency of granting the right or the terms they have first to be satisfied "that the requirements of this Part of this Act are complied with." E

What are "the requirements of this Part of this Act?" It seems to me that one must turn back to look at s. 4, because there is a negation of the power of granting a right to work, or an ancillary right, "unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement." To my mind, when one looks at sub-s. (1) of s. 6, and turns back to s. 4 (1), it appears that before ever the commissioners take the matter into their consideration they have to be satisfied that s. 4 has been complied with. F This seems good sense in such a procedure, for the court ought not to be invoked for its assistance unless all the powers of arrangement privately between the parties have been exhausted; and when one looks at the catalogue of reasons given in sub-s. (1) from (a) to (d), one sees that it connotes serious difficulties in respect of which it may be reasonable to invoke the assistance of the court. Section 4 (1) goes on to provide: G

> "(a) That the persons with power to grant the right are numerous or have conflicting interests; (b) that the persons with power to grant the right, or any of them, cannot be ascertained or cannot be found. . . . (d) that the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable."-

H Unless it is determined that unreasonableness is established, it appears to me that the court cannot proceed to exercise the jurisdiction given them, because the preliminary indicated by sub-s. (1) of s. 6, the preliminary on which the commission have to be satisfied, would otherwise not be fulfilled.

It is said in this case that such a matter cannot be brought before the Court of Appeal, by reason of the terms of s. 17 of the Railway and Canal Traffic Act, 1888, which established I the Railway and Canal Commission. Section 17 provides:

> "(1) No appeal shall lie from the commissioners upon a question of fact, or upon any question regarding the locus standi of a complainant. (2) Save as otherwise provided by this Act, an appeal shall lie from the commissioners to a Superior Court of Appeal"

—in other words, there is to be an appeal on questions of law, but not on questions of fact which lie within the sphere and competence of the tribunal. It is to be noted that

A by sub-s. (6) the power to review "an order or proceeding of the commissioners" is not to be questioned or reviewed or

> "restrained or removed by prohibition, injunction, certiorari, or otherwise, either at the instance of the Crown or otherwise."

Therefore, the sole right that is left is to question the exercise of the jurisdiction of the B commissioners on matters of law; and it is said that this point that arises under s. 4 is just one of those matters which may be, and is, excluded by virtue of the terms of s. 17 of the Act of 1888.

There is a difficulty in giving this effect to s. 17, to my mind, for I think that one has to look back at what is the jurisdiction which is entrusted to the commissioners under the Act of 1888; and, more than that, one has to remember that the Acts of 1923 and 1926 C superimpose upon the structure made in 1888 certain further powers. But although it may not be necessary for the purpose of my judgment—for there are other points on which I think the appeal succeeds—I should like to express my opinion in response to the argument which has been presented by counsel for the objector that the questions which arise under s. 4 are preliminary to the jurisdiction to be exercised by the commission, and that appeal on questions of fact relating to that preliminary question is not D excluded by s. 17. To my mind, the principle laid down in *Bunbury* v. *Fuller* (9 Exch. at p. 140) (2), and affirmed again in *Pease* v. *Chayter* (3) (3 B. & S., at pp. 640 and 653) applies. That rule is a well-established rule, and is, perhaps, most shortly referred to in *R.* v. *Bradford* (4), where CHANNELL, J., says ([1908] 1 K.B. at p. 371):

> "It is clear upon the authorities that such a tribunal cannot give itself jurisdiction E by wrongly deciding a question of fact which arises as a preliminary question before it begins to exercise its jurisdiction."

As he points out there, a difficulty constantly arises as to what is a preliminary question —whether the question before the inferior court is a preliminary one or whether it is exercising the jurisdiction given to it by the statute. For my part, I cannot find a better differentiation on that point than that which is provided by the judgment of F ATKIN, L.J., in *R.* v. *Lincolnshire Justices, Ex parte Brett* (5) ([1926] 2 K.B. at p. 202):

> "Where the inferior court has given a decision upon one of the points involved in the actual matter committed to its decision, it cannot be said that its decision upon that point is without jurisdiction. If the fact in question be not collateral, but a part of the very issue which the lower court has to inquire into, certiorari will not be granted. . . ."

G

Applying that test, I should ask myself the question: Are the matters which have been decided under s. 4 matters which are "part of the very issue which the lower court has to inquire into," and when I put that question I find that, to my mind, the answer is that s. 4 deals with matters which are collateral to, preliminary to, the question whether or not there should be a right of working, or an ancillary right, given, which must be H determined before the question whether those rights should be given, or the terms upon which they should be given, or the time at which they should be given. It must be found as a wholly different matter whether or not the person against whom the order is asked for has acted unreasonably. A good illustration and a close one to the present case is to be found in the *Liverpool United Gas Light Co.* v. *Everton Overseers* (6), another case in which the same point was considered.

I But, as I have said, although I have made those observations and expressed my own view, I doubt whether it is essential to come to a final determination upon that point, for upon another point I am quite satisfied that the appeal ought to be allowed. Let me accept the view that all these matters are for the court of the Railway and Canal Commission, but we have then to determine whether or not upon the facts found before us the respondent was unreasonable, unreasonable in his refusal or unreasonable in his demands. That is, to my mind, a question of law. It has been so determined in a number of cases on which this point has been brought before the courts. As an illustration, I may take the case of the question of what is a reasonable cause under the Workmen's Compensation Acts. In *Shott's Iron Co., Ltd.* v. *Fordyce* (7), LORD SANKEY, L.C., says ([1930] A.C. at p. 508): A

> "As LORD PARMOOR said in *King* v. *Port of London Authority* (8),
>
> > 'No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute.'" B

LORD DUNEDIN says the same ([1930] A.C. at p. 510):

> "The facts from which the inference is to be drawn one way or the other must be found as facts by the arbitrator, but the inference that he draws from them is not an inference in fact, but is an inference in law."

LORD BUCKMASTER is still more explicit. He says ([1930] A.C. at p. 512): C

> "Nor can I accept the view that the question lies in the twilight of debatable ground between law and fact. It is a question for the opinion of the tribunal in each case whether the facts proved constitute a reasonable cause within the meaning of the statute."

And at [1920] A.C. at p. 514, LORD MACMILLAN expresses himself in the same way. D Another illustration may be found in the law relating to reasonable cause in the matter of malicious prosecution, and LORD DAVEY says in *Cox* v. *English, Scottish, and Australian Bank, Ltd.* (9) ([1905] A.C. at p. 171):

> ". . . the question whether there was reasonable and probable cause was left to the jury, whereas the judge ought to have determined that for himself upon the facts found by the jury." E

Therefore, it appears that this question whether or not there was an unreasonable refusal or an unreasonable demand is a question for the decision of the court as a question of law, and subsidiary to that there is, of course, the question of law, which is without doubt a question of law, namely, whether there was any evidence at all of the objector unreasonably refusing or making an unreasonable demand.

I come, therefore, to consider what has been determined by the commission upon that F point. Sir Francis Taylor was the member of the commission who put his finger upon the point, and he said this in reference to s. 4:

> "Section 4 has, in the opinion of all of us, been satisfied in this sense, that Mr. Leyson was unreasonable in refusing to grant the right because he has all through insisted upon a dead rent of £275, a royalty of 7d., and 1d. way-leave, none of which this G court has thought right to grant."

Is that a test? Is that a right test of what is reasonable? In fact, the court did grant something more than that which was offered by the applicants, not precisely in the same form, but something more was granted at the instance of the court. Can it, therefore, be said that the objector was unreasonable in refusing terms which the commission itself had expanded into what they think ought to be the proper conditions? To say H or to hold that, unless the objector obtains all that he asks for, he was unreasonable seems to me to impose an incorrect standard of what is reasonable, and what is unreasonable.

Let it be quite plainly understood that in discussing this question I have no desire in any way to invade the territory which rightly belongs to the commission itself, such as to the conditions whether or not royalties may be imposed at a certain amount or for a I certain time based on the fact that there has been remission of royalties by some coalowners in the neighbourhood, or that a way-leave should be charged or not, or that the average clause should be for a certain time, longer or shorter. All those are matters which, to my mind, fall, and rightly fall, within the jurisdiction of the commissioners. But we have to consider whether or not on the facts found there was any evidence of unreasonableness, or upon the facts found a proper test of reasonableness has been imposed. For the moment, therefore, I turn to the facts as they stand. Here I say quite definitely that I think it is wrong to go back over some old negotiations, or, it may be, some old controversies which have taken place between parties some years previously. When the matter is brought before the commission the commissioners must consider what is the situation at the time when the application is made to them, and it is wrong to tar a man with a particular colour, and to say that at all times whenever he comes before the commission he must be treated in the character which was attributed to him in some past dealings.

I turn, therefore, to consider this matter in respect of the offer which was made in the letter of Dec. 19, 1931. I need not read the terms, except to say that the dead rent offered was £150 per annum, a way-leave of 1d. per ton on all foreign coal; and the letter concludes:

> "I think you will also find that even if it were possible or profitable for anyone else other than my clients even under normal conditions to work your minerals, by reason of the said scheme for selling and marketing coal, and the prevailing conditions generally in the coal mining industry, it will, to say the least, be difficult for you to get anyone else interested in these minerals."

That paragraph is one which I should regret was put in, because it does not seem a tactful invitation for acceptance by the objector. The reply on Dec. 21 is this:

> "I note your view that nobody else is likely to be interested in these minerals except your clients and am obliged for your letter . . . in which you inform me that the applicants would not undertake to work the [minerals] diligently or at all."

On Dec. 21 the reply by Mr. Harris is:

> "The question of whether they would work them diligently or not would depend entirely upon trade conditions, but I propose taking their instructions as to this."

On Dec. 22 Mr. Leyson writes back:

> "When years ago your clients' predecessors, Messrs. Glassbrook, took the coal at a small dead rent they locked it up and stated in so many words they were not going to work beyond the dead rent and would give it up unless sold to them at their price, which was refused. All this was fully explained when you proposed to take me before the commissioners, an invitation which I accepted but your clients thought better of."

He is insisting upon the covenant to work and perhaps also throwing out an answer to the fact that the applicants have said: "Well, you will never get any better terms than we offer you, because no one else could work your coal." The reply to that letter by Mr. Harris is this:

> "I have no doubt that if and when my clients do decide to work the minerals they would do so with all reasonable diligence and in the most approved and economical manner possible. My clients are not concerned as to what their predecessors may have done, and in any event a repetition of the attitude which it is alleged was adopted by them would not be an economical proposition to-day or a luxury which my clients could afford."

On Jan. 13, 1932, Mr. Harris, who had then communicated with his clients, writes:

> "They cannot guarantee, and, therefore, enter into a covenant for, diligent working, but are prepared to enter into a covenant to work the minerals in the most approved manner in the district, and with due regard to the state and condition of the minerals and the trade conditions."

Finally, Jan. 18, 1932, Mr. Leyson writes back:

> "I suggest you should put that correspondence before Mr. Williams, who was not then manager, so that he may understand why I have arrived at the determination that this coal will not be let except on the condition that it is worked diligently and constantly or given up."

That is the controversy. The application was made in April, based upon the terms of the letter of Dec. 19, 1931. Be it observed that no effort was made on the part of the applicants to see whether or not, by putting a covenant to work in terms and with certain exceptions, it would be possible to meet what the respondent obviously demanded. There was no further effort, and the point on which they had parted was that the objector attached vital importance to the covenant to work.

Was he unreasonable in that? Is that something which in law amounts to unreasonableness? On the other terms of the letter of Dec. 19 it is plain that the judgment of MacKinnon, J., shows that the objector was entitled to have some guarantee given to him that the minerals would be worked. In his judgment MacKinnon, J., says:

> "In my view it is both illogical and unnecessary to insert in an order for a lease of this sort both those forms of provision by which the obligation to work the coal is imposed on the applicants; either you put in a covenant imposing an obligation on them to work, or, alternatively, you put in a covenant imposing on them the obligation to pay the dead rent; the one is alternative to the other,"

and so it is that he puts in a dead rent and says that it is unnecessary to put in a clause binding the applicants to work. That is a determination by the learned judge that it was right to insist upon some method of ensuring that the coal would be worked, and for that purpose they do not accept the offer of £150 in respect of dead rent, but increase it to £240. I am not overlooking the fact that they do not charge any way-leave; but at the same time, in terms, the learned judge declares that on this question of securing that the work shall be done the commission have imposed a condition of sufficient obligation which will remove the dangers which the respondent foresaw. Having regard to that, is it possible to say that the insistence upon a covenant to work was something in respect of which the objector had demanded terms which are unreasonable?

In order that I may show that I am not unmindful of the evidence which was given before the commission, it is plain from the evidence that was adduced that there was some ground for anxiety on the part of the respondent. Mr. Grenfell, a witness giving evidence for the applicants, on the first day in reply to a question, said:

> "(Q.) Now you have heard it suggested here to-day that this area could be worked alone, in fact it is being suggested that genuine leases have been entered into or arrangements made, since this application was filed, with regard to working this coal. What have you to say about that? (A.) At the present price of coal it is entirely out of the question. (Q.) Why is that? (A.) Because coal has to be sold to-day at the bare cost of production and no one will find capital to sink a shaft in this small area."

And he says that some of the collieries have been shut down. Then he says in cross-examination he knows of some collieries, as I say, which have been shut down, and so on, and with regard to concessions that have been made by other coalowners they have been made for a time. But what is suggested in this is that the terms and conditions stated should run for the full period of thirty years. There is evidence given by Mr. Daniel Williams:

> "MacKinnon, J.: I rather gather that one of your chief objects in making the present application is really as much as anything else to get access to that? [that is, to the coal lying under the Duke of Beaufort's land.] (A.) That is so, my Lord, and also to protect our own property"

—not to work, but to protect and in order to get to the Duke of Beaufort's coal. Then Mr. Robert Treharne Rees gives this evidence:

> "(Q.) And as they have to pay a very heavy dead rent to the Duke of Beaufort, if the way-leave was removed from this lease there would be two urges, to use your phrase, to work the Duke of Beaufort's coal and to leave Mr. Leyson's coal alone? (A.) Quite so."

Mr. Treharne Rees was asked:

> "(Q.) Mr. Leyson consulted you in this matter because he was apprehensive that the applicants did not intend really to work his coal? (A.) That is so. (Q.) That was the point in his mind,"

A and so on. Upon that the commission itself yields so far as to impose a condition which will remove the anxiety felt by Mr. Leyson. In those circumstances it appears to me that it is impossible to hold as a matter of law on the facts found that there was an unreasonable demand on the part of Mr. Leyson.

After consideration of that evidence I come back to the consideration whether or not there is any foundation on which to hold in law upon these facts that s. 4 was B satisfied, and I have come to the conclusion that it is impossible so to hold. I repeat that I cannot accept the test which is suggested—that what is not granted by the commission affords a test or touchstone by which the reasonableness of the objector can be judged. I have come to the conclusion that there was no right to hold that the objector was unreasonable or that s. 4 was complied with, and that there is no evidence on which it could be held that he acted unreasonably. In those circumstances the C prohibition, for such it amounts to, of further proceeding with the application, contained in s. 4, operates to defeat the success of the applicants' application. The appeal must be allowed, with costs here and below.

SLESSER, L.J.—I am of the same opinion. I propose to follow the example of my Lord and at the outset to say a few words about the purpose of the two Acts which we D have here primarily to consider, the Mines (Working Facilities and Support) Act, 1923, as amended by the Mining Industry Act, 1926. Those Acts have for their objects, among other matters, to make provisions for facilitating the working of minerals in the national interest, and as part of the machinery for achieving those objects they have provided for certain lawful invasions of rights possessed by private individuals. It is elementary that where a statute authorises an invasion of a proprietary right it has to E be construed with care and strictness. As BOWEN, L.J., said in *Re Cuno, Mansfield* v. *Mansfield* (10) (43 Ch.D. 12 at p. 17):

> "In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

F In my opinion, the legislature was mindful of that salutary provision in passing the Act of 1923, and in terms, in s. 4 of that Act, placed a limitation on the power of the commission to grant rights either to work minerals on property which belonged to someone who had not hitherto worked the minerals or where other conditions required by the Act were satisfied, and in the case of granting ancillary rights, for s. 4 (1), in unambiguous language provides:

> G "Neither the right to work minerals nor an ancillary right shall be granted under this Act unless it is shown that it is not reasonably practicable to obtain the right in question by private arrangement for any of the following reasons."

Then follow a number of reasons with which we are not here immediately concerned. But, finally, cl. (d) is:

> H "That the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable."

Although the application here, strictly considered, is made under s. 13 of the Act of 1926 rather than under s. 1 of the Act of 1923, the two Acts are to be read as one and those essential conditions which I have read out from s. 4 of the Act of 1923 have in any event to be satisfied.

I The question which arises in the present case is whether the applicants are entitled to say in all the circumstances that they can show it is not reasonably practicable to obtain the right in question by private arrangement because the person with power to grant the right unreasonably refuses to grant it or demands terms which, having regard to the circumstances, are unreasonable. If they are unable to satisfy those requirements it follows, in my opinion, that there is no power to grant them rights under the Acts of 1923 or 1926. It is said that that matter has been decided in favour of the respondents here by the Railway and Canal Commissioners, a court of record presided over by a judge of the High Court, and that, having regard to the fact that the right to this appeal is statutory, when we come to consider the statute which gives the right of appeal, we have no jurisdiction to deal with their decision, which was a decision of fact.

The matter arises thus. In s. 10 (1) of the Act of 1923 it is provided:

> "The provisions of the Railway and Canal Traffic Act, 1888, as amended by any subsequent enactment, relating to the procedure for the determination of questions under that Act (including the provisions relating to appeals) shall apply to the determination of questions relating to applications under this Act as if they were herein re-enacted."

There are certain modifications which do not here concern us. That brings in the Railway and Canal Traffic Act, 1888, and particularly s. 17, which deals with appeals, the first subsection of which says that no right of appeal shall lie from the commissioners upon a question of fact, and if the respondents are right in saying that this is solely a question of fact I think they are equally right in saying that this court has no jurisdiction to deal with the matter. But apart from s. 17 of the Act of 1888, sub-s. (2) of s. 10 goes on to say:

> "Save as otherwise provided by this Act, an appeal shall lie from the commissioners to a superior court of appeal."

Then sub-s. (4) says:

> "On the hearing of an appeal the Court of Appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a superior court."

Therefore, the first question to consider is whether the defence which was urged before the commissioners that the objector had not unreasonably refused to grant a right and had not demanded terms which, having regard to the circumstances, were unreasonable, was or was not a question of fact. In my opinion it is impossible, having regard to the language of cl. (d), both limbs of which concern the question whether what has been done has been done unreasonably—whether the right has been unreasonably refused or the terms demanded were unreasonable—to say that that is a question of fact. It may be that industry will provide one with observations which would show that it is mixed question of fact and law, but by far the greater amount of authority on this matter goes to show, in my opinion, that it is a question of law as to what is reasonable on the facts found.

My Lord has referred already, and I need not repeat it, to the fact that this question has been raised under the Workmen's Compensation Acts in regard to the question whether, a notice being required in those Acts on the occasion of an accident, there may be cases where there is reasonable cause excusing the absence of such a notice. I need only on that point cite one passage which has been approved, as my Lord said, in *Shott's Iron Co.* v. *Fordyce* (7), from the speech of LORD PARMOOR in *King* v. *Port of London Authority* (8), speaking of the question whether the failure to make a claim within six months of the date of the accident was occasioned by reasonable cause or not ([1920] A.C. at p. 31):

> "No doubt the relevant facts should be found by the learned judge, and then it becomes a question of law whether these facts are such as to constitute a reasonable cause within the provision of the statute."

Another authority which supports the same view is that of LORD HERSCHELL in *Great Western Rail. Co.* v. *McCarthy* (11). That was a case which raised a point which has frequently been before the courts, a point under the Railway and Canal Traffic Act, 1854, whether a railway company which accepted certain risks and rates had imposed a condition which was just and reasonable, and argument has taken place from time to time on that point. LORD HERSCHELL quotes from BOWEN, L.J., in another case, and says (12 App. Cas. at p. 229):

> "I may remark before I proceed further, that, in my opinion, the question whether a contract is just and reasonable within the meaning of the statute must be determined by the court or judge alone, and that it is not a question proper to be left to a jury, even though questions of fact be necessarily involved in its determination."

Again, there are the authorities dealing with actions for malicious prosecution where it is necessary to show the presence or absence of reasonableness, and these also I need not dwell upon since they have been mentioned by my Lord. In my opinion, the question of reasonableness is a question of law upon facts found which may, therefore, under s. 17 of the Act of 1888 properly be considered by this court.

In those circumstances I come to the judgment in this particular case. It is, perhaps, a little unfortunate that, though I gather from the judgment of SIR FRANCIS TAYLOR, that counsel had been maintaining with some force that s. 4 of the Act of 1923 was a bar to this application succeeding, one cannot find any direct consideration of that point in the judgment of MACKINNON, J. If that point is, as I think it is, at the forefront of the whole right of the application in this case, it is unfortunate that it is not dealt with by that learned judge, but it is dealt with by SIR FRANCIS TAYLOR, a very eminent and learned judge, and he says that he is speaking on behalf of all the members of the court, and he favours us with the reasons why he thinks that in the circumstances of this case the objector was unreasonable, that being a compendious phrase to cover both limbs of s. 4 (1) (d) of the Act of 1923. What SIR FRANCIS TAYLOR says is this:

> "I will just add, in order to make it clear in deference to Mr. Blake Odgers' point under s. 4 in case any question might arise upon it, that the condition required by s. 4 has, in the opinion of all of us, been satisfied in this sense, that Mr. Leyson was unreasonable in refusing to grant the right because he has all through insisted upon a dead rent of £275, a royalty of 7d. and 1d. way-leave, none of which this court has thought right to grant."

As I read the correspondence in this case, and the evidence, both of which I have considered carefully, and neither of which, I think, it is necessary to read again in court seeing that my Lord has dealt with them, the essential difference between the parties in this case was not a question of quantum at all, but was a question whether or not the objector should receive a covenant from the applicants diligently to work the mine. They said without any ambiguity several times after the material dates, which I agree with my Lord do not go back further than the date stated in the earliest letter mentioned in the application, namely, Dec. 19, 1931, that they would not agree to those terms. I am not citing the actual letters, but they say: "We may agree; it depends on trade conditions," but in terms they are not prepared to say they will work the mine diligently, and that, and that only, in my opinion, was the real issue between the parties. MACKINNON, J., has taken the view, as I read his judgment, that really what the objector was demanding was what he was entitled to. What he says, in effect, is this: "The best way of satisfying the objector's proper requirements that they should work diligently is to impose upon them a dead rent and that dead rent, because they do not wish to pay money for nothing, will have the effect of making them work diligently, and will, therefore, satisfy the objectors' demand." With great respect, I doubt very much whether the payment of a dead rent would necessarily have that result, although it is not necessary here, in my view, on the question of reasonableness, to discuss it. There are, however, passages in the authorities, two of which I will mention, which show very clearly that the question of working diligently and the question of paying dead rent are two entirely separate matters. In *Jegon* v. *Vivian* (12) this is said by ERLE, C.J. (L.R. 1 C.P. at p. 34):

> "Beyond the royalty, a money rent is also usually reserved. This money rent is some security that the mine will be worked, as it is a dead loss if no coal is raised; it is also some security that the duration of the lease will be limited to the time in which all the coal will be raised,"

and so on. The Chief Justice is at pains to put it no higher than that. He says the money rent is some security that the mine will be worked.

The second passage which I would cite in this connection is the *Strelley* v. *Pearson* (13). FRY, J., said this, speaking of the dead rent (15 Ch.D. at p. 119):

> "Here the contention is that the lessee, if he cannot work at a profit, has a right to escape from the payment of the dead rent which is reserved during the term. That argument, as it appears to me, is resorted to simply because no better can be adduced, and it is one which cannot possibly succeed in inducing me to hold that such a clause is usual. The two things [the obligation to work and the payment of dead-rent] are plainly very different."

But be that as it may, seeing that MACKINNON, J., has taken the view that in practice the dead rent would be an efficacious means of enforcing what the objector had been asking for, how can it, then, be said that the objector has been unreasonable in asking for that which MACKINNON, J., has said he is entitled to, but by different machinery from the machinery of a covenant diligently to work? I think that is an impossible view; I do not think it was the view of the court. I think the view of the court is that expressed by SIR FRANCIS TAYLOR, namely, that the unreasonableness consisted in asking for certain sums of money, and it has been pointed out, in fact, he was offered on that point by the applicants more than the amount awarded—not in every particular, but broadly speaking. But that is, to my mind, immaterial here, because the real issue, as I say, was this question of the covenant to work.

In my opinion, therefore, the applicants fail to show that the objector has refused unreasonably to grant the right or that he has demanded terms having regard to the circumstances which are unreasonable. Therefore, the appeal must succeed.

I would only add this. My Lord has made reference to a number of cases which say that in any event there would be here an appeal, because the decision of fact here—and it would be a decision of fact—made by the tribunal under s. 4 is not a decision of fact on the merits of the question which they have to decide, but is supplementary and conditional or collateral in order to give them jurisdiction. I do not feel it is necessary for my purpose to decide that question or whether the words of s. 17 of the Act of 1888 are so strong as to prevent the court following what appears to me to have been the principle established by a long series of cases and which are now known compendiously as the rule in *Bunbury* v. *Fuller* (2) (9 Exch. at p. 140). It does not become necessary to decide that point in the present case, because if it is a question of law with regard to reasonableness or unreasonableness and if that question of law is open to us, and if we come to a conclusion upon it adverse to the view taken in the court below, that decides the case; but, speaking for myself, I would say that had it been necessary to consider that point in greater detail I should have been inclined to the view which has already been expressed by my Lord.

ROMER, L.J.—I agree that this appeal should be allowed. If I thought that the question whether the objector had demanded unreasonable terms within the meaning of s. 4 (1) (d) of the Act of 1923 was a question of fact, it would be necessary to consider whether s. 17 (1) of the Railway and Canal Traffic Act, 1888, did not preclude this court from entertaining the appeal. I do not, however, think it necessary to decide that question inasmuch as I have arrived at a conclusion that that question is either a question of law or a question of law and fact—it matters not which—and that really there was no evidence before the commissioners upon which they could have decided that question adversely to the objector. The conclusion that it is a question of law, or a mixed question of law and fact, is amply warranted by the authorities to which my Lords have referred. But, apart altogether from authority, it is clear that the word "reasonable" is a relative term and its meaning depends upon the context in which it is found; in other words, what has to be considered is whether the objector has made unreasonable demands within the meaning of this Act. That being so, it is obviously a question of law or a mixed question of law and fact.

In considering the question whether the objector did or did not make unreasonable demands, we have been warned by learned counsel for the applicants that we are not entitled to look at anything that happened after the application was made to the commissioners. For the moment I will obey that injunction and consider the state of

A affairs as existing on April 29, 1932, when the application was made. In 1927 long negotiations had taken place between the parties, without prejudice, but they had not been able to arrive at an arrangement. I am quite willing to assume that the objector was as unreasonable as you please in 1927; but for a long time after those negotiations came to an end nothing took place at all, until on Dec. 19, 1931, following upon an interview that had taken place, a letter was written on behalf of the applicants stating B certain terms upon which they were prepared to take a lease for thirty years, I think it was, of the coal seams belonging to the objector. He did not deal with those terms in the correspondence which ensued; all he did was to state that he was not willing to consider any terms unless there was to be included in the lease a covenant to work. That is the only demand he made. A man does not make an unreasonable demand unless it be a demand that no reasonable man would make. I confess I cannot understand how any-C body can suggest that it was an unreasonable demand for the objector to make, when granting a lease for thirty years, to say that the lessees should covenant to work the minerals. A covenant to work the minerals in some form or another is always inserted in every mining lease—and certainly no mining lease has been brought to our attention in this case which omits such a covenant. MR. MCSWINNEY—and a greater authority on this subject never lived—states this at p. 133 of the 5th Edn. of his work on MINES:

D

> "The lessor of a mine or quarry should always stipulate for a combination in the reddendum of a fixed or dead rent and a royalty. He will by those means ensure the receipt, on the one hand, of an early sum of a specified amount, however unproductive the demised property may prove, and, on the other hand, of a sum proportionate to its productiveness if proved productive."

E Of course, that necessarily implies that there is a covenant to work, because otherwise the lessor cannot compel the lessee to make the mine productive. We also have the authority of the solicitor for the applicants in this case. Mr. Harris, who is also one of the directors of the applicant company, and a gentleman with knowledge of the mining industry, was asked in re-examination about this matter—

F

> "(Mr. Bamber): A proper covenant to work is a natural part of every mining lease, is it not? (A.) In every case for the protection of the lessor."

Even if it were not always necessary in every case it is most assuredly necessary in this case; that is to say it was most reasonable to demand such a covenant in this case.

One cannot read the Acts of 1923 and 1926 without seeing the object of the legislature is to ensure the working of minerals where that working was being held up to the pre-G judice of the national interests by reason of the fact that the owner of the minerals either could not, or would not, work them himself. And when granting a lease of minerals in respect of which an application had been threatened, and had indeed once been made to the court, in order to obtain a grant, or a right, to work them, it must be taken that those are minerals which are to be worked in the national interest, and it was most reasonable on the part of the lessor, in such circumstances, to say: "I am not going to hand over to H you for thirty years the option of saying whether those minerals shall remain sterile during those thirty years or not." Indeed, MACKINNON, J., as has been pointed out, himself thought it was reasonable on the part of the lessor to secure that the minerals should be worked, but he thought the appropriate working of the minerals would be secured by the reservation of a dead rent. With the greatest possible respect to the learned judge that is not so in any case, because in reserving a dead rent you never do I secure the working of the minerals beyond sufficient to produce the dead rent, and you may not even secure that. But in this particular case there was another reason why the reservation of the dead rent would not secure, or necessarily secure, the working of the minerals, because MACKINNON, J., directed that the dead rent of £240 a year which he said was to be reserved was to be a dead rent not only in respect of coal and fireclay, but also in respect of the way-leave which was to be granted in respect of the Duke of Beaufort's coal to the south; and it might well be that that way-leave was of such importance to the lessees that they could well afford to pay a £240 dead rent and leave the minerals unworked during the whole of the time. As I have said, the only refusal made before the application was made was a refusal to grant a lease except upon the terms that it included a covenant to work, and that, in my opinion, was, so far from being unreasonable, a most reasonable thing for the lessor to insist upon. But even if his refusal was to be taken as a refusal of the terms offered, it must be remembered that one of the terms offered was a dead rent of £150, and the commissioners had themselves testified to the reasonableness of Mr. Leyson's objection to that by awarding him a dead rent of £240.

I said I would obey, for the time being, the injunction which was laid upon me by learned counsel for the applicants. I now proceed to disobey that injunction because the commissioners in the court below, upon whom no doubt a similar injunction had been put, disobeyed it. Sir Francis Taylor, as has been pointed out, was the only member of the commission who really in terms expressed the view that Mr. Leyson had been unreasonable, and he referred, as evidence of that unreasonableness obviously, to the letter of June 18, 1932, which had been written by Messrs. Forster, Brown, and Rees, on behalf of the objector, setting out the terms upon which Mr. Leyson was willing to grant a lease of the minerals in question. Sir Francis Taylor said he thought, or the tribunal thought, that Mr. Leyson was unreasonable in demanding £275 dead rent which had not been granted by the commissioners, and 1d. way-leave for the Duke of Beaufort's coal, which again had not been granted by the commissioners. With the greatest respect to the tribunal, I wish to point out that that letter did not amount, in any sense of the term, to a demand of any terms. It set out what they called tentative terms and the use of that word "tentative" obviously meant to indicate, and should have indicated, to the other side, that this was not an ultimatum on the part of Mr. Leyson, but the putting forth of terms which might form the basis of negotiation. It was not a demand. In the next place, even if it had been a demand, it is impossible, in my opinion, to say, in the circumstances of the case, and having regard to all the facts which have been found by the commissioners, that that was a demand which no reasonable man could put forward.

For those reasons I am of opinion that the commissioners arrived at a wrong conclusion on the question of law, and, indeed, that there was no evidence upon which they could arrive at their conclusion that Mr. Leyson had demanded unreasonable terms.

Appeal allowed.

Solicitors: *R. T. Leyson*; *T. D. Jones & Co.*, for *Edward Harris*, Swansea.

[*Reported by* G. P. Langworthy, Esq., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* CORKE (ON RELATION OF BROMLEY RURAL DISTRICT COUNCIL)

[CHANCERY DIVISION (Bennett, J.), July 25, 26, 27, 28, 29, 1932]

[Reported [1933] Ch. 89; 102 L.J.Ch. 30; 148 L.T. 95; 48 T.L.R. 650;
76 Sol. Jo. 593; 31 L.G.R. 35]

Nuisance—Commission by occupiers of defendant's land—Commission in vicinity of, but not on, defendant's land.

A person who allows to occupy his land persons who commit a nuisance, not on that land, but on land in its vicinity, as by trespassing, or creating a disturbance on, or befouling, the neighbouring land, can be restrained from permitting any person licensed by him to occupy his land or any part of it to commit any nuisance on land in the vicinity.

Rylands v. *Fletcher* (1) (1868), L.R. 3 H.L. 330, applied.

Notes. The use of caravans and caravan sites is now regulated by s. 269 of the Public Health Act, 1936.

Referred to: *Haigh* v. *Dendraeth Rural District Council*, [1945] 2 All E.R. 661.

As to nuisance caused to owners or occupiers of neighbouring land, see 24 HALSBURY'S LAWS (2nd Edn.) 41 et seq., and for cases see 36 DIGEST (Repl.) 282 et seq.

Cases referred to:

(1) *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 282, *334*.

(2) *Lyons, Sons & Co.* v. *Gulliver*, [1914] 1 Ch. 631; 83 L.J.Ch. 281; 110 L.T. 284; 78 J.P. 98; 30 T.L.R. 75; 58 Sol. Jo. 97; 12 L.G.R. 194, C.A.; 26 Digest 428, *1475*.

(3) *A.-G.* v. *Stone* (1895), 60 J.P. 168; 12 T.L.R. 76; 36 Digest (Repl.) 271, *234*.

(4) *A.-G.* v. *Todd Heatley*, [1897] 1 Ch. 560; 66 L.J.Ch. 275; 76 L.T. 174; 45 W.R. 394; 13 T.L.R. 220; 41 Sol. Jo. 311; 61 J.P.Jo. 164, C.A.; 36 Digest (Repl.) 271, *236*.

(5) *Soltau* v. *De Held* (1851), 2 Sim.N.S. 133; 21 L.J.Ch. 153; 16 Jur. 326; 61 E.R. 291; 36 Digest (Repl.) 256, *68*.

(6) *R.* v. *Moore* (1832), 3 B. & Ad. 184; 1 L.J.M.C. 30; 110 E.R. 68; 36 Digest (Repl.) 345, *856*.

(7) *R.* v. *Carlile* (1834), 6 C. & P. 636; 26 Digest 428, *1477*.

(8) *Barber* v. *Penley*, [1893] 2 Ch. 447; 62 L.J.Ch. 623; 68 L.T. 662; 9 T.L.R. 359; 37 Sol. Jo. 355; 3 R. 489; 26 Digest 428, *1473*.

Witness Action

This action was brought by the Attorney-General (at the relation of the local authority) and by the local authority against the defendant, who was the owner of a field, to restrain him from permitting it to be occupied or used by dwellers in caravans or tents in such a way as to be a nuisance or to be injurious to the health of the neighbourhood. It was alleged, inter alia, that the occupiers were guilty of insanitary conduct which was a menace to the health of the neighbourhood, and also had been guilty of acts of indecency and of making a noise both in the field and on the adjoining roads, which conduct offended the people living in the neighbourhood.

Vaisey, K.C., and *Charles R. R. Romer* for the Attorney-General, referred to *Lyons* v. *Gulliver* (2), *A.-G.* v. *Stone* (3), *A.-G.* v. *Todd Heatley* (4), KERR ON INJUNCTIONS, 6th Edn., p. 132, *Soltau* v. *De Held* (5), *Rylands* v. *Fletcher* (1), *R.* v. *Moore* (6), *R.* v. *Carlile* (7).

Galbraith, K.C., and *C. J. Parton* for the defendant, referred to the authorities mentioned above and also to KERR ON INJUNCTIONS, pp. 185 and 187; *Barber* v. *Penley* (8).

BENNETT, J.—The case, on the facts which have been proved, raises questions which are not altogether free from difficulty. I am satisfied that there are a number of acts committed by some of the persons who dwell in caravans on this encampment which endanger the health of those who live in the neighbourhood and interfere with the ordinary comfort and enjoyment of their property by those who live in the neighbourhood. The question which causes me difficulty is whether the defendant can be held responsible for the danger to the neighbours' health and the discomfort which the acts of these camp inhabitants cause to their neighbours.

The acts which give rise to a danger to the health of the neighbourhood, are acts done, not on the defendant's land, but off it by people who live on it. It is that fact which gives rise to the difficulty I feel, in point of law, in holding the defendant responsible. I am satisfied that a considerable number of the occupants of this camp, who live in caravans, instead of using the lavatories which the defendant has provided for sanitary purposes upon his camp, daily, and as a regular habit, use the adjoining land in circumstances and in a way which is most offensive to numbers of people who live in the vicinity. I am satisfied that these acts endanger the health of the neighbourhood. Uncovered human excrement may give rise to carriage of infection by flies and so forth, and so is a real danger to the health of the neighbourhood; and, in addition to that, owing to the fact that some of these caravan dwellers are not very particular as to the way in which they perform operations that are usually performed in private, offence is caused to people who live in the neighbourhood and who cannot help seeing what goes on. I think the acts complained of would be committed even if the defendant increased the lavatory accommodation, because I think some of the occupants of this encampment would prefer not to use lavatories, but would use other places. Other acts which have been proved are acts by men returning to the encampment late at night after the closing of the public-houses. Numbers of them urinate against the fences which are outside the camp before going to their caravans for the night. That, I think, is largely because the lavatories are at some distance from some of the caravans. Some of the caravans are as much as 100 yards away from the lavatories, and the lavatories are shut at half-past ten at night. In addition to those acts, it has been proved that, on Saturday nights, the dwellers in this camp, or some of them, on their return from the public-house, habitually make a noise, of such a kind as to disturb those whose houses they pass on their way back to the camp. It has also been proved that some of the dwellers in this encampment, instead of using the ordinary way provided by the defendant for entering it, approach it over other people's property, damaging the neighbours' fences in the process. In addition, some of the dwellers in this encampment have horses which they do not tether properly, and the horses break loose, with the result that damage is caused to the fruit trees and property of the neighbours.

The plaintiffs have, however, failed to prove that anything done on the defendant's land gives rise to a complaint by the neighbours. I do not think there is any smell of which reasonable people can complain coming from the camp. I do not think there is any fouling of the defendant's land which gives rise to any real danger to health. I think that the occupants of the camp are themselves sufficiently alive to the danger which they themselves would run if they fouled the ground in the immediate vicinity of their own caravans, and that, therefore, they do not do so. All the acts which interfere with the comfort and convenience of the neighbourhood and threaten the health of the neighbourhood are done, not on the defendant's land, but off it, by people whom the defendant brings on to it for his profit.

It is on these facts that the question arises whether the defendant can be held responsible for the nuisance which is caused to the neighbourhood by persons licensed by him to dwell in caravans on his land. It is necessary to sense the principle of law upon which his liability is to be based. It is, of course, not unlawful for a person to grant licences to caravan dwellers to place their caravans on his land. But it seems to me that, in bringing on to his land, for his own profit, a number of people who dwell in caravans, the defendant has put his land to an abnormal use. Persons whose homes are in caravans, moving about from place to place, have habits of life many of which are offensive to those who have fixed homes, and when collected together in large numbers, on a comparatively small parcel of land, such persons would be expected by reasonable people to do the kind of things which have been complained of in this action and of which proof has been given. On that view of the matter the principle which underlies the decision in *Rylands* v. *Fletcher* (1) affords, in my judgment, a basis upon which the defendant can be made responsible in law for the nuisance which undoubtedly exists, on the facts, in the vicinity of this camp, and which is caused by some of the people whom he brings there for his own profit. On that principle I hold that the defendant is responsible and that an injunction must be granted against him.

I desire to say that I am satisfied that some of the occupants of caravans on this brickfield are quite respectable people who have the misfortunate to be compelled by modern economic conditions to live in caravans rather than in houses, and against them not one word can properly be said. They, I feel quite certain, would make use, and would prefer to make use and do make use, of the sanitary facilities which the defendant has provided for them; but in addition to that class of persons the defendant does attract to his ground a large number of persons whose methods and habits of life are not in accordance with the standard to which the great majority of people in this country conform.

As regards the terms of the injunction, that will be framed so as to restrain the defendant from allowing the occupants of the camp to do certain specific acts, namely, foul the neighbours' land, break through the neighbours' fences, permit their horses to damage the neighbours' crops, and disturb the neighbours by noisy behaviour while returning home at night. If any of those things happen, quite regardless of any steps which he has taken to stop them, the defendant will be responsible. In order, however, to give him time to make arrangements for the purpose of complying with the terms of the injunction, I think it will be reasonable to suspend its operation for six weeks.

The order, as drawn up, was as follows:

> "This court doth declare that it is the duty of the defendant to prevent all persons licensed by him to occupy use or dwell in caravans tents or huts placed or erected upon his land known as the Old Brickfields, St. Paul's Cray in the county of Kent in the pleadings mentioned (a) from depositing solid or liquid filth upon any land in the vicinity of his said land (b) from breaking down the fences of persons dwelling in the vicinity of his said land or from otherwise trespassing upon the lands of any such persons (c) from permitting horses to trespass upon land in the vicinity of his said land and (d) from creating disturbance by noise in the vicinity of his said land in such a way as by all or any of the acts aforesaid to be a nuisance or injurious to the health of the neighbourhood And this court doth order that the defendant be restrained from allowing any person licensed by him to occupy use or dwell in any caravan tent or hut placed or erected on his said land (a) to deposit any solid or liquid filth upon any land in the vicinity of his said land (b) to break down the fences of persons dwelling in the vicinity of the said land or otherwise to trespass upon the lands of any such persons (c) to permit horses to trespass upon the land in the vicinity of his said land and (d) to create disturbances by noise in the vicinity of his said land in such a way as by all or any of the acts aforesaid to be a nuisance or injurious to the health of the neighbourhood. But the operation of this injunction is suspended until after Sept. 9, 1932. And it is ordered that the defendant do pay to the plaintiffs the relators the Bromley Rural District Council their costs of this action such costs to be taxed by the taxing master."

Solicitors: *May, Sykes & Co.*; *Farrar, Porter & Co.*, for *Chancellor & Ridley*, Dartford.

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re DUDDELL. ROUNDWAY *v.* ROUNDWAY

[CHANCERY DIVISION (Farwell, J.), February 3, 4, 1932]

[Reported [1932] 1 Ch. 585; 101 L.J.Ch. 248; 146 L.T. 565]

Power of Appointment—Will—Joint will—Residuary devise subject to life tenancy as A and B shall by will appoint—Joint will by A and B making appointment—Death of A during life tenancy—No revocation of joint will—Effect of joint will as exercise of power of appointment.

A testator devised and bequeathed the residue of his real and personal estate to his wife for life and after her death to his son and daughter for their lives, and after their decease to such persons and to such ends and purposes as they should by will appoint and in default of appointment to his right heirs. The son and daughter executed a joint will. The son died in November, 1917, having by his separate will confirmed the joint will, and the joint will, the separate will and a codicil thereto were admitted to probate as being his last testamentary disposition. The widow died on Aug. 8, 1931, leaving the daughter surviving. On the question whether the appointment by the joint will was a good exercise of the power of appointment given by the testator's will to his son and daughter,

Held: an appointment by a joint will could be made by two persons; if the daughter did not revoke the joint will, it would, on the death of the daughter, be an effective exercise of the power of appointment; and, being admitted to probate as her testamentary disposition, would comply with the requirements in the will of the father.

Notes. As to power to appoint by will given to two persons, see 25 HALSBURY'S LAWS (2nd Edn.) 542, para. 977; and for cases on the subject see 37 DIGEST 417–420, *263–298*.

As to joint wills, see 34 HALSBURY'S LAWS (2nd Edn.) 17, 18, para. 12; and for cases on the subject see 44 DIGEST 180–182, *93–112*.

Case referred to:

(1) *Earl of Darlington* v. *Pulteney* (1775), 1 Cowp. 260; 98 E.R. 1075; 44 Digest 180, *93*.

Adjourned Summons.

This summons raised the question of the effect of a joint will, purporting to be made in exercise of a power of appointment given to a son and daughter by the will of their father.

By his will dated Oct. 7, 1881, George Duddell devised and bequeathed the residue of his real and personal estate on trust for his wife, Frances Kate Duddell, during her life, and after her death in trust for his two children, William Du Bois Duddell and Blanche Gladys Du Bois Duddell,

> "for their sole and separate use during the terms of their natural lives, but so nevertheless that the said William Du Bois and Blanche Gladys Du Bois shall not have power to deprive himself or herself of the growing rents and profits by way of anticipation, and after the decease of the said William Du Bois and Blanche Gladys Du Bois to convey and assign the lands, tenements, and premises to such persons and to such ends and purposes as the said William Du Bois and Blanche Gladys Du Bois shall by will direct and appoint, and in default of such appointment to my right heirs for ever."

The testator died on Dec. 30, 1887. His wife and the two children survived him. After the death of the testator, questions arose as to the effect of the residuary devise and bequest after the death of the widow, and in 1904 an application was made to the court, but BYRNE, J., declined to determine the question as being a future one. The son and daughter, being then of full age, made between themselves certain arrangements to provide for the future. Such arrangements provided for a deed of mutual covenant, and for the execution by the son and daughter of a joint will, exercising the power of appointment given to them by their father's will. The deed of covenant was dated April 26, 1904, and thereby it was mutually covenanted and agreed that the son and daughter should, and would, as from the death of the widow and during the residue of their joint lives

> "stand possessed of all income of the residuary real and personal estate of George Duddell and of the proceeds of sale and conversion of such real and personal estate and of the investments money and property for the time being representing such real and personal estate and proceeds of sale respectively to which they he or she are is or may become entitled under the will of George Duddell in trust in equal shares for the said William Du Bois Duddell and Blanche Gladys Du Bois Duddell during their joint lives, and after the death of either of them in trust as to one moiety of the said income for the survivor of them, and as to the remaining moiety of the said income in trust for such person or persons for such purposes and in such manner as whichever of them shall first die shall at any time by any deed or deeds revocable or irrevocable or by his or her separate will or codicil appoint and in default of and subject to any such appointment in trust for the legal personal representatives or representative of whichever of them shall first die."

At the same time the son and daughter, also on April 26, 1904, executed a joint will, exercising the power of appointment given to them by the will of their father, and by such appointment they directed that, after the death of the widow, the residuary estate should be held on the same trusts as were declared by the deed of covenant.

William Du Bois Duddell made a separate will dated May 13, 1904, and, having revoked all testamentary dispositions other than the joint will, and confirmed the joint will, appointed and bequeathed to his sister for her separate use without power of anticipation, all income derived from the residuary real and personal estate of their father to which, if he should predecease his sister, his executor or administrators would, during the residue of the life of his sister, become entitled as part of his personal estate under and by virtue of the joint will and the deed of mutual covenant. William Du Bois Duddell subsequently made a codicil dated June 7, 1917, and thereby gave all the residue of the property belonging to him at his death, or over which he would have a general power of appointment or disposition by will—other than any power of appointment, whether joint or separate, vested in him by the will of his father—unto his mother—then Frances Kate Smithers—absolutely, but if she predeceased him then he gave the same to his sister absolutely, and the codicil continued:

> "In all other respects I confirm the joint will dated April 20, 1904, and re-signed on April 26, 1904, of myself and my sister, and my said will dated May 13, 1904."

William Du Bois Duddell died in November, 1917, and the Court of Probate admitted as his last will and testamentary disposition the joint will, the separate will, and the codicil. Blanche Gladys Du Bois Duddell married Edward Murray Colston, who became Baron Roundway. She had not revoked, or attempted to revoke, the joint will. The mother, Frances Kate Smithers, died on Aug. 8, 1931, and by her will she appointed Lady Roundway her executrix and sole residuary legatee.

On the death of the mother, various questions arose as to the effect of the will of George Duddell, and the Settled Land Act trustees of that will issued this summons for the decision of those questions. The only point which required a report related to the effect of the joint will, and whether it was a good exercise of the power of appointment given by the will of George Duddell to his son and daughter.

Danckwerts for the plaintiffs.
Morton, K.C., and *Stafford Crossman* for Lady Roundway.
C. D. Gray for the heir-at-law and next-of-kin of George Duddell.
Wilfrid Hunt for the executors of William Duddell.
Overton for the trustees of Lady Roundway's marriage settlement.

FARWELL, J.—The question I have now to determine is, as it seems to me, of considerable interest from a legal point of view, and has the merit or otherwise of being, so far as I know, a novel point. Putting it very shortly, the question is whether, if a power of appointment by will is given to two persons, that power is exercisable at all,

and, if so, how it can be exercised. [HIS LORDSHIP then read the power of appointment A
in George Duddell's will, and continued:] The will now in question is dated April 26, 1904, and it purports to be made by the son and daughter. It begins:

> "We William Du Bois Duddell and Blanche Glady Du Bois Duddell hereby revoke all joint wills and testamentary dispositions heretofore made by us and declare this to be our last joint will which we make this 26th day of April, 1904." B

Then it proceeds to exercise the powers of appointment given to the two of them by the will of their father. On the death of William Duddell, the son, the Probate Court admitted to probate, as his last testamentary disposition, the joint will, a separate will, and a codicil thereto, and, as I understand it, these three documents together were, and I must treat them as being, for all purposes the final disposition of his property by the son. At present Lady Roundway has not, so far as I know, attempted in any way to C
revoke the joint will. Whether she could make a will which would operate as a good revocation of the joint will, so far as it purports to exercise the power of appointment, I am not prepared to say; the question has not arisen and it would be quite wrong for me to express any opinion on it. If, when Lady Roundway dies, it is found that she has attempted to revoke the joint appointment, it may become necessary to determine what the effect of that may be; but at present that question does not arise, and I am not D
determining it. What I have to consider is whether, assuming that Lady Roundway makes no attempt to alter or revoke the joint will, so far as it purports to exercise the power of appointment, the result will be that, on her death, the property will go in accordance with the appointment contained in the joint will.

I think that it is useful to begin by looking at the definition of "will" which is to be found in the Wills Act, 1837. That definition in s. 1 is in these terms: E

> "The word 'will' shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise"

—and then there are other matters. Therefore, one starts with this, that in order that this appointment may be well made it has to be effected by a writing in the nature of a F
will to operate as an exercise of the power. Moreover, in order that a power may be validly exercised, it is now established beyond all question that all essentials which are required by the terms of the power must be complied with. That a power can be given to two or more persons to appoint by deed jointly is, of course, unquestionable, and, equally, a power to appoint by will given to one person creates no difficulty, for, in such a case, if the power is exercised by will, then on the death of the appointor the will G
operates as an exercise of the power and the property passes accordingly. But in the case of a joint will, on the death of the first of the two joint appointors, the property that is subject to the power does not pass at all, and it may be—though I do not decide this—that, if the survivor of the two were to revoke, or seek to revoke, the joint appointment, the result would be that there would be no effective appointment at all. Moreover, in any case the joint will, on the death of the first of the two appointors, cannot H
operate as an exercise of the power so as to pass any property or interest in the property at all. That, I think, is clear. There would be no divesting of the estate in default of appointment and revesting as, for example, would be the case where an appointment is made to take effect at the termination of a life interest which is still subsisting. In a case of that kind, the appointment, although it does not entitle the appointee to an immediate possession of the property, by reason of the existing life interest, does operate I
there and then to divest the vested interest in default of appointment, and to give the person in whose favour the appointment is made a vested interest.

The joint will cannot, on the death of the first of the two appointors, have any such operation, but none the less the document is, in my judgment, rightly admitted to probate, as being part of the dispositions which the testator, the first appointor, has made of his own property and the property over which he has a power of appointment. On the death of the second of the two appointors, assuming that no attempt has been made by the survivor to revoke the joint will, the joint will will again be admitted to probate, together with any other will that the second appointor has made, as being together the dispositions of that person's property and of the power of appointment given to that person. If I can treat the joint will as being a joint appointment by will by the two persons, then, on the death of the survivor, the property will, for the first time, vest in the appointees. Now, am I justified in holding that the effect of that operation—that is to say, the will made jointly, proved on the death of the first appointor, proved again on the death of the second appointor, and then taking effect—is an effective appointment by will by the two named appointors? There is, as I have said, no direct authority at all on this; but counsel for Lady Roundway has very rightly called my attention to one sentence in a judgment of LORD MANSFIELD. It is the case of *Earl of Darlington* v. *Pulteney* (1). In that case the question was, whether a power to appoint by deed was well exercised by a will. Perhaps it is not surprising that the learned judge decided that the will was not a good exercise of the power, and, so far as the decision is concerned, it has no bearing on the question which I have to consider, but there is this passage in the judgment. The learned judge says (1 Cowp. at p. 268):

> "The first requisite which the power prescribes is impossible to be performed by will; which is, that it shall be by joint deed of Lord Bath and his son. Now there cannot be a joint will."

That passage is quoted verbatim by MR. CHANCE in his most learned work on POWERS (1831), and treated by him as being a statement of the law; but he does not discuss the matter at all, nor does he refer to any other authorities for the proposition. I cannot think that LORD MANSFIELD, when he made that statement, had in mind at all the sort of question that I have to consider, nor is the statement in one sense quite accurate at the present time, because, in my judgment, it is plain on the authorities that there may be a joint will in the sense that, if two people make a bargain to make a joint will, effect may be given to that document. On the death of the first of those two persons the will is admitted to probate as a disposition of the property that he possesses. On the death of the second person, assuming that no fresh will has been made, the will is admitted to probate as the disposition of the second person's property, and together they operate to dispose jointly of the property in the two of them, and to that extent it is not quite accurate to say that a joint will is an impossibility. But, however, that may be, I do not think that it would be right for me to take one sentence out of the judgment, even of so great a judge, in a case in which he was not considering the question I am considering, and treat that as being any authority in this particular case. The question really is whether, on the true construction of this particular power, there will be, on the death of the lady, such an appointment as the will of the testator directs. I am assuming that, on the death of Lady Roundway, it will be found that the joint will remains unaltered, and that there has been no attempt by her to alter or revoke it. On that assumption, it appears to me that, when the will is admitted to probate as part of the disposition of her property and her powers, there will be a direction and appointment by the two named persons by will in a particular way, and I cannot myself see why such a direction and appointment is not within the words which the testator himself has used. He has said that the property shall go as William and Blanche shall by will direct and appoint. On the death of Lady Roundway, on the assumption that I have made, there will be a direction and appointment by will of the two named persons, and I, myself, cannot see why that should not operate as a good appointment within the meaning of this will. If I am right in having construed this bequest in this will as giving these two persons an interest in the estate as joint tenants, then the effect must be that the power of appointment is a power of appointment by both parties, and I am bound, as it seems to me, to give effect if I can to what the testator has provided. If I come to the conclusion that, because this is a power to the two of them to appoint by will, therefore this power can never be exercised, I am not giving effect to what was the plain intention of the testator. I should, of course, be driven to that conclusion if I thought that the testator had sought to do something that the law did not permit, but, as I have said, that is not the conclusion to which I have come. This seems to me to be a case where I have to see whether there will be, on the death of Lady Roundway, an appointment by will by these two persons, and, in my judgment, the joint will will A then be such an appointment. It is quite true, as counsel for the heir-at-law has pointed out, that, on the death of William, no property passed, no property vested; that that appointment could not have any immediate effect whatsoever; that it was an appointment that was then inchoate, and whether it would be effective to pass the property or not might depend on circumstances which would have to be considered thereafter. But none the less, when the events happen—that is to say, the death of Lady Roundway B and the proof of the joint will as part of her testamentary disposition—then, in those circumstances, there will be, in my judgment, a direction and appointment by those two named persons, which will comply with the requirements of the testator as provided in this clause, and will, therefore, be an effective appointment, and I decide accordingly.

Solicitors: *Capron & Co.*; *Longbourne, Stevens, Powell*, for *Jackson & Jackson*, Devizes. C

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

D

R. *v.* PARKER

[Court of Criminal Appeal (Swift, Humphreys and Goddard, JJ.) August 19, 1932]

E

[Reported [1933] 1 K.B. 850; 102 L.J.K.B. 766; 147 L.T. 502; 24 Cr. App. Rep. 2; 29 Cox, C.C. 550]

Criminal Law—Trial—Summing-up—Comment on applicant's silence before examining magistrates—Defence then disclosed by co-prisoners—Defence not disclosed by applicant.

At the preliminary investigation of an indictable offence before justices two of F three prisoners who were charged together disclosed their defences, which were alibis, and called witnesses. The third prisoner, in answer to the statutory formula, said that he did not wish to give evidence or call witnesses. At the trial he, too, put forward the defence of an alibi, and the judge, in his summing up, commented adversely on the fact that this defence, unlike that of the other two prisoners, had not been put forward in the court below. G

Held: the judge was bound, in the interest of the other two prisoners, to point out this difference between their cases and that of the third prisoner, and no exception could, therefore, be taken to the comments.

R. v. *Naylor* (1) (1932), ante p. 152 distinguished.

Notes. As to the judge's summing-up see 10 Halsbury's Laws (3rd Edn.) 423–425, and for cases see 14 Digest (Repl.) 330 et seq. H

Cases referred to:

(1) *R.* v. *Naylor*, ante, p. 152; [1933] 1 K.B. 685; 102 L.J.K.B. 561; 147 L.T. 159; 23 Cr. App. Rep. 177; 29 Cox, C.C. 493, C.C.A.; 14 Digest (Repl.) 656, *6668*.

Application for leave to appeal against conviction.

The applicant was convicted at Hampshire Assizes before Avory, J., of robbery I with violence, and was sentenced to five years' penal servitude and fifteen strokes of the cat.

On April 25, 1932, the treasury officer and a messenger of Lloyd's Bank, Portsmouth, were taking a large sum in notes from the bank to the post office, the notes being carried by the messenger in a canvas bag. Two men alighted from a motor car, which had been suddenly pulled up, and one of them assaulted the messenger and snatched the bag. Both men then went back to the car, which was rapidly driven away. The applicant, a man named Hinds and another man were together charged with robbery with violence.

A At the police court each of the three prisoners was asked, in the terms of the statutory formula, whether he wished to say anything, to give evidence on his own behalf, or to call witnesses. The applicant answered these two questions in the negative, but the other two prisoners gave evidence in support of an alibi, and called witnesses. At the trial the applicant's defence was, in substance, also an alibi. In the course of his summing-up, AVORY, J. said:

B

> "Now you will remember, that this alibi [of the applicant], unlike those of the other two, was never disclosed when he was at the police court, but when he was there asked if he would give evidence or call any witnesses he contented himself by saying that he would reserve them until the trial, and so in that way the police had no opportunity of making any inquiries into the truth of the evidence given by those witnesses."

C

H. Wickham for the applicant.
T. J. O'Connor, K.C. (*M. Campbell-Johnston* with him), for the Crown.

The judgment of the court was delivered by:

SWIFT, J.—It is said that the statement made by AVORY, J., in his summing-up in D regard to disclosure of defence offends against the principle laid down in *R.* v. *Naylor* (1). In our view, it does not. The facts in this case are very different from those in that case. Here the judge was dealing with the defences of three separate defendants. He was pointing out to the jury that at the police court two of them had disclosed their defences and their evidence, whereas the applicant had reserved his defence and evidence so that the police had not the same opportunity of inquiring into his case as into the E cases of the other defendants. He was bound, in the interest of the other two defendants, to point out the difference between the cases, and there was nothing in what he said which in any way infringed the principle laid down in the authorities cited. There is no substance in this point or in any of the other points taken on behalf of the applicant, and the court sees no ground for interfering with the conviction.

Application refused.

F

Solicitors: *Peet & Manduell*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

WINDRIDGE *v.* ANCIENT ORDER OF FORESTERS' FRIENDLY SOCIETY AND OTHERS

[King's Bench Division (Lord Hewart, C.J., Avory and du Parcq, JJ.) October 14, 1932]

[Reported [1933] 1 K.B. 42; 102 L.J.K.B. 62; 148 L.T. 285; 96 J.P. 483; 49 T.L.R. 16; 30 L.G.R. 510]

Friendly Society—Annual return—Falsity—Limit of time for laying information—Information within six months of sending return to registrar, but more than six months after completion of preparation of return—Competency—Friendly Societies Act, 1896 (59 *&* 60 *Vict.*, *c.* 25), *s.* 84 (c).

On Jan. 20, 1932, an information was preferred against a sub-branch of a registered friendly society for making a false annual return, contrary to s. 84 of the Friendly Societies Act, 1896, and against the officers of the sub-branch for aiding and abetting the commission of the offence. On March 3, 1931, the return, signed by the trustee and the auditors of the sub-branch, which was false, though not to their knowledge, was sent to the secretary of the district branch. On July 30, 1931, which was less than six calendar months before the information was laid, the return was sent to the Chief Registrar of Friendly Societies and received by him on that date.

Held: though an offence may well have been committed on March 3, 1931, also, and may well have been a continuing offence, an offence was committed on the date when the return was sent to the Chief Registrar, and the information was, therefore, within time.

Notes. As to offences under the Friendly Societies Act, 1896, see 18 Halsbury's Laws (3rd Edn.) 107 et seq., and for cases see 25 Digest 329 et seq. For the Act of 1896 see 10 Halsbury's Statutes (2nd Edn.) 531.

Case Stated by Surrey justices.

On Jan. 20, 1932, an information under the Friendly Societies Act, 1896, was preferred by the appellant Windridge, on behalf of the Chief Registrar of Friendly Societies, against the Court Good Intent No. 2349 of the Ancient Order of Foresters Friendly Society, charging the respondent, the Court Good Intent (hereinafter referred to as "the respondent branch"), that, being a registered branch of a registered friendly society, they did, on July 30, 1931, unlawfully make a return under s. 27 of the Act which was false in that it purported to show that as at Dec. 31, 1930, to which date the return was made out, the investments of the branch included treasury bonds to the value of £300 contrary to s. 84 (c) of the Act. William Scrivens, a trustee of the branch (hereinafter called "the respondent trustee"), and William Griffin Tucker and Leonard Dinnage, the auditors of the return (hereinafter called "the respondent auditors"), were charged in the information with aiding and abetting the offence.

On the hearing of the information it was proved or admitted that: (a) The respondent branch was at all material times a branch registered under the Friendly Societies Act, 1896, of the Ancient Order of Foresters Friendly Society (hereinafter referred to as "the Order") and the Order was a friendly society registered under the said Act. The respondent branch was also a sub-branch of a registered branch known as the Dorking, Epsom and West Surrey District Branch of the Order (hereinafter referred to as "the district branch"). The respondent Scrivens was at all material times a trustee of the respondent branch and the respondent auditors were appointed auditors of the accounts and annual return of the respondent branch for the year ended Dec. 31, 1930. (b) On Feb. 24, 1931, the respondent auditors attended on one George E. James, who was the secretary of the respondent branch (and is hereinafter referred to as such) and inspected the books of account of the respondent branch, but did not examine any of the items in detail nor inspect all the vouchers relating to the accounts. (c) On Feb. 27, 1931, the respondent trustee and the respondent auditor Tucker inspected certain deeds and securities of the respondent branch at the Dorking offices of the Westminster Bank, Ltd., where the same were kept in a box of which the respondent trustee had the only key.

The respondent auditor Dinnage was not present. The said deeds and securities were checked from a list supplied by the secretary of the respondent branch. The security for the Treasury bonds held by the respondent branch in the names of its trustees had not been in the bank or in the custody of the trustees since the month of June 1928, but had been in the custody of the secretary of the respondent branch, who was at the time of these proceedings serving a term of imprisonment. (d) The form of annual return required to be sent to the registrar by the respondent branch under s. 27 of the Friendly Societies Act, 1896, was filled in and signed by the secretary of the respondent branch and was presented for the signatures of the respondent trustee and of the respondent auditors at an adjourned meeting of the respondent branch held on March 3, 1931. The respondent auditors reported at the said meeting that the accounts were correct and signed the said form without taking steps to verify the same with the accounts and vouchers relating thereto, including the said securities so inspected by them as aforesaid, and the respondent trustee signed the said form without taking steps to verify that the items included among the assets on the balance sheet of the said form corresponded with the securities which had been inspected by him as aforesaid at the bank on Feb. 27, 1931, and checked the list supplied by the secretary of the respondent branch. The respondents relied upon the confidence which they then had in the secretary of the respondent branch and on one another and at all material times bona fide believed that the said form correctly showed the receipts and expenditure funds and effects of the respondent branch. The said return so filled up as aforesaid was in fact false. (e) The said form was the form of annual return prescribed by the Chief Registrar under s. 98 (3) of the aforesaid Act for all branches of the Order, was made out for the year ending Dec. 31, 1930, and was signed by the respondent trustee under a certificate forming part of the prescribed form in the following terms:

> "I certify that the assets shown on p. 8 are correct and that the deeds and securities for all of them are in the possession or custody of myself and my co-trustees or in the custody of a bank, and that all of them are in the names of the trustees of the court."

(f) The said form was also signed by the respondent auditors under a certificate forming part of the prescribed form in the following terms:

> "The undersigned, having had access to all books and accounts of the court and having examined the foregoing annual return and verified the same with the accounts and vouchers relating thereto, now sign the same as found to be correct duly vouched and in accordance with law."

(g) Among the assets on the said balance sheet on p. 8 of the said form, which said balance sheet purported to show the assets of the respondent branch as at Dec. 31, 1930, there was included the item "Treasury bonds, £300," but on the said date the respondent branch held Treasury bonds of the value of £5 10s. only. (h) More than six calendar months before the information herein was laid—namely, on March 3, 1931—the said form so filled in and signed was sent to the secretary of the district branch in accordance with the registered rules of the respondent branch in order that the same might be sent by the said secretary of the district branch to the secretary of the Order in accordance with the registered rules of the said district branch and be sent by the said secretary of the Order to the registrar in accordance with the registered rules of the said Order and the provisions of s. 27 of the Friendly Societies Act, 1896. (i) Less than six calendar months before the information herein was laid—namely, on July 30, 1931—the said form was sent to and received by the central office of the Registry of Friendly Societies and was filed.

On the part of the appellant it was contended:—(a) That the respondent branch committed the alleged offence and/or the respondent trustee and/or respondent auditors and/or either of them aided, abetted, counselled and/or procured the commission of the alleged offence on July 30, 1931. (b) That the offence of "making a return in any respect false" under s. 84 (c) of the Friendly Societies Act, 1896, was committed when the said false return was received by the registrar, to whom the same is required to be sent under the provisions of s. 27 of the said Act in the manner provided by sub-s. (4) of the said

s. 27. (c) That the aforesaid offence under s. 84 (c) was committed whether or not the respondents knew that the return was false or bona fide believed it to be true, and that negligence went only to establish the gravity of the said offence. (d) That no higher standard of mens rea was required in order to establish aiding, abetting, counselling and/or procuring the said offence than in the case of the principal offence, and that it was sufficient for the prosecution to prove that the respondent trustee and the respondent auditors signed a form of annual return with knowledge of the nature of the document and the destination for which the same was intended, and that the said form was in fact false and was actually received by the registrar. (e) That it was sufficient for the prosecution to establish that the respondent trustee and/or the respondent auditors and/or either of them had either aided, abetted, counselled or procured the commission of the alleged offence. (f) That if the respondent trustee and/or the respondent auditors and/or either of them committed the alleged offence they did so on the same date as the respondent branch, and that the alleged offence was committed when the said form was received by the registrar through the officer appointed in that behalf.

The respondent branch was not legally represented. On behalf of the respondents other than the respondent branch (hereinafter called the personal respondents) it was contended that:—(a) The personal respondents did not commit the alleged offence on July 30, 1931, or at all. (b) That it was necessary for the prosecution to prove that the personal respondents or any of them aided, abetted, counselled and procured the commission of the alleged offence, since the words in s. 5 of the Summary Jurisdiction Act 1848, constituted only one offence. (c) That there was no evidence that the personal respondents, counselled or procured the alleged offence, since they, bona fide, believed the form which they signed to be true. (d) That mere negligence on the part of the respondents was not sufficient to justify a conviction for aiding and abetting the alleged offence. (e) That, if the personal respondents committed any offence, they did so not later than March 3, 1931, when they signed the form of annual return of the respondent branch in the form prescribed by the registrar for the year ended Dec. 31, 1930, and sent the same to the secretary of the district branch, and that the information was accordingly out of time by virtue of s. 11 of the Summary Jurisdiction Act, 1848.

The justices, being of opinion that all the respondents committed the alleged offence on March 3, 1931, and not later, held that the proceedings were barred by the Summary Jurisdiction Act, 1848, s. 11, and, accordingly, dismissed the information. The question on which the opinion of the court was desired was whether upon the above statement of facts the justices came to a correct determination and decision in point of law.

Wilfrid Lewis, for the appellant.
The respondent Scrivens in person.
The other respondents did not appear and were not represented.

LORD HEWART, C.J.—This is a Case stated by justices for the county of Surrey. It arises out of an information preferred on Jan. 20, 1932, on behalf of the Chief Registrar of Friendly Societies against the Court of Good Intent No. 2349, of the Ancient Order of Foresters Friendly Society, William Scrivens, William Griffen Tucker, and Leonard Dinnage, for that the society's branch, whose registered office was situate within the petty sessional division, being a registered branch of the friendly society, on July 30, 1931, did unlawfully make a return under s. 27 of the statute which was false in that it purported to show that, as at Dec. 31, 1930, to which date the return was made out, the investments of the branch included Treasury bonds of the value of £300, contrary to s. 84 (c) of the statute, and that Mr. Scrivens, a trustee of the branch, and Mr. Tucker and Mr. Dinnage (auditors of the return) unlawfully aided, abetted, counselled and procured the commission of that offence, contrary to the statute. The justices, having heard the information, dismissed it. The question for us is whether they came to a correct decision in point of law. They have stated their view very clearly in the case, where they say:

> "We being of opinion that all the respondents committed the alleged offence on March 3, 1931, and not later, held that the proceedings were barred by the Summary Jurisdiction Act, 1848, s. 11, and, accordingly, dismissed the information."

It has been urged by counsel for the appellant that there is all the difference between preparing a return for somebody and sending the return to that person. Section 27 of the Friendly Societies Act, 1896, provides that every registered society and branch shall, once in every year, not later than May 31, send the return (in the Act called the annual return) of receipts and expenditure, funds and effects of the society or branch as audited; and by sub-s. (4) of that section it is provided that in the case of a branch the annual return shall be sent to the registrar through an officer appointed in that behalf by the society of which the branch forms part. Section 84 (c) provides that it shall be an offence under the Act if a registered society or branch or an officer or member thereof makes a return or wilfully furnishes information in any respect false or insufficient.

It should be made clear—indeed it has been made clear already—that, so far as these respondents are concerned, there is no charge of fraud. The charge is one of falsity in fact. The question, and the only question, is what is the crucial date. Apparently, the justices have taken the view that the crucial date is the date when the signature of the return was made, in accordance with the internal rules of the society. That seems to me to be erroneous. It may well be that an offence was committed on that date. It may well be that there was a continuing offence. But it does not in the least follow that there was no offence on the date when, as the information charged, the return was sent to the Chief Registrar of Friendly Societies. It seems to me that there has been some confusion between the preparation of the document and the sending of it. On the facts which are found here, I think it is clear that the offence which was charged in this information was committed, and that the proceedings were in time. I think, therefore, that this appeal ought to be allowed, and the case ought to go back to the justices with the direction that the offence charged was proved.

I may add, as has already been suggested, that the justices will, of course, take into account the fact that it is not suggested, so far as these respondents are concerned, that the return was known to be false.

AVORY, J.—I agree; and I only wish to add that nothing in this judgment conflicts with the view that an offence may be committed under this section when the return is sent to the secretary of the district branch, or when it is further sent to the secretary of the Order in accordance with the registered rules of the district branch.

DU PARCQ, J.—I agree: and I do not think I can usefully add anything.

Case remitted.

Solicitor: *Treasury Solicitor.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

A

Re WILLIAMS. WILLIAMS *v.* PAROCHIAL CHURCH COUNCIL OF THE PARISH OF ALL SOULS, HASTINGS

[CHANCERY DIVISION (Farwell, J.), October 21, 22, 1932]

[Reported [1933] Ch. 244; 102 L.J.Ch. 58; 148 L.T. 310] B

Will—Absolute gift—Gift to husband together with express intention that property should at husband's death go to a church—Knowledge by husband of such intention—Silence of husband constituting agreement to carry out wife's wishes—Enforcement by court.

A testatrix by her will gave all her property to her husband "absolutely, knowing he is fully aware of my intention that at his death my possessions are to be sold and given to All Souls' Church, Clive Vale, Hastings. . . ." Her will also contained the following sentences: "I am aware of my husband's intention to bestow his possessions at his death on the same All Souls' Church. . . . I charge my husband to pay £20 (twenty pounds) free of legacy duty to my dear friend, Mrs. Adelaide Frances Shoesmith. . . . I appoint my dear husband sole executor of this my last will, but if he should be incapacitated from acting as such and be prevented from making a fresh will then I wish that Mr. Alfred Elliott . . . will act as executor in place of my husband to this my will and also for my husband in seeing that our mutual wishes respecting our properties passing at the death of us both to the benefit of All Souls' Church are carried out." The testatrix died in June, 1926, and her will was proved by her husband. Her husband made his will on the same day as that on which the testatrix made her will and thereby gave all his property to his wife. He died in November, 1930. Evidence was admitted that the husband was present at the time when the testatrix executed her will and was well aware of the terms thereof and said nothing in disapproval thereof. The parochial church council claimed the wife's property. C D E

Held: by his silence the husband must be taken to have agreed to carry out his wife's wishes and, therefore, he took the property burdened with that obligation which was one the court would enforce; accordingly, the wife's property to which the husband was entitled under the will belonged to the parochial church council. F

Re Gardner, Huey v. *Cunnington* (1), [1920] 2 Ch. 523 applied.

Re Falkiner, Mead v. *Smith* (2), [1924] 1 Ch. 88 distinguished.

G

Notes. As to evidence of matters binding on a donor by his undertaking, but not disclosed by a will, see 34 HALSBURY'S LAWS (2nd Edn.) 183–185, para. 235; and for cases on the subject, see 43 DIGEST 596–602, *446–491.*

Cases referred to:

(1) *Re Gardner, Huey* v. *Cunnington*, [1920] 2 Ch. 523; 89 L.J.Ch. 649; 124 L.T. 49; 36 T.L.R. 784; 64 Sol. Jo. 650, C.A.; 43 Digest 598, *465*. H

(2) *Re Falkiner, Mead* v. *Smith*, [1924] 1 Ch. 88; 93 L.J.Ch. 76; 130 L.T. 405; 68 Sol. Jo. 101; 43 Digest 599, *470*.

(3) *McCormick* v. *Grogan* (1869), L.R. 4 H.L. 82; 17 W.R. 961, H.L.; 43 Digest 600, *480*.

(4) *French* v. *French*, [1902] 1 I.R. 224. I

(5) *Blackwell* v. *Blackwell*, [1929] A.C. 318; 98 L.J.Ch. 251; 140 L.T. 444; 45 T.L.R. 208; 73 Sol. Jo. 92, H.L.; Digest Supp.

(6) *Re Huxtable, Huxtable* v. *Crawford*, [1902] 2 Ch. 793; 71 L.J.Ch. 876; 87 L.T. 415; 51 W.R. 282, C.A.; 8 Digest (Repl.) 407, *995*.

(7) *Re Williams, Williams* v. *Williams*, [1897] 2 Ch. 12; 66 L.J.Ch. 485; 76 L.T. 600; 45 W.R. 519; 41 Sol. Jo. 452, C.A.; 43 Digest 552, *17*.

(8) *Re Conolly, Conolly* v. *Conolly*, [1910] 1 Ch. 219; 79 L.J.Ch. 148; 101 L.T. 783; 26 T.L.R. 189; 8 Digest (Repl.) 384, *773*.

Adjourned Summons

The testatrix, Mrs. Lucy Kate Williams, made her will on June 30, 1921, as follows:

> "I give and bequeath everything of which I am possessed or may become entitled to my dearly loved husband George Arthur Williams absolutely, knowing that he is fully aware of my intention that at his death all my possessions are to be sold and given to All Souls' Church, Clive Vale, Hastings, in gratitude for much spiritual help received from the ministrations of its fine clergy, and in admiration of the self-denial of its devout congregation. I am aware of my husband's intention to bestow his possessions at his death on the same All Souls' Church. Perhaps a window in the Lady Chapel might be put up to record our mutual gratitude. I charge my dear husband to pay £20 (twenty pounds), free of legacy duty, to my dear friend, Mrs. Adelaide Frances Shoesmith (formerly Miss Sands) . . . as a small token of my everlasting gratitude for her devoted affection to my dear mother and myself. . . . I appoint my dear husband sole executor of this my last will, but if he should be incapacitated from acting as such and be prevented from making a fresh will then I wish that Mr. Alfred Elliott, solicitor, of 3, Cambridge Road, Hastings, will act as executor in place of my husband to this my will and also for my husband in seeing that our mutual wishes respecting our properties passing at the death of us both to the benefit of All Souls' Church are carried out."

The testatrix died on June 3, 1926, without having revoked her will, which was proved on July 6, 1926, in the Lewes District Probate Registry by her husband, George Arthur Williams. Her husband had made his will on the same day as that on which the testatrix made her will, namely, on June 30, 1921, and by that will he gave all he possessed and all to which he might become entitled to his wife, whom he appointed his sole executrix. The husband died on Nov. 24, 1930, without having revoked or altered his will. Letters of administration with the will annexed were granted to his sister, the plaintiff, Emily Williams, and on May 22, 1931, letters of administration de bonis non to the estate of the testatrix with her will annexed were also granted to the plaintiff, Emily Williams.

Questions having arisen as to who were entitled to the estate of the testatrix, this summons was taken out by the plaintiff as personal representative of both the testatrix and her husband. The defendants were the parochial council of All Souls' Church, the Attorney-General, and the next-of-kin of the husband. The questions which the court had to determine were whether the plaintiff, as personal representative of the husband, was entitled to the estate of the testatrix, or whether the parochial church council was entitled to such estate, and whether by any secret trust that bound the husband, or how otherwise.

Evidence was admitted that the testatrix and her husband attended at the office of Messrs. Elliott and Harding, solicitors, at Hastings, and that they both executed their respective wills at that office in the presence of Mr. Elliott and Mr. Harding, and, furthermore, that the husband was well aware of the terms of the will of the testatrix, and said nothing in disapproval thereof.

G. G. Solomon for the plaintiff.

T. R. Colquhoun Dill for the parochial church council referred to *McCormick* v. *Grogan* (3), *French* v. *French* (4), *Blackwell* v. *Blackwell* (5), and *Re Gardner* (1).

Stafford Crossman for the Attorney-General.

L. F. Potts for the next-of-kin referred to *Re Huxtable, Huxtable* v. *Crawford* (6), *Re Falkiner* (2), *Re Williams, Williams* v. *Williams* (7), and *Re Conolly, Conolly* v. *Conolly* (8).

FARWELL, J., stated the parties and facts, read the will, and continued: The circumstances under which the will of the lady was executed appear in a joint affidavit made by Mr. Elliott and Mr. Harding, solicitors at Hastings.

It appears that on June 20, 1921, Mr. and Mrs. Williams went to the office of the solicitors, and they saw in the first instance Mr. Elliott. The lady appears to have been the spokeswoman of the party, the husband not taking a very active part in the proceedings. The lady produced her will and stated its contents; then the solicitor read the will, which he saw was in her handwriting; it was unsigned. She said, and this was said in clear language in the presence of her husband, that it was the wish of herself and her husband that both of their estates should ultimately go to this particular church. She referred to the intention expressed in her will, and discussed its contents with the solicitor. The husband was present at the whole of the interview, and heard what took place. The solicitor thereupon, not unnaturally, asked the lady whether she desired to consult him as to the form of her will, but she was content with her own efforts at draftsmanship, and refused any assistance from him on that score, explaining that she was only anxious to ensure that it was properly executed, and that that was the reason why she and her husband were at the office. The solicitor pointed out that he felt some doubt about the effect of the will as it stood, but she was quite content with it, and the will was left as drawn by her. It appears that the husband had also gone to the solicitors' office with his will in his pocket; he also produced that will, which was perused by the solicitor, and ultimately Mr. Elliott sent for his partner, Mr. Harding, to whom the whole matter was explained, and both wills were executed in the presence of the two solicitors. The wife, as I have already said, pre-deceased her husband, so that on the lady's death, the husband went into possession of her property. He died in 1930, having given by his will the whole of his property to his wife, who pre-deceased him, with the result that he died intestate.

I think that it is necessary to state quite shortly what, in my judgment, is the effect of the evidence to which I have referred, but before doing so there is another affidavit to which I should make a short reference, an affidavit by the plaintiff in these proceedings. It appears from her evidence that in 1921 or thereabouts the testatrix and her husband asked her to witness the signatures to their wills, which she did, but apparently the spouses, or one of them, had some doubt as to the propriety of the form of execution, and it was for this reason that the solicitors were consulted. The plaintiff goes on to say:

> "Some time subsequent to this I remember that one of them, I think it was my said brother (i.e., the husband), informed me that they had seen Mr. Elliott, and that he and his partner had witnessed the wills. I did not know the contents of either will. A short time after the death of my said sister-in-law Lucy Kate Williams on June 3, 1926, my said brother discussed the contents of her will with me, and there is no doubt in my mind, from what he said to me then, that he intended to carry out his wife's wishes as expressed in her will, so far as her estate was concerned, and that he considered it a moral obligation so to do."

This evidence in my judgment does not afford me much assistance, and the important evidence is that of the solicitors. The result of that evidence, in my judgment, is that the contents of his wife's will were known to the husband before he attended at the solicitors' office. I think that both these wills had been discussed by the spouses, and that, prior to the visit to the solicitors, the husband had agreed to carry out his wife's wishes. So far, no doubt, that is largely a matter of inference, but, even if the evidence was not sufficient to establish this, it is quite clear that the husband was present at the solicitors' office; that he undoubtedly knew at that meeting what the contents of his wife's will were; that he undoubtedly knew that his wife's desire was that, at his death, her property should go in the particular way which she indicated; and by his silence he must be taken, in my judgment, to have agreed, not merely to be bound by the terms of his wife's will, or to give effect to the dispositions of it, but he must be taken to have agreed to carry out his wife's wishes.

Now, if that be the true effect of the evidence, it is said on behalf of the parochial church council that this case comes exactly within the principle of such authorities as *McCormick* v. *Grogan* (3), and the more recent case of *Re Gardner* (1) and other similar cases. The principle of those cases is well settled, and is this, that if a person permits his property to go undisposed of to his heir-at-law or next-of-kin, or makes a will leaving his property to a particular person, on the faith of an understanding or promise by the beneficiary to deal with the property in a particular way, then, if the beneficiary takes the property, that promise or agreement is an obligation which is binding on his conscience, and if he fails to give effect to the promise, or to the agreement, a court of equity will enforce the obligation, and see that the promise is carried into effect, because

A it is against conscience for the beneficiary to take the property, and disregard the obligation. This principle, it is said, is applicable to the present case. Here it is said that the husband, by his silence in the solicitors' office, agreed to carry out the wishes of his wife with regard to the disposal of her property after his death, and since he failed to do so this court will now give effect to them. On the other hand, counsel for the next-of-kin says that this is not a case in which the principle can be applied at all; that B this case differs from such cases as *Re Gardner* (1), in that the wishes of the testatrix are stated in the will itself. In *Re Gardner* (1), and the other cases to which I have been referred, the trust was in the nature of a secret trust, that is to say the gift in the will was a gift to a person apparently for his own use and benefit, and the obligation imposed by the testator was imposed outside the will altogether. Here the will itself states what the wishes of the testatrix are, and it is said that there is no room for the application of the C principle of *Re Gardner* (1) and that class of case. It is further contended that the will itself gives the property to the husband absolutely, and that, on its true construction, no trust is created; that it is an absolute gift, and nothing more than a superadded expression of a wish; and that to admit evidence to show the existence of a binding agreement, which would be given effect to as a trust outside the will, is to permit evidence to be given to contradict the will, and that no such evidence is admissible.

D Neither of these contentions is, in my judgment, well founded. Such cases as *Re Gardner* (1), in my judgment, are authorities for the proposition that evidence is admissible to prove the existence of an agreement or promise to give effect to the testator's wishes, notwithstanding that the gift in the will to the legatee is in terms absolute. In my judgment, therefore, so far as counsel's argument is based on the suggestion that there is an absolute gift in the will, and that no evidence of an agreement is admissible, it E cannot be supported.

With regard to the other contention, that is, I think, based on the decision in *Re Falkiner* (2). In my judgment, that case does not apply to the present one. In that case, the facts were somewhat unusual, and the true explanation of the decision is that TOMLIN, J., came to the conclusion that all that the beneficiary had promised or undertaken to do was to give effect to the dispositions contained in the will, and, since the will F contained the most express and definite statement that there was to be no trust imposed on the beneficiary, there was no room for any binding obligation.

Now, in the present case, assuming that on the true construction of the will, no express trust is created, there is certainly no express provision, as there was in *Re Falkiner* (2) that the legatee was to be under no obligation as to how he dealt with the property, and if the evidence establishes that there was a promise or an agreement by the G husband that the property when he got it should go at his death to the defendant council, then, in my judgment, he took the property burdened with that obligation, and it is an obligation which the court will enforce, and since, in my judgment, the evidence does establish the existence of such a promise, it follows that, the husband having died without having taken steps to ensure that his promise should be carried out, this court will now give effect to that promise by declaring that the property of the wife to which H the husband was entitled under the will belongs to the defendant council.

But before I make that declaration, I think that, having regard to the argument addressed to me by counsel for the next-of-kin, it is right that I should say this. I am by no means satisfied that this will does not, on its true construction, create a trust, and in saying that I am not in the least forgetting such cases as *Re Williams* (7) and *Re Conolly* (8), and other cases to which I was referred. In all these cases the question is one of I the true construction of the particular words which the testator or testatrix has used. Counsel has laid great stress on the fact that the property is given to the husband absolutely, and he says that the mere expression of a belief that the husband will give effect to her wishes is insufficient to impose a trust. That argument would have much more force if the latter part of the will had been omitted, but I find in the latter part of the will that the testatrix expresses herself in these most emphatic words:

> "I charge my dear husband to pay £20 free of legacy duty to my dear friend Mrs. Adelaide Frances Shoesmith."

Now, the words, "I charge my husband to pay the sum" are wholly inconsistent with the mere expression of a wish. That in itself must, in my judgment, create a trust, which could be enforced if the husband failed to pay to the lady her legacy. If that be the true effect of those words, they largely discount the effect of the word "absolutely" in the gift to the husband, because, although the husband is given the property in terms absolutely, he is charged to do something with a portion of it. In my judgment, those words alone are sufficient to indicate that the word "absolutely" cannot be read without some qualification, and this, coupled with the proviso in the last part of the will, that, in the event of her husband not being able to carry out her wishes to benefit the defendant council, then someone else is to take up the burden, and to see that the property goes as she desires, seems to me to point very strongly to the conclusion that the true effect of the testatrix's will is not an absolute gift to her husband subject to a mere expression of desire as to how the property is to go after his death, but that it is a gift to the husband for life, with a trust to dispose of the property after his death in the way she has indicated. It is not, however, necessary for me to determine this question in the view which I take of the case on other grounds. I propose, in the circumstances, to make a declaration that the defendant council are entitled to the whole estate of the testatrix.

Solicitors: *Savage Cooper & Wright*, for *Elliott & Harding*, Hastings; *Treasury Solicitor*; *Tamplin & Co.*, for *Davenport Jones & Glenister*, Hastings.

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

ILFORD CORPORATION *v.* MALLINSON AND OTHERS

King's Bench Division (Lord Hewart, C.J., Avory and Hawke, JJ.), April 7, 1932]

[Reported 147 L.T. 37; 96 J.P. 185; 48 T.L.R. 358; 30 L.G.R. 201]

Private Street Works—Expenses—Exemption—Place of public religious worship—Vacant land adjoining chapel—Proposal to erect Sunday school—Poor Rate Exemption Act, 1833 (3 *&* 4 *Will.* 4, *c.* 30), *s.* 1—*Private Street Works Act*, 1892 (55 *&* 56 *Vict., c.* 57), *s.* 16.

An objection was made by the trustees of a chapel to the inclusion in a provisional apportionment under the Private Street Works Act, 1892, of vacant land adjoining the chapel, on the ground that the land was exempt from the payment of expenses under s. 16 of that Act and s. 1 of the Poor Rate Exemption Act, 1833. The trustees were owners of the land, and at the time of the provisional apportionment it was their intention to erect a Sunday school thereon communicating by a corridor with the chapel.

Held: the land was not exempt as a "place" or "premises" exclusively appropriated to religious worship within the meaning of the above Acts, as the words "place" and "premises" referred to buildings only and did not include a piece of vacant land; and, further, there was no evidence on which it could be held that the land was within the curtilage of or formed part of the site of the chapel.

Notes. Section 1 of the Poor Rate Exemption Act, 1833, has been replaced by s. 7 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

As to private street works, see 19 Halsbury's Laws (3rd Edn.) 437 et seq., and for cases see 26 Digest 539 et seq. For Private Street Works Act, 1892, see 11 Halsbury's Statutes (2nd Edn.) 181 and for Rating and Valuation (Miscellaneous Provisions) Act, 1955, see ibid., vol. 35, 377.

Case referred to:

(1) *North Manchester Overseers* v. *Winstanley*, [1908] 1 K.B. 835; 77 L.J.K.B. 661; 98 L.T. 781; 72 J.P. 171; 24 T.L.R. 338, C.A.; affirmed, sub nom. *Winstanley* v. *North Manchester Overseers*, [1910] A.C. 7; 79 L.J.K.B. 95; 101 L.T. 616; 74 J.P. 49; 26 T.L.R. 90; 54 Sol. Jo. 80; 8 L.G.R. 75, H.L.; 38 Digest 452, *189*.

Case Stated by Essex justices.

The respondents, the trustees of the Eastern Avenue United Methodist Church, objected to a proposal by the appellants, Ilford Corporation, to include in a provisional apportionment certain land owned by them adjoining the chapel and abutting on a street known as "The Drive," which the appellants intended to level, &c., under the powers conferred on an urban authority by the Private Street Works Act, 1892, on the ground that the land was exempt from expenses as a "place" or "premises" exclusively appropriated to religious worship under s. 16 of the above Act and s. 1 of the Poor Rate Exemption Act, 1833.

Upon the hearing of the objection it was admitted or proved that the appellants were the urban authority under the Private Street Works Act, 1892, for the borough of Ilford, and had duly adopted the said Act. On Oct. 28, 1930, the appellants duly passed a resolution approving plans and estimates, &c., for making up under the said Act that part of the street known as The Drive in the said borough. The resolution was duly advertised, and notice of provisional apportionment was duly served upon the respondents on Nov. 27, 1930. The respondents were the owners of the chapel and land coloured pink and green on a plan referred to as plan No. 2. The said land coloured pink fronted, adjoined, or abutted upon that portion of The Drive referred to in the resolution and was included in the provisional apportionment. On Dec. 19, 1930, the respondents objected to the provisional apportionment on the ground that the said land ought to be excluded from the provisional apportionment. The respondents held the land upon trusts similar in all respects to those contained in a model trust deed under which they could have used the said land for any of a number of purposes, including the erection of dwelling-houses thereon. The said land was, at the date of the provisional apportionment and until a few days before the hearing of the objection, separated from the chapel by a temporary close-boarded wooden fence about six feet in height, but had not at any material time been separated by any fence from the land which was marked green on the plan No. 2, and which was laid out as tennis courts. The fence was erected to prevent the builders' men and other unauthorised persons from obtaining, during the course of the erection of the chapel, access to the tennis courts and land to which the objection applied. A notice-board was erected on the south-west corner of the land to which the objection applied, and it bore the words "Site for Sunday School and Hall in connection with the United Methodist Churches." The notice-board was erected while the chapel was being built, and it had since remained there continuously. Plans for the erection of a school and a hall upon the land to which the objection applied were submitted to the appellants and approved by the appellants on April 28, 1931. It was the intention of the respondents to amend the plans by enlarging certain of the rooms and including a corridor connecting the school with the chapel building. The valuation list for the parish of Ilford in the borough of Ilford rating area contained an entry of land described as "Tennis courts, &c., The Drive, and Castle View Gardens," and assessed at a gross value of £10 and a rateable value of £6. The demand note referred only to "tennis courts," and there was no evidence to show that other land was included. It was the intention of the respondents to commence the erection of the Sunday School buildings as soon as the amended plans had been approved by the appellants. Except for lack of funds these buildings would have been erected at the same time as the chapel. It was not the intention of the respondents to use or permit the use of the Sunday school buildings, when erected, for any purpose other than that of a Sunday school. The land to which the objection applied was part of the site of the chapel, and was within the curtilage of the chapel. The plans for the erection of the chapel which were submitted to the appellants for approval showed no part of the land coloured pink and green on plan No. 2 as part of the site of the chapel.

It was contended on behalf of the appellants:—(a) That the said land was not a A "place" within s. 16 of the Private Street Works Act, 1892. (b) That the said land was not exclusively appropriated to public religious worship within s. 1 of the Poor Rate Exemption Act, 1833. (c) That s. 2 of the Poor Rate Exemption Act, 1833, only preserved the exemption from rating of churches, chapels, and places to which s. 1 of the said Act applied, and was inapplicable in the case of land fenced off from a church and unused at the date of the provisional apportionment. (d) That any evidence of intended user B of the said land was irrelevant, and that the liability of the respondents must be decided in view of the user and condition of the land upon the date of the notice of the provisional apportionment. It was contended on behalf of the respondents:—(a) That the land in question was part of the site of the chapel and/or was within the curtilage of the chapel. (b) That land within the curtilage of the chapel and set apart exclusively for the purposes of religious worship or Sunday schools was exempt from rating under the provisions of C the Poor Rate Exemption Act, 1833, and was, therefore, within the provisions of s. 16 of the Private Street Works Act, 1892. (c) That as the land in question was held under the same trusts as the land on which the chapel stood, it was set aside for the exclusive purposes of a chapel or Sunday school, and was, therefore, exempt from rating under the provisions of the said section. (d) That, on the facts proved or admitted in this case and the law applicable thereto, the land was exempt from rating under the Poor Rate D Exemption Act, 1833, and was therefore within the provisions of s. 16 of the Private Street Works Act, 1892. The following case was referred to by the appellants: *North Manchester Overseers* v. *Winstanley* (1).

The justices were of opinion that the respondents' contentions were correct, and that the land in question was within the curtilage of the chapel and formed part of the site of the chapel, and that the respondents should not have been included in the provisional E apportionment by reason of the provisions of s. 16 of the Private Street Works Act, 1892. The question for the opinion of the court was whether upon the above statement of facts the justices came to a correct determination and decision in point of law, and, if not, what should be done in the premises.

The sections of the Poor Rate Exemption Act, 1833, and the Private Street Works Act, 1892, which are relevant to the case, are set out in the judgment of the Lord Chief F Justice.

Joshua Scholefield, K.C., and *Erskine Simes* for the appellants.
William Allen, K.C., and *A. M. Trustram Eve* for the respondents.

LORD HEWART, C.J.—This is a Case Stated by justices for the county of Essex G arising out of an objection by the trustees of the Eastern Avenue United Methodist Church to a proposal of the appellants to level, pave, metal, flag, light, make good, and surface water drain a street or part of a street known as The Drive, in the borough of Ilford. It is contended that the respondents were exempt from any payment in respect of the land to which the objection applied, namely, the land coloured pink upon plan No. 2. H

At the material time the respondents were the owners of a chapel and of land coloured pink and green upon the plan, and the land coloured pink fronted, adjoined or abutted upon that portion of The Drive referred to in the resolution and included in the provisional apportionment. It was claimed that the land was exempt under s. 16 of the Private Street Works Act, 1892, which provides:

> "The incumbent or minister or trustee of any church, chapel or place appropriated I to public or religious worship, which is for the time being by law exempt from rates for the relief of the poor, shall not be liable to any expenses of private street works as the owner of such church, chapel, or place or of any churchyard or burial ground attached thereto."

What is the meaning of the words "which is for the time being by law exempt from rates for the relief of the poor"? In order to construe those words, one must refer to s. 1 of the Poor Rate Exemption Act, 1833, by which it is provided that

> A "no person or persons shall be rated or shall be liable to be rated, or to pay to any church or poor rates or cesses, for or in respect of any churches, district churches, chapels, meeting-houses or premises, or such part thereof as shall be exclusively appropriated to public religious worship, and which (other than churches, district churches, and episcopal chapels of the Established Church) shall be duly certified for the performance of such religious worship according to the provision of any Act or B Acts now in force."

There is no finding here that there was any certificate, and the first question is whether these were premises within the meaning of that section.

It is made plain, I think, by the decision in *North Manchester Overseers* v. *Winstanley* (1) that the word "premises" refers to buildings. The President in that case said ([1908] 1 K.B. at p. 849):

> C "With regard to the first point it is, to say the least, doubtful whether the ground which is set apart for burial can be said to be exclusively appropriated to public religious worship, and it is not necessary to express a final opinion on this point; for, with regard to the second point, the only word which would cover this ground is the word 'premises,' and, having regard to the collocation of the words in this short Act, I think that word is really confined to buildings of churches, district churches, D chapels, and meeting-houses, or at any rate to buildings used for similar purposes as such buildings."

That is sufficient to dispose of this case, but the justices have found as a fact that the land to which the objection applied was part of the site of the chapel and within the curtilage of the chapel. When one looks at the plan, it is obvious that the land was E a large plot of land, a part of which has since been used for the erection of a Sunday school and a part of which, the corner plot, is still vacant and may, under the provisions of the trust deed, be used for the erection of dwelling-houses. I think there was no evidence upon which the justices could find that this land formed part of the curtilage. The way in which they expressed their opinion is curious. They say:

> "We were of the opinion that the respondents' contentions were correct and that F the land in question was within the curtilage of the chapel and formed part of the site of the chapel, and that the respondents should not have been included in the provisional apportionment by reason of the provisions of s. 16 of the Private Street Works Act, 1892."

In my opinion there was no evidence upon which the justices could find that the land referred to was within the curtilage of the chapel or formed part of the site of the chapel. G I think, therefore, that this appeal must be allowed.

AVORY, J.—I am of the same opinion. In order to establish this exemption it was necessary that the present respondents, the trustees, should establish that this land coloured pink on the plan, which abuts upon the road that is being paved, was either a "place appropriated to public religious worship" within the meaning of s. 16 of the H Private Street Works Act, 1892, or that it was, to use the other expression which occurs in the Poor Rate Exemption Act, 1833, "premises or part of premises exclusively appropriated to public religious worship."

I agree that on both grounds they have failed to establish that this land coloured pink was either a place or part of a place appropriated to public religious worship, or that it was part of premises exclusively appropriated to public religious worship. It I was not a building, it was a piece of vacant land at the time. As the case to which reference has been made shows, those words "premises" or "place" must be construed ejusdem generis and mean a building. Apart from that I agree with my Lord that there was in this case no evidence upon which the justices could find that this land coloured pink was within the curtilage of the chapel; they might just as well have found that the land which is coloured green on the plan, and which is now being used as tennis courts, was part of the curtilage.

I agree, therefore, that the appeal should be allowed and the case remitted to the justices for them to hold that the land in question is not exempted.

HAWKE, J.—I agree.

Appeal allowed.

Solicitors: *A. Partington,* Town Clerk, Ilford; *E. C. Rawlings, Butt & Bowyer.*

[*Reported by* T. R. F. BUTLER, ESQ., *Barrister-at-Law.*]

HEARTS OF OAK ASSURANCE CO., LTD. *v.* ATTORNEY-GENERAL

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton, and Lord Macmillan) February 18, 19, March 15, 1932]

[Reported [1932] A.C. 392; 101 L.J.Ch. 177; 147 L.T. 41; 48 T.L.R. 296; 76 Sol. Jo. 217]

Insurance—Industrial assurance—Examination into affairs of society—Publicity—Extent of commissioner's discretion—Friendly Societies Act, 1896 (59 *&* 60 Vict., *c.* 25), *s.* 76 (5)—*Industrial Assurance Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 8), *s.* 17 (1), (2), (3), *ss.* 43 *and* 45 (2).

An inspector appointed under s. 17 (1) of the Industrial Assurance Act, 1923, for the purpose of examining into and reporting on the affairs of an industrial assurance company is not entitled to conduct such examination in public, or to make public the information gained by him in the course of such examination or of the exercise of the powers conferred on him by s. 17 (1) and by the Friendly Societies Act, 1896, s. 76 (5), or otherwise to make use of such information save for the purpose of preparing his report on the affairs of the company.

Re Grosvenor & West-End Railway Terminus Hotel Co., Ltd. (1), (1897), 76 L.T. 337, applied.

Notes. The Acts of 1896 and 1923 have now been amended by the Industrial Assurance and Friendly Societies Act, 1948 (11 & 12 Geo. 6, c. 39), 10 HALSBURY'S STATUTES (2nd Edn.) 646, but the provisions considered in this case are unaffected thereby. The Companies Act, 1929, s. 135, has now been replaced by the Companies Act, 1948, ss. 164–168.

Considered and referred to: *O'Connor* v. *Waldron,* [1934] All E.R.Rep. 281. Considered: *Re Gaumont British Picture Corpn., Ltd.,* [1940] 2 All E.R. 415.

As to the investigation of the affairs of an industrial assurance company, see 21 HALSBURY'S LAWS (3rd Edn.) 49, paras. 116, 117, and as to the conduct of the inspection, see ibid., 118, para. 275.

For the Friendly Societies Act, 1896, see 10 HALSBURY'S STATUTES (2nd Edn.) 531. For the Industrial Assurance Act, 1923, see ibid., 594.

Cases referred to:

(1) *Re Grosvenor and West-End Railway Terminus Hotel Co., Ltd.* (1897), 76 L.T. 337; 13 T.L.R. 309; 41 Sol. Jo. 365, C.A.; 9 Digest (Repl.) 627, *4187.*

(2) *Kimber* v. *Press Association,* [1893] 1 Q.B. 65; 62 L.J.Q.B. 152; 67 L.T. 515; 57 J.P. 247; 41 W.R. 17; 9 T.L.R. 6; 37 Sol. Jo. 8; 4 R. 95, C.A.; Digest Supp.

Appeal from the decision of the Court of Appeal (LAWRENCE and ROMER, L.JJ.; LORD HANWORTH, M.R. dissenting), reported [1931] 2 Ch. 370. The Hearts of Oak, Assurance Co. claimed in this action declarations that an inspector appointed by the Industrial Assurance Commissioner under s. 17 (1) of the Industrial Assurance Act, 1923, to examine into and report on the affairs of the plaintiff company was not bound nor entitled to conduct that examination in public, nor entitled to make public the information gained by him in the course of the examination or of the exercise of the powers conferred on him by s. 17 (1) of the Act of 1923, and by s. 76 (5) of the Friendly Societies Act, 1896, or otherwise to make use of such information save to prepare his report on the affairs of the plaintiff company.

They pleaded that John Fox, the Deputy Industrial Assurance Commissioner, on Dec. 7, 1929, was appointed inspector to report on the affairs of this company. Having examined the books and documents, he held a meeting at Newcastle-on-Tyne in June, 1930, at which he examined in public on oath officers, members, agents and servants of the company, and made a statement making public much information obtained by him while examining into the affairs of the company. In July, 1930, at Cardiff, in spite of submissions not to adopt such a course, he held a further meeting in public, with newspaper reporters present, and publicly examined witnesses on oath. The company alleged that he intended to continue to hold such examinations in public and to make public the information thereby obtained by him.

The defence admitted that he did intend to hold examinations into the affairs of the company in public and to make public the information gained by him in the course of such examinations so far as his duties required and it might be lawful and proper for him to do so.

The Court of Appeal, whose judgments were reserved and written, held (affirming the decision of LUXMOORE, J.) (LORD HANWORTH, M.R., dissenting), that the fact that no regulations had been made under s. 43 was immaterial, as the appellants' contention involved that any regulations sanctioning a public inspection would be ultra vires and void. It was not necessary to determine whether the inspection held under s. 17 was a judicial inquiry, as even if it was non-judicial there was no case which held that in that event it ought not to be held in public; it was necessary that policy-holders should know what transpired at the inspection; the court had no jurisdiction to declare the inspection must be held in private or to restrain the commissioner or inspector appointed by him from holding the inspection in public. LORD HANWORTH, M.R., dissented on the grounds that, as on an inspection ordered by s. 17 there was no issue to be tried, but merely information to be gathered and laid before the commissioner or inspector, the proceeding of the inspector was not a judicial proceeding, and the inspector consequently was not entitled at his discretion to admit the public and to make public what his examination revealed, and, the proceedings not being judicial and evidence given thereat consequently not being protected by absolute privilege [principle stated by LORD ESHER, M.R., in *Kimber* v. *Press Association* (2), [1893] 1 Q.B. 65 at p. 68, applied], the wisdom on public grounds of holding the inquiry in public ceased to apply and the device of the communications being confidential became the better course for obtaining the end in view. The company appealed.

Pritt, K.C., *J. H. Stamp* and *Blanco White* for the appellant, the insurance company.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *The Solicitor-General* (*Sir Boyd Merriman, K.C.*) and *Stafford Crossman* for the respondent, the Attorney-General.

The House took time for consideration.

March 15. The following opinions were read.

LORD THANKERTON.—On Dec. 7, 1929, the Industrial Assurance Commissioner, in terms of s. 17 (1) of the Industrial Assurance Act, 1923, appointed an inspector to examine into and report on the affairs of the appellant company. In the course of conducting that examination, a question arose as to whether the inspector was entitled to conduct the examination in public, and, after certain correspondence between the company and the commissioner, the present action was brought by the company in order to have the matter settled.

The material part of s. 17 of the Act of 1923 is as follows:

> "17.—(1) If, in the case of any collecting society or industrial assurance company, in the opinion of the commissioner there is reasonable cause to believe that an offence against this Act or against the Friendly Societies Act, 1896, or the Assurance Companies Act, 1909, has been, or is likely to be committed, the commissioner or any inspector appointed by him for the purpose shall have power to examine into and

report on the affairs of the society or company, and for that purpose may exercise in respect of the society or company all or any of the powers given by sub-s. (5) of s. 76 of the Friendly Societies Act, 1896, to an inspector appointed under that section.

"(2) On himself holding such an inspection or on receiving the report of an inspector so appointed the commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein and in particular may in the case of a society award that the society be dissolved and its affairs wound-up, and in the case of a company may present a petition to the court for the winding-up of the company."

Subsection (5) of s. 76 of the Friendly Societies Act, 1896, provides as follows:

> "(5) An inspector appointed under this section may require the production of all or any of the books and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer such oath accordingly."

It may be added that under s. 45 (2) of the Act of 1923 where the commissioner awards that a collecting society be dissolved and its affairs wound-up, the society is entitled to appeal against the award to the High Court or, in the case of a society registered in Scotland, to the Court of Session.

In the present case the commissioner did not make the examination himself but appointed an inspector, but it seems clear that the decision in the present case will equally apply where the commissioner himself makes the examination.

There is no express provision either in the Act of 1923 or in the Act of 1896 as to whether the examination is to be in public or in private, or as to any discretionary power in the matter. The solution of the question, in my opinion, will rest mainly on a consideration of the nature and purpose of the examination.

In their statement of claim the appellants seek the following relief, namely:

> "(i) A declaration that an inspector appointed by the Industrial Assurance Commissioner under s. 17 (1) of the Industrial Assurance Act, 1923, for the purpose of examining into and reporting on the affairs of the plaintiffs is not bound to conduct such examination in public.
>
> "(ii) A declaration that an inspector appointed by the Industrial Assurance Commissioner under the said subsection for the said purpose is not entitled to conduct such examination in public.
>
> "(iii) A declaration that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said subsection, and by s. 76 (5) of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purpose of preparing his report on the affairs of the plaintiffs."

Although the respondent originally maintained in his defence that the inspector was bound to hold the examination in public, he did not oppose the first declaration asked for by this House, but maintained that the inspector had a discretionary power.

It appears to me to be clear that the object of the examination is merely to recover information as to the company's affairs, and that it is in no sense a judicial proceeding for the purpose of trial of an offence; it is enough to point out that there are no parties before the inspector, that he alone conducts the inquiry and that the power to examine on oath is confined to the officers, members, agents, and servants of the company. The information so gained by the commissioner, either by himself or from the report of an inspector, will enable him to decide whether to take action under sub-s. (2) of s. 17. If he takes so serious a view of the situation as in the case of a society, to award dissolution or, in the case of a company, to petition for winding-up, the society or company respectively will have the opportunity of having the whole matter judicially investigated, in the case of a society, in an appeal, and, in the case of a company, by opposing the petition.

While the Industrial Assurance Commissioner may be said to act generally in the public interest, his main function is the protection of the industrial policy-holders, and a claim to the power to admit the public to these examinations must not be confused with the admission of policy-holders; indeed, it is easy to conceive circumstances under which the admission of the public might be prejudicial to the interests of the policy-holders.

Except in so far as the statutory provisions otherwise direct, it seems to me that the affairs either of a collecting society or of an industrial assurance company are their own domestic matter, and that, therefore, in the absence of any statutory provision providing otherwise, the examination under s. 17 of the Act of 1923 ought not to be conducted in public. The commissioner cannot properly deal with the situation disclosed by the examination until the latter is completed, and it would seem to be of importance that the credit of the society or company and the confidence of its policy-holders should not be open to any risk before the commissioner has decided on what steps, if any, it is expedient for him to take. If the examination were to be held in public, it might well be that unfavourable opinions as to the financial position of the society or company might be prematurely and wrongly formed in the minds of the public or the policy-holders either through reports in the press or as the results of attendance at the examination of some of the persons to be examined on oath. The action of the inspector in the present case does not appear to have been very wise, but I have regarded the question as a general one, unaffected by indiscretions in this particular case.

The examination authorised by s. 17 of the Act of 1923 is very different from the familiar form of public inquiry by a departmental official, where parties interested are entitled to attend and be heard. The nearest analogy to the present case is to be found in s. 135 of the Companies Act, 1929, under which the Board of Trade is entitled to appoint inspectors to investigate the affairs of a company and to report thereon; the provisions are very similar, except that the Board of Trade can only so act on the application of a prescribed number of shareholders, and that if the Board, on receipt of the report, are of opinion that an offence has been committed they are to refer the matter to the criminal authorities. It has been held that an investigation under the corresponding provisions of the Companies Act, 1862, is not a judicial proceeding: (see *Re Grosvenor and West-End Railway Terminus Hotel Co., Ltd.* (1). The reasons against publicity in such an investigation would be equally strong in my opinion.

I may add that I agree with the views expressed by the learned Master of the Rolls, who dissented in the Court of Appeal.

I am, therefore, of opinion that the appellants are right in their contention and, on this footing, counsel for both parties were able to submit an agreed form of declaration for the consideration of your Lordships, the learned Attorney-General expressing himself as satisfied that the public interest would be sufficiently safeguarded thereby. The declaration thus suggested was as follows:

> "Declare that an inspector appointed by the Industrial Assurance Commission under s. 17 (1) of the Industrial Assurance Act, 1923, for the purpose of examining and reporting on the affairs of the plaintiffs is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute.
>
> "Declare that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said subsection and by s. 76 (5) of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto."

While the agreement of parties cannot relieve your Lordships of the duty of putting a proper construction on the Act of Parliament, I am of opinion that a declaration in those terms will accurately express the conclusion to which I have come on the matter, and I therefore agree that the appeal should be allowed and a declaration made in the terms quoted. A

LORD WARRINGTON and **LORD ATKIN** concurred.

LORD MACMILLAN.—The purpose of these proceedings is to obtain a judicial determination of the question whether as a matter of law the inspection of the affairs of an industrial assurance company for which provision is made by s. 17 of the Industrial Assurance Act, 1923, must be conducted in private. B The appellant company so contends. The Attorney-General, who appears in the public interest, while originally maintaining that the inspection must be conducted in public, is now content to maintain that the inspection may at discretion be conducted either in public or in private. The statute itself is silent on the subject, and your Lordships have accordingly to undertake the responsibility of inferring what was the intention of Parliament in the matter from C other provisions of the Act.

The widespread activities of industrial assurance companies and collecting societies, to both of which the Act applies, have very properly engaged the special attention of Parliament in view of the importance of preventing abuses in their administration, and s. 17 of the Act of 1923 provides a valuable means of detecting and bringing to book delinquents. D The section forms one of a group of five under the general heading, "Accounts, Returns, Inspection, Valuations, Meetings," and the first subsection enacts as follows:

> "17.—(1) If, in the case of any collecting society or industrial assurance company, in the opinion of the Commissioner there is reasonable cause to believe that an offence against this Act or against the Friendly Societies Act, 1896, or the Assurance Companies Act, 1909, has been, or is likely to be committed, E the Commissioner or any inspector appointed by him for the purpose shall have power to examine into and report on the affairs of the society or company, and for that purpose may exercise in respect of the society or company all or any of the powers given by sub-s. (5) of s. 76 of the Friendly Societies Act, 1896, to an inspector appointed under that section."

Section 76 (5) of the Friendly Societies Act, 1896, reads as follows: F

> "76.—(5) An inspector appointed under this section may require the production of all or any of the books and documents of the society, and may examine on oath its officers, members, agents, and servants in relation to its business, and may administer such oath accordingly."

The commissioner referred to is the Chief Registrar of Friendly Societies, who by s. 2 (1) G of the Act of 1923 is constituted

> "the authority charged with such powers and duties in relation to industrial assurance as are conferred and imposed upon him by this Act"

and in this capacity is designated the Industrial Assurance Commissioner.

As to the executive action which may follow on the inspection, s. 17 (2) provides that H

> "on himself holding such an inspection or on receiving the report of an inspector so appointed the commissioner may issue such directions and take such steps as he considers necessary or proper to deal with the situation disclosed therein, and in particular may in the case of a society award that the society be dissolved and its affairs wound-up, or in the case of a company may present a petition to the court for the winding-up of the company."

I

A collecting society may appeal to the High Court against a dissolution award by the commissioner: (see s. 45 (2)). It will thus be seen that in the case of an industrial assurance company the commissioner can take effective action on the inspection and report only by means of an application to the court, while in the case of a collecting society his action may be reviewed by the court, so that in either case the inspection may ultimately be followed by judicial proceedings. Under s. 17 (3) the Commissioner is given power, subject to appeal, to direct that the expenses of an inspection shall be defrayed out of the funds of the society or company or by the officers or former officers, A or members or former members of the committee of management or board of directors of the society or company, to be recoverable by him summarily as a civil debt. Section 39 imposes penalties on any collecting society or industrial assurance company which fails to comply with any of the provisions of the Act or any directions given by the commissioner thereunder.

I think I have now collected all the passages in the Act which can provide any material B to assist your Lordships in discharging the somewhat embarrassing duty of determining from what Parliament has said on other matters what it must be held to have intended on the point at issue, as to which it has omitted to say anything. Fortunately the indications to be derived from these passages are sufficiently significant.

It will be observed in the first place that the commissioner may institute an inspection not only when in his opinion there is reasonable cause to believe that a statutory offence C has been committed but also if in his opinion there is reasonable cause to believe that a statutory offence is likely to be committed. From this it appears that the investigation may be of a very delicate nature, and it can hardly have been contemplated that publicity should be given to suspicions, however reasonably entertained, that an offence was likely to be committed. Then it will be noticed that the commissioner may either himself conduct the inspection or entrust it to an inspector appointed by him for the purpose. D The object manifestly is that the commissioner may either by himself directly, or through the medium of a delegate, obtain the information necessary to enable him to decide what action, if any, he should take. The cardinal words of the section are those which empower the commissioner or his inspector "to examine into and report on the affairs of the society." It seems a little odd that the commissioner should be empowered to report to himself, but at any rate this is clear, that the inspection is intended to be a E proceeding of a purely preliminary character. It is obviously appropriate to conduct in private an investigation of such a character, designed as it is to inform the mind of a responsible official so that he may be able to decide whether he should or should not take any overt action, especially when the investigation may be initiated merely on reasonable suspicion of the probability of some irregularity having occurred. Indeed the very nature of the procedure directed is suggestive. An inspection of a company's books F and documents and an examination of its officials are naturally conducted not in a public place but at the private premises where the books are kept and the officials are to be found. If the inspection may legally be conducted in public then any part of the proceedings may be so conducted, and it is as inconceivable as it would be impracticable, that an examination of the books of a company should be carried out in the presence of the public.

G If Parliament had intended that the inspection should or might be conducted as a public inquiry one would have expected to find in the Act the familiar provisions which are inserted when a public inquiry is contemplated. These in the present instance are conspicuously absent. Not only are there no directions for the public notification of the time and place of meeting, but there is also no provision for the parties under suspicion being afforded any indication of the offences of which they are suspected or being H permitted to be represented or defend themselves in any way, although, if the Attorney-General is right, the as yet unverified suspicions of the commissioner or his inspector may be made public and communicated to the press. Anything more repugnant to elementary ideas of fairness and propriety it would be difficult to conceive.

Apart from these general considerations, however, there is one clue to the intention of the statute which your Lordships may well find conclusive. It so happens that in I providing for the inspection in question Parliament has followed closely the terms in which it has provided for the analogous investigations of the affairs of joint stock companies by inspectors appointed by the Board of Trade. These inspections are now conducted under s. 135 of the Companies Act, 1929, which takes the place of s. 109 of the Act of 1908 in force when the Industrial Assurance Act of 1923 was passed. Previously inspections were provided for under s. 56 of the Companies Act, 1862. This system of inspection has thus been in existence for some seventy years. Your Lordships have been informed that such inspections under the Companies Acts have from the inception of this legislation been invariably in practice conducted in private. When Parliament borrowed the system of inspection from the company code and applied it to industrial A assurance companies and collecting societies it must be assumed that it was so applied in the knowledge of the existing practice and with the intention that this practice should be followed.

In deciding such a question as the present there are two main considerations to be kept in mind. On the one hand it is important to secure that the efficiency of the procedure for the purpose in view is not impaired. On the other hand it is not less important to ensure B that fair treatment is accorded to all concerned. I am satisfied that both these ends can best be attained by the holding of such inspections in private. I can well imagine that irreparable harm might unjustly be done to the reputation of a company and much anxiety unnecessarily occasioned to its policy-holders by giving publicity to such preliminary investigations. The commissioner on the completion of the inspection might find himself gravely embarrassed in deciding what action he should take by C agitation created for or against the company by premature publicity. What has happened in the present case, where the inspector took it upon himself to hold a public sitting at which he made a number of statements seriously affecting the appellants, affords an indication of the inexpediency of any publicity at the inspection stage, particularly when the task of inspection is entrusted to persons without judicial experience. The Attorney-General urged that it was desirable that abuses where they existed D should be made known at the earliest moment and that publicity might have the advantage of bringing forward witnesses who could give useful evidence. I can see every reason for speedy action in the interests of the numerous policy-holders of such companies whenever abuses have been ascertained to exist, but it is quite a different matter to give publicity to the process of obtaining the information on which the commissioner has to decide whether or not an offence has been proved to exist and on which action may or E may not follow. I may add that it is at least doubtful whether the person conducting such an inspection has any authority to examine witnesses other than the officers, members, agents and servants of the company.

In the course of the discussion, which was most helpfully and reasonably conducted on both sides, counsel offered to assist the House by agreeing upon a formula which should define the position in the event of your Lordships coming to the conclusion that the F statute did not authorise the conduct of inspections in public. They suggested that in that event your Lordships might pronounce as follows:

> "Declare that an inspector appointed by the Industrial Assurance Commission under s. 17 (1) of the Industrial Assurance Act, 1923, for the purpose of examining and reporting on the affairs of the plaintiffs is not entitled to conduct the inspection in public, but this shall not prevent him from admitting from time to time any persons the presence of whom is reasonably necessary to enable him properly to carry out his duty under the statute. G
>
> "Declare that an inspector so appointed for the said purpose is not entitled to make public the information gained by him in the course of such examination or of the exercise of the powers conferred upon him by the said subsection and by s. 76 (5) of the Friendly Societies Act, 1896, or otherwise to make use of such information save for the purposes of carrying out his examination and of preparing his report on the affairs of the plaintiffs and for purposes ancillary thereto." H

I am of the opinion that your Lordships may adopt the language thus provided as accurately defining the position under the statute. The result is that the appeal will be allowed and a declaration made in the terms quoted. I

LORD DUNEDIN.—I am sincerely glad that your Lordships see your way to adhibit your imprimatur to the very sensible form of declaration which the Attorney-General has said he would be content with if he is not right in his absolute contention. I say this because I think that every consideration of good taste and proper feeling point to the advisability of an inquiry of this sort being held in private. However, as the Attorney-General has not actually waived the point, I am bound to say that I cannot myself see my way to laying it down that the inquiry should be in private, even under the conditions proposed. I say this for this reason: I do not think it is a judicial proceeding which must be held in public; privilege in it would be qualified and not absolute privilege. But the statute does not say whether it is to be in public or private, and therefore I cannot see how a court of law can have power to say that it must be in private simply because it thinks that conditions of expediency all point that way.

The argument that weighed with me most in favour of the opposite view was that drawn from the admitted practice as to inspections under the Companies Acts. But had the question that is raised here been raised in such a case, I feel I should have felt myself entitled to say that the practice had so long existed that it had, so to speak, been crystallised into something equivalent to a direction in the Act itself. That cannot be said here, and I feel myself unable to say that a court of law could give a declaration or pronounce an injunction which would make the holding of an inquiry in public illegal. I am, therefore, obliged formally to dissent from the judgment, while at the same time fully approving of its result.

Appeal allowed.

Solicitors: *Kingsley Wood, Williams & Co.*; *Treasury Solicitor.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* SNEATH AS COMMITTEE OF A LUNATIC

[COURT OF APPEAL (Lord Hanworth, M.R., Greer and Romer, L.JJ.), January 12, 13, 14, February 8, 1932]

[Reported [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434; 48 T.L.R. 241; 17 Tax Cas. 149]

Surtax—Deductions—Payments exigible under the Lunacy Acts from income otherwise payable to the patient—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 4, *r.* 5—*Lunacy Act*, 1890 (53 *&* 54 *Vict.*, *c.* 5), *s.* 148.

Surtax—Appeal from assessment—Res judicata—Previous decision of Special Commissioners that certain charges deductible from taxpayer's income in previous years—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5., *c.* 40), *s.* 4, *r.* 5.

Res judicata—Surtax—Appeal from assessment—Previous decision of Special Commissioners that charges in question deductible from taxpayer's income in previous years—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 4, *r.* 5.

The Lunacy Act, 1890, provides for the appropriation or application of the patient's income, not the alienation of it, and so the Lunacy percentage on the clear annual income of a patient in respect of whom a committee has been appointed, which is payable by virtue of rules made under s. 148 of the Lunacy Act, 1890, the remuneration paid to the committee, and other statutory exactions from money otherwise payable to the patient, are expenses paid out of the patient's income after it has become his income and not payments by which the patient's income is diminished, and so are not deductible in computing the patient's income for the purposes of supertax: *Committee of A.B.* v. *Simpson* (1) (1928), 14 Tax Cas. 29, approved and applied.

A decision of the Special Commissioners on an appeal as to the assessment of tax is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made, and cannot be treated as an estoppel binding on the same party for all years: *I.R. Comrs.* v. *Brooks* (2), [1915] A.C. 478, and *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (3), [1926] A.C. 94, applied;

Hoystead v. *Taxation Comr.* (4), [1926] A.C. 155, distinguished; *Aylmer* v. *Mahaffy* (5), [1926] N.I. 167, not followed.

Per Greer, L.J.: The estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers. . . . to make an estimate of the income of the taxpayer for the particular year in question.

Notes. Supertax is now called surtax. Earlier Income Tax enactments were repealed and replaced by the Income Tax Act, 1952, s. 363 (1) of which provides for the assessment to tax of the committee of an incapacitated person.

Distinguished: *Patrick* v. *Lloyd* (1944), 171 L.T. 235. Referred to: *R.* v. *Income Tax Special Comrs., Ex parte Elmhurst*, [1935] All E.R. Rep. 808; *B.P. Refinery* (*Kent*), *Ltd.* v. *Lower Medway Internal Drainage Board*, [1956] 2 All E.R. 834.

As to income tax being an annual tax, see 20 Halsbury's Laws (3rd Edn.) 23, para. 27, text and note (l), as to the authority of tax decisions of the Court of Appeal of Northern Ireland, see ibid. 30, para. 35, text and note (t), as to charge to tax of trustees of incapacitated persons, see ibid. 390, para. 711, as to res judicata in income tax appeals, see ibid. 689–690, para. 1360, text and notes (r) and (s), and as to estoppel by res judicata generally, see 15 ibid. 181–182, para. 355, text and notes (c)–(f). For the Income Tax Act, 1952, s. 363 (1) see 31 Halsbury's Statutes (2nd Edn.) 351, and for the Lunacy Act, 1890, s. 148, see 17 ibid. 1123.

Cases referred to:

(1) *Committee of A.B.* v. *Simpson* (1928), 14 Tax Cas. 29; Digest Supp.

(2) *I.R. Comrs.* v. *Brooks*, [1915] A.C. 478; 84 L.J.K.B. 404; 112 L.T. 523; 31 T.L.R. 89; 59 Sol. Jo. 160; sub nom. *Brooks* v. *I.R. Comrs.*, 7 Tax Cas. 236, H.L.; 28 Digest 110, *677*.

(3) *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*, [1926] A.C. 94; 95 L.J.P.C. 33; 134 L.T. 335, P.C.; Digest Supp.

(4) *Hoystead* v. *Taxation Comr.*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; 42 T.L.R. 207, P.C.; Digest Supp.

(5) *Aylmer* v. *Mahaffy*, [1925] N. 167; 10 Tax Cas. 594; 28 Digest 44, *e*.

(6) *Mersey Docks and Harbour Board* v. *Lucas* (1883), 8 App. Cas. 891; 53 L.J.Q.B. 4; 49 L.T. 781; 48 J.P. 212; 32 W.R. 34; 2 Tax Cas. 25, H.L.; 28 Digest 21, *104*.

(7) *Murray* v. *I.R. Comrs.*, 1926 S.L.T. 714; 11 Tax Cas. 133; Digest Supp.

(8) *Macfarlane* v. *I.R. Comrs.*, 1929 S.C. (Ct. of Sess.) 453; 1929 S.L.T. 395; 14 Tax Cas. 532; Digest Supp.

(9) *Perkins' Executor* v. *I.R. Comrs.* (1928), 13 Tax Cas. 851; Digest Supp.

(10) *R.* v. *Hutchings* (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 29 W.R. 724, C.A.; 21 Digest 232, *631*.

(11) *The Duchess of Kingston's Case* (1776), 1 East, P.C. 468; 1 Leach 146; 20 State Tr. 355; 2 Smith, L.C. 12th Edn. 754; 21 Digest 159, *213*.

(12) *Boulter* v. *Kent Justices*, [1897] A.C. 556; 66 L.J.Q.B. 787; 77 L.T. 288; 61 J.P. 532; 46 W.R. 114; 13 T.L.R. 538, H.L.; 16 Digest 99, *6*.

(13) *Wakefield Corpn.* v. *Cooke*, [1904] A.C. 31; 73 L.J.K.B. 88; 89 L.T. 707; 68 J.P. 225; 52 W.R. 321; 20 T.L.R. 115; 48 Sol. Jo. 130; 2 L.G.R. 270, H.L.; 21 Digest 154, *163*.

(14) *A.-G. for Trinidad and Tobago* v. *Eriché*, [1893] A.C. 518; 63 L.J.P.C. 6; 69 L.T. 505; 1 R. 440, P.C.; 21 Digest 231, *623*.

Appeal from a decision of Rowlatt, J., dismissing an appeal by the Crown by way of Case Stated from a decision of the Special Commissioners in favour of the taxpayer on an appeal against an assessment to supertax.

The Case Stated as follows:

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 24, 1929, for the purpose of hearing appeals, William Cecil Sneath (hereinafter called the committee), as committee for D.G.M., a person of unsound mind, hereinafter called the patient, appealed against an assessment to supertax in the

sum of £4,885 for the year ending April 5, 1929, made upon him under the provisions of the Income Tax Acts.

2. By order in lunacy dated Nov. 25, 1913, the custody, regulation, occupation, disposition and receipt of the estate of the patient were committed and granted to the committee, and from that date the committee has at all times acted as committee of the said estate. The committee has been allowed by the court remuneration at the rate of £50 per annum for so acting, and by the above-mentioned order he is required to give security in the sum of £6,000. Such security is given by way of a guarantee bond, the premium on which, amounting to £18 per annum, is also paid out of the income of the patient's estate.

3. Under the provisions of s. 148 of the Lunacy Act, 1890, and the rules made thereunder (which, so far as material, are set out in the *Committee of A.B.* v. *Simpson* (1), a lunacy percentage at the rate of 4 per cent. per annum on the clear annual income is payable to the court. The percentage paid in respect of the patient's estate for the year ending April 5, 1928, amounted to £136.

4. On Oct. 21, 1918, the committee appealed to the Special Commissioners against the assessments of supertax made upon him as committee of the patient's estate for the years 1914–15, 1915–16, 1916–17 and 1917–18, on the ground that the lunacy percentage and committee's remuneration paid for the years material to those assessments did not form part of the patient's income for the purposes of supertax and ought to be allowed as deductions from the gross income of the estate in computing the patient's income for the purpose of supertax. The commissioners who heard the appeal on that occasion held that the lunacy percentage and committee's remuneration did not form part of the patient's income, and reduced the assessments by the amounts of those payments. The representative of the Crown expressed his dissatisfaction with that decision as being erroneous in point of law, but did not demand a Case to be stated for the opinion of the High Court.

5. For each of the years 1918–19 to 1927–28 inclusive the committee claimed similar deductions from the gross income of the estate in making his returns of the patient's income for the purposes of supertax, and these deductions were allowed by the Assessing Commissioners in making the assessments to supertax for those years.

6. In making his return of the patient's income for the purpose of supertax for the year ending April 5, 1929, the committee claimed that the following sums did not form part of the patient's income for the purposes of supertax and ought to be allowed as deductions from the gross income of the estate:

Lunacy Percentage	£136
Committee's remuneration	50
Committee's Guarantee Premium	18
Law Costs	28
Total	£232

In making the assessment under appeal to the Assessing Commissioners disallowed the whole of the deductions claimed, on the ground that they were payments made out of the income after it had become the income of the patient.

7. At the hearing of the appeal the claim for a deduction in respect of law costs was not pursued, but in regard to the other payments claimed as deductions it was contended on behalf of the committee: (a) That such payments did not form part of the income of the patient for purposes of supertax; (b) That the *Committee of A.B.* v. *Simpson* (1), which dealt with the question of the liability of the committee, as the person in control of the fund and receiving the income, to assessment to income tax, was not conclusive as to the computation of the patient's income for purposes of supertax; (c) That the matter was res judicata, as the same question between the same parties (so far as regards the claim to deduct the lunacy percentage and the committee's remuneration) had already been finally determined by the Special Commissioners on the revenue's previous appeal.

8. It was contended on behalf of the Crown, inter alia: (a) That the case was concluded by the decision in the *Committee of A.B.* v. *Simpson* (1). (b) That the payments claimed as deductions were payments made out of the patient's income after it had become his income, and that they were not admissible as deductions in computing his income for the purposes of supertax. (c) That the previous decision of the Special Commissioners only applied to the particular years to which the appeals then before them related, and that in determining the appeal now before them they were bound to follow the direction given by the High Court in a subsequent case, which had shown that their decision on revenue's earlier appeal had been wrong in law.

9. We, the commissioners who heard the appeal, gave our decision in the following terms:

> "Although the question actually decided in the *Committee of A.B.* v. *Simpson* (1) was a different one, we consider, in view of the language used in the judgment in that case, that if we were dealing with the present case de novo we should be bound to hold that both the lunacy percentage and the committee's remuneration were expenses made out of the lunatic's income after it has become his income, and not payments by which his income was diminished, and that they could not be deducted in computing his income for the purposes of supertax.
>
> "But the point is taken that the matter is res judicata, as the same question was raised in the case of the same committee on appeal before the Special Commissioners against assessments for the years 1914–15 to 1917–18 inclusive in October, 1918, when it was decided in the committee's favour, and it was held that the lunacy percentage and the committee's remuneration paid for the years then under review did not form part of the patient's income. Having regard to the decisions in *Hoystead* v. *Taxation Comr.* (4); and *Aylmer* v. *Mahaffy* (5) we feel that we have no alternative but to admit this plea and to allow the appeal as regards the lunacy percentage and the committee's remuneration.
>
> "The claim for the guarantee premium and law costs is not covered by the previous decision and we hold that these payments are not admissible deductions in computing the patient's income for supertax."

We accordingly reduced the assessment by the amount of the lunacy percentage and the committee's remuneration to the sum of £4,699.

10. The revenue immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 7 (6) and s. 149, which Case we have stated and do sign accordingly.

ROWLATT, J., affirmed the decision of the Special Commissioners, considering himself bound to follow the decision of *Aylmer* v. *Mahaffy* (5), decided by the Court of Appeal of Northern Ireland.

The revenue appealed.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the Crown.
A. M. Latter, K.C., and *Cyril King* for the committee.

The arguments and the cases referred to sufficiently appear from the judgments.

Cur. adv. vult.

Feb. 8. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal from a judgment of ROWLATT, J., given on March 13, 1931, dismissing an appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, dated July 24, 1929. ROWLATT, J., felt in duty bound to follow the decision of *Aylmer* v. *Mahaffy* (5), decided in the Court of Appeal of Northern Ireland, wherein a previous decision of the Recorder of Belfast upon a point which arose in reference to an assessment to income tax upon one Mahaffy for the financial year 1921–22 was held to operate as res judicata in reference to a similar claim to make a deduction from income assessed to tax in the financial year 1922–23.

The facts relevant to the subject-matter under appeal are as follows [His Lordship stated the facts and continued:]

A When the decision of the Special Commissioners came before ROWLATT, J., he felt bound to follow *Aylmer* v. *Mahaffy* (5). His words are:

> "I say with some disappointment I think I am precluded from going into this case and expressing my own view."

Hence this appeal. It therefore raises the two questions tabulated before the commissioners, B and I proceed to deal with the first point: Does the principle established in *Simpson's Case* (1) apply to the present assessment which is in relation to supertax?

Supertax is charged by s. 4 of the Income Tax Act, 1918; and by s. 5 the income is to be estimated at the total income from all sources for the previous year with certain allowable deductions. Those details are not relevant on this point, for what is argued is that the money otherwise payable to, and receivable by the patient, was reduced by C a statutory exaction from it, so that the reduced amount was his income and not the undiminished and larger sum which would have reached him but for the overriding force of the Lunacy Act and rules. For the purpose of this argument no distinction can in my opinion be drawn between the fee or remuneration paid to the committee and the percentage which is devoted to the cost of the administration of lunatics' estates. Both are exigible under the Lunacy Act and the rules made under it.

D It is to be noted that by the Lunacy Rule 133

> "the masters shall certify the amount of percentage payable in each case, and the person who is to pay the same, and the time within which the same is to be paid, and such person shall pay the same out of the first money coming to his hands on account of income."

E So far, therefore, as the method goes, the money first passes to the committee, and it is out of money received by him as income of the patient that he is to satisfy the percentage required to be paid. In *Simpson's Case* (1) (14 Tax Cas. at p. 33) ROWLATT, J., held that this payment was

> "an expense like any other expense of a person, sane or insane; an expense compulsory or not, it does not matter; but an expense made, after the income is received F and has borne tax, out of the money which is left in the hands of the recipient."

It has long ago been held that an appropriation of profits made by a statute does not render the portion thus deflected any less a part of the profits subjected to tax: (see *Mersey Docks and Harbour Board* v. *Lucas* (6)).

Two Scottish cases were cited to the court: *Murray* v. *I.R. Comrs.* (7) and *MacFarlane* v. *I.R. Comrs.* (8). Both these cases were decisions on the terms of particular trusts as G to the sum to which the beneficiaries were entitled. The question that arose: Was the sum payable to the beneficiaries that which remained after the payment of the expenses of the management of the trust, which were to be discharged in priority to their receipt of any payment, or were the expenses of management to be treated as taken out of the sum to which they had an absolute interest? In both cases it was held that under the terms of the trusts the interest of the beneficiaries was confined to the net sum after H payment of the expenses. These cases do not serve to contradict the principles above stated—more particularly having regard to the terms of r. 133 above quoted.

The Lunacy Act provides for the appropriation or application of the patient's income—not the alienation of it; and see a decision of ROWLATT, J.—*Perkins' Executor* v. *I.R. Comrs.* (9) which illustrates this distinction.

I come, therefore, to the conclusion that the commissioners were right in their decision I upon this point, and that the deduction claimed ought not to be allowed in the case of supertax.

I turn, therefore, to the second and very difficult point: Is the claim for this deduction res judicata by the decision of the Special Commissioners in October, 1918?

There is a subsidiary point which also arises—if the decision in October, 1918, was the decision of a lis between the parties for how long is it effective? Can it create an estoppel for all time, or only in relation to the assessment of the particular year, because supertax is a tax annually imposed and charged and assessed for the year of charge only?

The appeal in *Aylmer* v. *Mahaffy* (5) was decided in Northern Ireland in May, 1925.

Hoystead v. *Taxation Comrs.* (4) was an appeal from Australia and was decided in December of that year.

Part IX of the Income Tax Act, 1918, contains special provisions applicable to Ireland. By s. 195 all appeals against assessments are to be heard and determined by the Special Commissioners and their determination on any appeal is to be final and conclusive, unless the person assessed requires (a) that his appeal shall be re-heard as thereinafter provided, or (b) unless under s. 196 a Case is required to be stated for the opinion of the High Court. If the latter option is exercised, then the Special Case comes before the High Court, equally in Ireland as in England, as designated in s. 235, and by s. 149 the High Court has the powers specified therein, and a further appeal lies through the courts to the House of Lords. This procedure only enables an appeal to be dealt with on a point of law.

But if the earlier option is exercised then the appeal of the assessed person, which includes questions of fact as well as of law, is re-heard by the recorder or the county court judge, as the case may be, having jurisdiction in the place where the assessment was made, and the determination of the matter by the recorder or county court judge is final and conclusive. There is no step by way of appeal ultra.

Mahaffy's appeal as to the assessment upon him for 1921–22 was determined by the Recorder of Belfast irrevocably and irremediably. The appeal from the assessment made upon him in 1922–23 followed the other procedure, by Case Stated, and so came on the point of law only before the Court of Appeal of Northern Ireland. It is to be noticed that the decision of the High Court was that the commissioners ought to have acted on their view that the claim for deduction made was not permissible. Incidentally Henry, C.J., comments upon the fact that the appeal before the court related only to the later year; 1922–23, that is to say, was a fresh and independent assessment for another year. The Court of Appeal, however, allowed the appeal to their court and treated the decision of the recorder as to the previous year as an estoppel, the decision having been given on a definite issue between two opposing parties by a tribunal competent to decide between them, and found authority for supporting that judgment in the case, among others, of *I.R. Comrs.* v. *Brooks* (2), to which I must refer later. One comment arises from a consideration of the judgments delivered in the Court of Appeal of Northern Ireland on a point that may have influenced their decision, and that is that they deprecated the "jockeying for courts" which had taken place—the one party being anxious to take the case once more before the recorder, the other being anxious to avoid that tribunal and to have the cases decided afresh as on a point of law. Moore, L.J., said that it was a mixed question of law and fact and was so determined by the recorder.

In *Hoystead* v. *Taxation Comr.* (4) it was decided by the Privy Council that a previous decision of the Full Court of Australia on a point fundamental to their decision created an estoppel on the same question which arose in a later year as between the same subjects and the taxing authorities. The earlier decision was as to the status of six daughters under their father's will—were they owners of the original shares under the will? If they were original owners, were they entitled to a separate and individual deduction as against the charging authority? It was decided by the Full Court in favour of the daughters and their status under the will was thus once and for all determined. It is not difficult to follow this decision or to accept the view that the earlier decision created an estoppel.

The *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (3) was decided on Nov. 10, 1925, in between the above two decisions. It was there held that a previous decision of the High Court of Australia which related to a valuation and a liability to tax in a previous year did not provide an estoppel as res judicata. The decision of the board affirmed that, in the year for which the decision was reached it could not be disputed, but the judgment went on ([1926] A.C. at p. 100):

> "The present question relates to a new question, namely, the valuation for a different year and the liability for that year. It is not eadem questio and therefore the principle of res judicata cannot apply."

The observation of Henry, C.J., quoted above, is in accord with this view of the Privy Council. It is thus important to examine the nature of the decision of the Special Commissioners upon an assessment to tax charged upon a subject.

The conditions that must be fulfilled if an estoppel arising upon res judicata is to be effective, are not in doubt. Lord Selborne states them in his judgment in *R.* v. *Hutchings* (10); (6 Q.B.D. at p. 304) quoting from the judgment of De Grey, C.J., in the *Duchess of Kingston's Case* (11).

There must be a lis inter partes in which the point relied on for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the court. The court must be one of competent jurisdiction that has seisin of the case for the purpose of reaching a final decision inter partes, though it may be a private tribunal such as an arbitrator whose forum is a domestic one constituted by the parties themselves.

What then was the function and power of the Special Commissioners in October, 1918? The method of estimating the supertax of an individual is analogous to that whereby the income of a person is estimated for income tax charged on him in respect of it.

By s. 7 (6) of the Act of 1918, all the provisions of the Income Tax Act relating to persons who are to be chargeable with income tax, and to income tax assessments, and to appeals against those assessments, shall so far as they are applicable apply to the charge and assessment of supertax; and the Special Commissioners shall "for the purpose of assessment have any powers of a surveyor." Some of the most important of his powers are to be found in s. 121. He is enabled to examine the statements of profits or gains rendered by the person charged under Sched. D; if he makes no objection the assessment is made; if he is dissatisfied with the decision of the additional commissioners, he can appeal to the General Commissioners; he can take objection to a statement rendered and put the matter in train to be decided, and upon an appeal for the purpose of the representation of the Crown on any appeal before the Special Commissioners,

> "any person nominated in that behalf by the Commissioners of Inland Revenue shall have the same powers at and upon the determination of the appeal as a surveyor has at and upon the determination of any appeal relating to income tax."

Those powers are to be found in ss. 137–139, and when the appeal against an assessment under Sched. D, or an objection by a surveyor has been heard by the Special Commissioners, then by s. 148 their determination is final and conclusive, though thereafter the matter may come before the High Court on a Case Stated under s. 149.

It is the amount of the assessment to be made on the facts of the Case before them that is determined by them. By s. 149 (2), "The High Court shall determine any question or questions of law arising upon the Case." The High Court may reverse, affirm, or amend the determination in respect of which the Case has been stated or remit the matter to the commissioners with the opinion of the court thereon. It is difficult to attribute to such a determination of an assessment of amount, the decision of a lis inter partes. The observations of Lord Herschell in *Boulter* v. *Kent Justices* (12) ([1897] A.C. at p. 569) seem applicable to such a proceeding. The decision related, it is true to the question of the refusal of justices to renew a licence. He says:

> "There is, in truth, no lis, no controversy inter partes, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party."

There is no interest in the surveyor, except to bring before the court all facts relevant to the assessment. The decision does not enure in his favour unless he is to be treated as representing the taxpayers at large, exclusive of the one upon whom the assessment in question is made.

The view that I am expressing is in accord with the decision in *I.R. Comrs.* v. *Brooks* (2), and the fact that the effect of it was set aside by s. 5 (2) of the Act of 1918 does not impair the principle on which the case was decided. Lord Parker ([1915] A.C. at p. 491) said that he did not dispute the general principles of law governing estoppels;

> "but it seems to me that where there is statutory provision requiring an estimate to be made for a statutory purpose and by a statutory authority, the principle of estoppel cannot be invoked to render the provision nugatory in cases where such principles might otherwise have applied."

In this view it is unnecessary to discuss the difficult question that arises upon estoppel as illustrated by *Hoystead's Case* (4) and the cases dealt with in the judgment of LORD SHAW—*R.* v. *Hutchings* (10) and *Wakefield Corpn.* v. *Cooke* (13).

There is, however, the subsidiary point which I have referred to above and upon which I desire to add some observations.

In the course of the argument of the Case our attention was directed to the several sections under which the tax is imposed for the year by the Finance Act passed in each year—s. 1; the assessment and charge to tax is to be made for a year from April 6 in one year to April 5 in the following year—s. 2; and the year of assessment is the year for which the grant of the tax has been made by the Act imposing it—s. 237; the assessors are appointed for a year—s. 76 (3); and claims for exemption and abatement are to be made by him who makes the claim by delivery to the assessors of all particulars—a duty which recurs in every year of charge.

It seems difficult to attribute to an assessment thus made such a permanence as will provide an estoppel by res judicata in all future years by reason of a matter taken into account, or not taken into account, in a previous assessment for a year. The assessment seems inherently to be of a passing nature.

The Special Commissioners are empowered under s. 7 (7) to amend any assessment made by them thereunder, or to make an assessment or an additional assessment during any time within the year of assessment, or within six—it used until 1923 to be three—years after the expiration thereof. The difficulty arising from the tax being annual, and for a year only, is at once emphasised and overcome by the special provisions of s. 210.

These provisions seem fully to justify the application of the observations made in the *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (3) ([1926] A.C. at p. 100) to the present case, and the application of the principle in *I.R. Comrs.* v. *Brooks* (2).

I am, therefore, of opinion that the assessment is final and conclusive between the parties only in relation to the assessment for the particular year for which it is made. No doubt a decision reached in one year would be a cogent factor in the determination of a similar point in a following year, but I cannot think that it is to be treated as an estoppel binding on the same party for all years.

For these reasons I am of the opinion that the appeal must be allowed, the reductions claimed disallowed and the assessment in full affirmed. There will be no costs in accordance with the arrangement made by the Attorney-General with the committee.

GREER, L.J.—In this case the income of a lunatic has been assessed by the Special Commissioners on the assumption that they were bound to treat the lunacy percentage payable out of the lunatic's income amounting to £136, and the committee's remuneration amounting to £50, making in all £186, as a deduction from the total of the moneys received by his committee before ascertaining the lunatic's income for tax purposes in respect of supertax for the year ending April 5, 1929, on the ground that the taxing authority is estopped from contending that the said sums are not deductions from income, but are sums paid on behalf of the lunatic out of his taxable income. The commissioners, while expressing an opinion in favour of the Crown, did not give a decision on the question whether the said sums were rightly treated as proper deductions in ascertaining the lunatic's income, because they decided that the revenue was estopped from inquiring into this matter by reason of the decision of commissioners on a similar question in respect of the income of the lunatic for supertax purposes in the years 1918–19 to 1927–28.

The principal question arising for decision on this appeal is whether the taxing authority is so estopped. I have come to the conclusion that the taxing authority is not so estopped. Income tax and supertax are imposed by the legislature separately for each year of tax. Inasmuch as it is impossible to collect the tax unless there is some machinery to enable the authorities to ascertain what is the amount of the income on which the tax is to be paid, elaborate machinery is provided by the incorporation in the taxing statute of the tax management Act of 1918 as amended from time to time, to enable the income to be ascertained. There must be in each year through the means provided by the state for assessment, ascertainment of the taxpayer's income for the purpose of Sched. D, which is the only one with which this appeal is concerned. The taxpayer has to make a return for assessment after receiving notice from the assessors. When the return is made the assessor is under a duty to examine the statement, and under s. 113, to deliver it to the commissioners, who then make an assessment on which the tax can be levied if there is no appeal. By s. 136 any person aggrieved may appeal in the case of income tax to the General Commissioners by giving twenty-one days' notice, and, in the case of supertax, to the Special Commissioners, and he must give notice of the grounds of his appeal. The Special Commissioners then determine, on the examination of the appellant and any other evidence that is before them, and on hearing his solicitor or counsel, what his assessment is to be for the year of tax with which the assessment is concerned, and they have power to increase the assessment. The commissioners who hear the appeal in any one year may, of course, be different persons from those who heard an appeal in the previous year, but the assessors and the commissioners have imposed upon them the duty of making the assessment in each year, and whether that assessment is made before or after an appeal, it is, in my judgment, the estimate of the commissioners for the year in question, and the assessors in any subsequent year have to make their own estimate, and are not bound by the estimate made in previous years. I think the estimating authorities, even when an appeal is made to them, are not acting as judges deciding litigation between the subject and the Crown. They are merely in the position of valuers whose proceedings are regulated by statute to enable them to make an estimate of the income of the taxpayer for the particular year in question. The nature of the legislation for the imposition of taxes making it necessary that the statute should provide for some machinery whereby the taxable income is ascertained, that machinery is set going separately for each year of tax, and though the figure determined in one year is final for that year, it is not final for any other purpose. It is final not as a judgment inter partes but as the final estimate of the statutory estimating body. No lis comes into existence until there has been a final estimate of the income which determines the tax payable. There can be no lis until the rights and duties are ascertained and thereafter questioned by litigation. It would be unfortunate if we were compelled to arrive at any other result, because it might well be that in any one year the taxpayer might not think it worth while to challenge the decision of the commissioners for that particular year, though it might in later years prove to be worth his while to contest their view. On the other hand, it is equally likely that there may be many cases in which the Crown would be quite prepared to make a concession in one year, whereas they might rightly conclude in subsequent years that it would not be in the interests of taxpayers generally that they should make such a concession. It is also worth noting that statutory allowances by way of deduction from tax are often varied by the Taxing Act of any particular year.

I think on principle that the commissioners, even when they hear a case on appeal, are not giving a decision which can give rise to an estoppel. Further, I think the question is determined by the decision in *I.R. Comrs.* v. *Brooks* (2), in the House of Lords. I refer especially to the speech of LORD LOREBURN ([1915] A.C. at p. 482), where he sets out the relevant facts of the case and the decision of the House of Lords. I do not think that the decision of the Privy Council in *Hoystead* v. *Taxation Comr.* (4) is an authority to the contrary, because in that case the decision which was treated as giving rise to an estoppel was a decision not of the commissioners, but of the Australian High Court.

The views above expressed seem to me to render it unnecessary to enter into the question whether, if the decision of the commissioners could be treated as a decision of a court of record, it ought to be determined that the point whether the alleged deductions were rightly made was an essential part of the decision, or was only incidentally cognisable within the meaning of *R.* v. *Hutchings* (10). This is a question of some difficulty, but I think it better to reserve my views about it until it necessarily arises.

A On the question of estoppel, ROWLATT, J., did not give any reasons of his own. He considered himself bound by the decision of the High Court of Northern Ireland in *Aylmer* v. *Mahaffy* (5). We are not bound by that case, and in my judgment it was wrongly decided. It was argued for the committee, though not very strenuously, that the sums in question were proper deductions to be made from the total income of the lunatic in order to arrive at his net assessable income. In my judgment, this argument B ought not to succeed. By reason of his status as a lunatic the taxpayer is compelled by law to have his affairs managed under the lunacy laws. The costs of such management consist of a percentage payable to a government department, and the sum of £50 payable to the committee. These sums are, in my judgment, just as much payments out of income as similar payments would be in the case of an individual taxpayer who, for his own convenience, paid a bank or other agent a commission to look after his property C and manage his affairs.

In my judgment, the appeal should be allowed.

ROMER, L.J.—In this case the commissioners would have been prepared to accept the revenue's contention that the lunacy percentage and the committee's remuneration could not be deducted in computing the patient's income for the purposes of supertax, D had they not come to the conclusion that the revenue were estopped from so contending by reason of the decision of the Special Commissioners in the year 1918. ROWLATT, J., on appeal, came to the same conclusion. The first question to be determined, therefore, is whether the revenue are so estopped. In *Hoystead* v. *Taxation Comr.* (4) ([1926] A.C. at p. 170), the principle of estoppel at common law was stated, and, if I may respectfully say so, was, in my opinion, correctly stated by LORD SHAW as follows: E

> "If in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision."

F It is to be observed that the principle only applies to a decision of a court of competent jurisdiction. That this is so has been recognised in at least two reported cases. In *R.* v. *Hutchings* (10), an urban authority had in the year 1874 taken proceedings before the justices in petty sessions for the purpose of recovering summarily from one Hutchings his quota of the expenses alleged by the authority to have been incurred by them under s. 150 of the Public Health Act, 1875, in executing certain works in and over a street on G which Hutchings was a frontager. The section in terms only applies to streets that are not highways, and the justices dismissed the summons on the ground that the street in question was in fact a highway. In the year 1879 the urban authority took further summary proceedings against Hutchings under the same section for the purpose of recovering his quota of further expenses incurred by them in connection with the same street. It was held by the Court of Appeal that the authority was not estopped by the H decision of the justices in 1874 from alleging that the street was not a highway. The reason, as I understand the judgment, was that the justices had no jurisdiction to decide the question whether the street was a highway or not, although they necessarily had to form an opinion upon the matter before they could make an order upon Hutchings for payment. LORD SELBORNE said (6 Q.B.D. at p. 304):

> I "We are not in this case called upon to determine how far, or under what conditions, an order of a court of summary jurisdiction may operate between the parties to it as an estoppel. Assuming that it may do so to some extent, and under some conditions, I conceive it to be clear that it cannot so operate . . . as to any matter as to which that court had no authority to adjudicate directly and immediately between the parties."

Such, at any rate, was the view of the case taken by LORD DAVEY in the House of Lords in *Wakefield Corpn.* v. *Cooke* (13). He said ([1904] A.C. at p. 38):

> "They [that is to say the justices] had jurisdiction to decide whether a sum of money was due from a particular individual to the corporation, and for the purpose of determining that question it might be necessary for them incidentally to express an opinion upon the question of whether a road was a highway repairable by the inhabitants at large or not; but, supposing that to be so, that would not make an incidental determination of that kind res judicata in a subsequent proceeding in which that question came into prominence."

In the *Wakefield Corpn. Case* (13) the court of summary jurisdiction did have power to adjudicate upon that question so that their decision upon it became res judicata.

The principle applied in *Hutchings' Case* (10) was also applied by the Privy Council in *A.-G. for Trinidad and Tobago* v. *Eriché* (14). In rejecting the contention that certain proceedings taken before a stipendiary magistrate and on appeal from him to the Supreme Court of Trinidad constituted res judicata on a question of title to lands, LORD HOBHOUSE, who delivered the judgment of the Board, said ([1893] A.C. at p. 522):

> "It is hardly necessary to refer at length to authorities for the elementary principle that in order to establish the plea of res judicata the judgment relied on must have been pronounced by a court having concurrent or exclusive jurisdiction directly upon the point. In the *Duchess of Kingston's Case* (11), which is constantly referred to for the law on this subject, it is laid down that in order to establish the plea of res judicata the court whose judgment is invoked must have had jurisdiction and have given judgment directly upon the matter in question; but that if the matter came collaterally into question in the first court, or were only incidentally cognisable by it, or merely to be inferred by argument from the judgment, the judgment is not conclusive. In the present case the question of title is only incidentally cognisable by the magistrate and by the court sitting in appeal from him."

In these circumstances the contention of the committee that the revenue are estopped by the decision of the commissioners in the year 1918 from alleging that the lunacy percentage and the committee's salary are not permissible deductions from the patient's income for the purposes of supertax for the year 1928–1929, cannot, in any case, succeed if the commissioners, when deciding the proper amount of the patient's assessment to supertax for the years 1914–1918, had no jurisdiction to adjudicate directly and as a substantive issue on the question whether the sums in question could be deducted in other years. In my opinion they had no such jurisdiction. The duty of the commissioners, as I read the provisions of the Income Tax Acts, is to form an estimate in each year of assessment of the amount of the income of the taxpayer on which the surtax imposed for that year is to be charged. For this purpose the taxpayer is required to make a return of his income from all sources as defined by s. 5 of the Income Tax Act, 1918. With this to guide them, the commissioners have then to form their own estimate of the total income and to make an assessment accordingly. If the taxpayer is not content with such assessment he can bring the matter before the Special Commissioners by way of appeal. But the proceedings on the appeal are still merely directed towards ascertaining the income upon which the taxpayer is to be charged with surtax for the particular year of assessment, and the Special Commissioners may, if they think fit, increase the assessment made by them in the first instance. The appeal is merely another step taken by the commissioners, at the instance of the taxpayer, in the course of the discharge by them of their administrative duty of collecting the surtax. In estimating the total income of the taxpayer the commissioners must necessarily form, and perhaps express, opinions on various incidental questions of fact or law. But the only thing that the commissioners have jurisdiction to decide directly and as a substantive matter is the amount of the taxpayer's income for the year in question. This being so, their decision on any incidental question of fact or law, however necessary it may be for the purpose of ascertaining the income for the year of assessment, cannot, as it seems to me, be conclusive in reference to the ascertainment of the taxpayer's income for any subsequent year of assessment with which the commissioners have nothing to do, and in respect of which a fresh estimate will have to be made when the time comes, and possibly by other Special Commissioners.

For these reasons I am of the opinion that the decision of the Special Commissioners in the year 1918 does not estop the revenue from now raising the question whether the lunacy percentage and the committee's remuneration are proper deductions from the patient's income for the purpose of an assessment to supertax for the year 1928–1929. As to the question itself, it must, in my opinion, be answered in the negative for the reasons just given by the other members of the court, to which reasons I cannot usefully add anything. I accordingly agree that the appeal should be allowed.

Hills.—My Lord, we have made an agreement for taxation of costs, we to pay the other side's costs.

LORD HANWORTH.—Certainly.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Waterhouse & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

DIGBY *v.* PENNY

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), April 13, 1932]

[Reported [1932] 2 K.B. 491; 101 L.J.K.B. 615; 147 L.T. 221; 48 T.L.R. 403]

Agriculture—Agricultural holding—Compensation for disturbance—Notice to quit—Statement of reasons—Reference to section without giving particulars—Validity of notice—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 12 (1) (*a*), (*b*).

By the Agricultural Holdings Act, 1923, s. 12 (1): "Where the tenancy of a holding terminates by reason of a notice to quit given by the landlord, and in consequence of such notice the tenant quits the holding, then, unless the tenant—(a) was not at the date of the notice cultivating the holding according to the rules of good husbandry; or (b) had, at the date of the notice, failed to comply within a reasonable time with any notice in writing by the landlord served on him requiring him to pay any rent due in respect of the holding or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry; . . . and unless the notice to quit states that it is given for one or more of the reasons aforesaid, compensation for the disturbance shall be payable by the landlord to the tenant in accordance with the provisions of this section: . . ."

A landlord served on the tenant of one of his farms a year's notice to quit in the following form: "In accordance with s. 12 (1), paras. (a) and (b), of the Agricultural Holdings Act, 1923, we do hereby give you notice to quit." In pursuance of that notice the tenant quitted the farm and thereupon made a claim for compensation for disturbance on the ground that the form of notice to quit was not sufficiently in compliance with s. 12 to debar his claim for compensation for disturbance, in that it did not state that it was given for one or more of the reasons set out in that section.

Held: the notice as given was a sufficient compliance with the requirements of s. 12.

Per CURIAM: It was not unreasonable to hold that both landlord and tenant were acquainted with the terms of the statute under which the farm was held.

Notes. The Agricultural Holdings Act, 1923, has been repealed: the Agricultural Holdings Act, 1948, s. 24 (2) (d) corresponds sufficiently to s. 12 (i) (a), (b) of the Act of 1923 for this case to be an authority as to the construction of that provision. When s. 24 (2) (d) of the 1948 Act is applicable, the right to compensation for disturbance is excluded by the proviso to s. 34 (2).

As to the facts or reasons which must be stated in a notice to quit an agricultural holding, see HALSBURY'S LAWS (3rd Edn.) 285, para. 101 text and note (i). For the Agricultural Holdings Act, 1948, see 28 HALSBURY'S STATUTES (2nd Edn.) 25.

Appeal by the tenant from an order of JUDGE HYSLOP-MAXWELL, dated Feb. 11, 1932, made in the county court of Somersetshire, holden at Yeovil, on a Case Stated for the opinion of the court pursuant to Sched. II of the Agricultural Holdings Act, 1923.

The Case stated as follows:

1. Under a tenancy agreement, dated May 10, 1923, and made between Frederick James Bosworth Wingfield Digby, the landlord, of the one part, and Arthur Richard Penny, the tenant, of the other part, the tenant became the tenant of a farm, known as North Wootton Farm, in the parish of North Wootton and the county of Dorset, on a yearly Michaelmas tenancy.

2. A year's notice to quit was served on the tenant on Sept. 27, 1930, by Messrs. Rawlence and Squarey, as agents for the landlord, in the following form:

> "In accordance with s. 12 (1) paras. (a) and (b), of the Agricultural Holdings Act, 1923, we do hereby, as agents for and on behalf of Frederick James Bosworth Wingfield Digby, your landlord, give you notice to quit and deliver up possession of the farm, lands, and premises situated in the parish of North Wootton in the county of Dorset now in your occupation on Sept. 29, 1931, or at the expiration of the year of your tenancy which shall expire next after the end of one year from the service of this notice."

3. In pursuance of the said notice the tenant quitted the farm.

4. The tenant duly made a claim for compensation for disturbance, the due receipt of which was admitted by the landlord.

5. It was contended on behalf of the landlord that the form of notice to quit as served complied with the requirements of s. 12 of the said Act in stating the reasons for which it was given, namely: (a) That the tenant was not cultivating the holding according to the rules of good husbandry; and (b) that the tenant at the date of the notice had failed to comply within a reasonable time with a notice in writing by the landlord served on him to pay any rent due in respect of the holding, or to remedy any breach, being a breach which was capable of being remedied, of any term or condition of the tenancy consistent with good husbandry; and that under that section the tenant's claim for compensation was barred if those reasons could be substantiated.

6. It was contended on behalf of the tenant that the form of notice to quit was not sufficiently in compliance with s. 12 of the said Act to debar the claim for compensation for disturbance made by him in that it did not state that it was given for one or more of the reasons set out in that section.

The question for the opinion of the court was whether the contention of the landlord or of the tenant as stated therein was the correct one.

The county court judge held that the contention of the tenant was the right one.

The landlord appealed.

Monckton, K.C., and *W. M. Walker* for the landlord.

J. L. Pratt for the tenant.

SCRUTTON, L.J.—This appeal raises quite a short point, which has been very clearly argued. The Agricultural Holdings Act, 1923, provides generally that when a landlord turns out a tenant he must pay him compensation for disturbance, but he need not do so if he gives the tenant notice to quit for any of the six reasons mentioned in s. 12 (1) of the Act, and that reason is established. If, therefore, the landlord desires to avoid paying compensation he must see that the notice to quit states that it is given for one or more of those reasons. The question is whether the notice given in the present case has sufficiently stated the reasons. It is in these words:

> "In accordance with s. 12 (1) paras. (a) and (b) of the Agricultural Holdings Act, 1923, we give you notice to quit and deliver up possession of the farm, lands and premises . . ."

The reason mentioned in s. 12 (1), para. (a), is that the tenant was not at the date of the notice cultivating the holding according to the rules of good husbandry; the reason mentioned in sub-s. (1), para. (b), is that the tenant had, at the date of the notice, failed to comply within a reasonable time with any notice in writing by the landlord served on him requiring him to pay any rent due in respect of the holding, or to remedy any breach being a breach which was capable of being remedied of any term or condition of the tenancy consistent with good husbandry. If the landlord in giving his notice to quit had stated that it was given for the reasons set out in paras. (a) and (b), and had set out those clauses in extenso, counsel concedes that the tenant could not complain, although the notice did not give particulars of any breaches of obligation to conform to the rules of good husbandry. Moreover, when the Act intends that particulars shall be given it says so; see, for example, s. 16 (2). The question is whether this notice to quit, which is given under para. (a), is a good notice. I think it is. The county court judge thought not, on the ground that it was not sufficiently definite, and that the tenant could not be supposed to know the terms of s. 12 of the Act. I cannot take that view. In my opinion, it is not unreasonable to suppose that both landlord and tenant were acquainted with the terms of the statute under which the farm was held. I can see no substantial difference between

> "I give you notice to quit in accordance with s. 12 (1) (a) of the Agricultural Holdings Act" and "I give you notice to quit for the reason given in s. 12 (1) (a) of the Agricultural Holdings Act, which is that at the date hereof you are not cultivating the holding according to the rules of good husbandry."

The case does not admit of much argument. In my opinion, the notice to quit was sufficient, but I think it was somewhat clumsily drawn, and landlords who use it cannot have the costs of upholding it. But the appeal must be allowed.

GREER, L.J.—I am of the same opinion. An agreement in writing between a landlord and a tenant is like other written contracts in this respect, that its terms are to be found in the document and in any Act of Parliament which modifies the contract. It is not unreasonable to treat landlords and tenants as persons who ought to know what the terms of their contracts are, whether they are contained in a lease or in a statute. If the landlord is under an obligation to specify a matter of which he complains, the matter consists of the breach of a clause in the agreement, it would be enough for the landlord to say: "You have broken clause x of our agreement"; in the same way it is enough to exclude the landlord's liability to pay compensation for disturbance under s. 12 of the Act if he says: "I give you notice to quit for the reasons stated in sub-s. (1) (a) and (b) of s. 12 of the Agricultural Holdings Act, 1923." In my opinion, the notice as given was sufficient.

SLESSER, L.J.—I agree, and have nothing to add.

Appeal allowed.

Solicitors: *Dawson & Co.*, for *Ffooks & Grimley*, Sherborne; *Bridgman & Co.*, for *Lock, Reed & Lock*, Dorchester.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

DEWHURST AND ANOTHER *v.* HUNTER (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan) February 25, 26, April 14, 1932]

[Reported 146 L.T. 510; 16 Tax Cas. 605]

Income Tax—Company—Director—Loss of office—Articles of association giving right to compensation on resignation—Director accepting reduced remuneration—Waiver of right to compensation for loss of office on payment of lump sum—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. E.*

The articles of association of a limited company provided (a) (by art. 104) that the directors should be paid by way of remuneration such sums as the company should in general meeting determine, to be divided among the directors as the directors should decide; and (b) (by art. 109) that in the event of a director dying or resigning the company should pay to his personal representatives or to him "by way of compensation for the loss of office a sum equal to the total amount of the remuneration which in his five years of office last preceding the commencement of the financial year in which his death" or resignation should occur should have been received by him under art. 104. The remuneration of the directors was paid by the company free of tax. The chairman of the board of directors, D., desired to resign, but the other directors wished him to remain on the board although he would in future be unable to attend meetings regularly. D., therefore, offered to waive any future claim which he might have under art. 109, and suggested that he be paid £10,000 in cash and should, though ceasing to be chairman, remain a director at the (greatly reduced) salary of £250 per annum. The directors accepted these suggestions and the £10,000 was paid "as compensation for loss of office, in lieu of the provisions under art. 109." At a later date, without any request from D., the board resolved that "the sum of £2,900 be paid to [him] representing five years' income tax in respect of "the amount of £10,000 previously paid to him "as compensation for the loss of office in full settlement of any sum due or to become due under art. 109." Income tax was claimed under Sched. E in respect of both the £10,000 and the £2,900.

Held (LORD DUNEDIN and LORD MACMILLAN dissenting): neither sum was liable to income tax because neither was a profit from D.'s employment as a director, being paid, not in respect of past or future services, but in respect of the release of the company's contingent obligations under art. 109.

Notes. The Income Tax Act, 1918, Sched. E, was replaced by the Income Tax Act, 1952, s. 156.

Distinguished: *Prendergast* v. *Cameron*, [1939] 1 All E.R. 223. Considered: *Wales* v. *Tilley*, [1942] 2 All E.R. 22; *Calvert* v. *Wainwright*, [1947] 1 All E.R. 282; *Henley* v. *Murray*, [1950] 1 All E.R. 908. Applied: *Dale* v. *De Soissons*, [1950] 2 All E.R. 460. Referred to: *Van den Berghs, Ltd.* v. *Clark*, [1935] All E.R. Rep. 874; *Bush, Beach and Gent, Ltd.* v. *Road*, [1939] 3 All E.R. 302; *Duff* v. *Barlow* (1941), 85 Sol. Jo. 368; *Tilley* v. *Wales*, [1943] 1 All E.R. 280; *Wilson* v. *Nicholson, Sons and Daniels, Ltd., Wilson* v. *Daniels*, [1943] 2 All E.R. 732; *Bolam* v. *Muller* (1947), 28 Tax Cas. 471; *Anglo-French Exploration Co., Ltd.* v. *Clayson*, [1955] 3 All E.R. 779.

As to liability to tax under Sched. E of compensation for loss of office, see 20 HALSBURY'S LAWS (3rd Edn.) 324, 325, para. 593; for the Income Tax Act, 1952, s. 156, see 31 HALSBURY'S STATUTES (2nd Edn.) 149; and for cases on the subject see 28 DIGEST 85–88, *490–507*.

Cases referred to:

(1) *Chibbett* v. *J. Robinson & Sons* (1924), 132 L.T. 26; 9 Tax Cas. 48; 28 Digest 19, *98*.

(2) *Duncan's Trustees* v. *Inland Revenue*, 1909 S.C. 1212; 28 Digest 67, *c*.

(3) *Duncan's Executors* v. *Farmer* (*Surveyor of Taxes*) (1909), 5 Tax Cas. 417; 28 Digest 62, *n.*

(4) *Cowan* v. *Seymour*, [1920] 1 K.B. 500; 89 L.J.K.B. 459; 122 L.T. 465; 36 T.L.R. 155; 64 Sol. Jo. 259; 7 Tax Cas. 372, C.A.; 28 Digest 85, *490.*

(5) *Seymour* v. *Reed*, [1927] A.C. 554; 96 L.J.K.B. 839; 137 L.T. 312; 43 T.L.R. 584; 71 Sol. Jo. 488; 11 Tax Cas. 625, H.L.; Digest Supp.

(6) *Smyth* v. *Stretton* (1904), 90 L.T. 756; 53 W.R. 288; 20 T.L.R. 443; 48 Sol. Jo. 437; 5 Tax Cas. 36; 28 Digest 87, *505.*

(7) *Davis* v. *Harrison* (1927), 96 L.J.K.B. 848; 137 L.T. 324; 43 T.L.R. 623; 11 Tax Cas. 707; Digest Supp.

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.), on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The Case Stated as follows:

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on Oct. 25, 1929, for the purpose of hearing appeals, Commander H. Dewhurst appealed against assessments of £10,000 and £2,900 made upon him for the years 1923–24 and 1925–26 to income tax under Sched. E by the additional commissioners for the city of Manchester.

The company of Geo. and R. Dewhurst (1920), Ltd., hereinafter called "the company," was incorporated on March 16, 1920, to take over as a going concern a long-established cotton business belonging to Geo. and R. Dewhurst, Ltd. Commander Dewhurst was one of the promoters of the company and a large shareholder. He had been for some time a director of the previous company, and he also became chairman and a director of the new company. He was also one of the signatories to the memorandum and articles of association of the new company. He had no written contract of service with the company apart from the articles and resolutions hereinafter mentioned. By arts. 104 and 109 of the company, it was provided as follows:

> "104. The directors shall be paid out of the funds of the company by way of remuneration for their services such sums as the company in general meeting shall from time to time determine. Such remuneration shall be divided among them in such proportions and manner as the directors may determine, and in default of such determination within the year, equally. Such remuneration may be either by way of fees or commission or participation in profits, or by any or all of those modes or otherwise as the company in general meeting shall determine. The directors shall also be paid all hotel, travelling, and other expenses incurred by them in connection with the business of the company, including their travelling expenses of attending and returning from board and committee meetings."
>
> "109. In the event of any director dying or resigning his office, or in the event of any director ceasing to hold office for any cause other than misconduct, bankruptcy, lunacy or incompetence, the company shall pay to him or his representatives (as the case may require) by way of compensation for the loss of office a sum equal to the total amount of the remuneration which in his five years of office last preceding the commencement of the financial year in which his death, resignation, or cesser of office shall occur, shall have been received by him under cl. 104 hereof, but so that in computing the amount of the remuneration so received, there shall be excluded from account all sums received by him by way of commission or participation in profits or otherwise than by way of director's fees. No such compensation shall be paid in the case of a director who at the commencement of the financial year in which his death, resignation or cesser of office occurs, shall have held the office of director (whether continuously or discontinuously) for less than five years; but in the case of any person who shall have been a director of this company for less than five years, any period during which he held office as a director of the old company shall be added to, and computed with, the period for which he was a director of this company, and in that case the remuneration received by him in his character as a director of the old company, and by way of fees shall be deemed to have been remuneration received

by him as a director of this company. In computing for the purposes of this clause the amount of the fees received by any director, any sums deducted therefrom for income tax shall be reckoned as part of such fees. It shall rest solely with the directors to determine for what cause any director ceased to hold office, and their decision shall be final and conclusive."

At a meeting of the directors held on April 27, 1920, the following resolution was passed: That in pursuance of art. 124, Mr. Harry Dewhurst be and he is hereby appointed chairman of the meetings of directors. That the total yearly directors' fees which may be voted by the company in general meeting shall be divided amongst the directors in the following shares and proportions, namely, three-fifths of such total to Messrs. Harry Dewhurst, Gerard Powys Dewhurst, and Cyril Dewhurst in equal proportions and the remaining two-fifths of such total fees equally between Messrs. Thomas Percy Shelmerdine, Malcolme George Dewhurst Melville, Edward Sydney Arliss, Joseph Foster and Arthur Foster.

At an extraordinary general meeting of the company held on May 11, 1920, the following resolution was passed: That the remuneration of the directors commencing from March 31, 1920, shall be £12,500 per annum, to be divided in the proportions as fixed and approved of at the directors' meeting held April 27, last, namely:

Harry Dewhurst	£2,500	per annum
Gerard P. Dewhurst	2,500	,,
Cyril Dewhurst	2,500	,,
T. P. Shelmerdine	1,000	,,
M. G. D. Melville	1,000	,,
E. S. Arliss	1,000	,,
Joseph Foster	1,000	,,
Arthur Foster	1,000	,,

all payable half-yearly on March 31 and Sept. 30, income tax on the same to be borne by the company.

The following table shows the remuneration received by Commander Dewhurst as a director from Geo. and R. Dewhurst, Ltd., and the company for the five years up to 1922 inclusive, together with the appropriate income tax, which was also paid by the companies:

	Fees.	Income Tax.		
1918	£1,150	£492	15	0
1919	2,000	857	5	0
1920	2,375	1,017	15	0
1921	2,500	1,071	10	0
1922	2,125	708	0	0
	£10,150	£4,147	5	0

In 1923 Commander Dewhurst had removed his home to Scotland from Cheshire and wished to retire from active management of the company. After consulting his fellow directors, who wished to be able still to consult him about the business, he wrote the following letter:

"July 10, 1923.—My dear Powys,—I wish to give you notice that, at the next meeting of the directors of the company, it is my intention to resign my office as chairman. With regard to my future position in the company, and to the suggestions you submitted a short time ago, I have carefully considered these and venture to put the following proposal before you and my fellow directors: I waive any future claim under s. 109 in the articles of association. I be paid the sum of £10,000 (ten thousand) in cash. I remain on the board of the company, with a remuneration of £250 (two hundred and fifty) per annum free of income tax. Will you be good enough to submit these proposals at the next meeting?—Yours ever, (Signed) HARRY DEWHURST."

A

The following resolution was passed at the meeting of directors held Aug. 9, 1923:

> "That the board accept with great regret the resignation of Commander Harry Dewhurst as chairman of the company and that he be paid the sum of £10,000 as compensation for loss of office, in lieu of the provisions under cl. 109 of the articles of association of the company and that he be paid the sum of £250 per annum free of income tax as director of the company as from Aug. 1 last."

B

In pursuance of the above resolution £5,000 was paid to the respondent on Dec. 1, 1923, and a further £5,000 on Dec. 31, 1923. Having made a payment to Mr. Arthur Foster of £1,496 14s. 5d., the directors of the company, without any request from Commander Dewhurst, reconsidered the amount paid to him, and on Feb. 2, 1926, passed the following resolution:

C

> "That the sum of £2,900 be paid to Mr. Harry Dewhurst representing five years' income tax in respect of the amounts paid to him on Dec. 1 and 31, 1923, as compensation for loss of office in full settlement of any sum due or to become due to him under art. 109 of the articles of association of the company."

It was agreed that the sum of £2,900 was not calculated to represent the income tax exactly. The assessments appealed against were made to cover the amounts of £10,000 and £2,900 so paid to Commander Dewhurst. These sums were allowed as deductions in making the assessments under Sched. D upon the company. D

At the commencement of the financial year in which Commander Dewhurst resigned the office of chairman of the board of directors, he had held the office of director (either of the old company or the new company) continuously for not less than five years. At all material times he held the necessary number of qualifying shares as a director, both of the old and new companies as required by the respective articles. Evidence (which was accepted by the commissioners) was given by Commander Dewhurst to the following effect. Prior to 1923 he was residing in Cheshire and attending the company's office at Preston very often. When he moved to Perthshire his attendance necessarily became only occasional. If he had chosen, he would have been entitled to resign his position as director and then could have demanded the payment under art. 109. He was quite willing, however, not to resign his directorship altogether. He realised, however, that having moved to Perthshire, and being unable, in consequence, to attend the company's office as theretofore, he could not expect to receive as large a remuneration as director as he had hitherto received. He also realised that, owing to the reduction of his salary as a director to £250, the amount payable to him under art. 109, when he finally retired, would automatically decrease during each of the five succeeding years. His desire, therefore, on his resignation of the chairmanship, was to receive payment forthwith under art. 109. He realised, of course, that he could not reasonably ask for payment of the sum due under art. 109 twice over, and therefore in consideration of the company paying to him £10,000 in 1923, he agreed to make no further claim under art. 109 when he finally retired. E F G

On behalf of Commander Dewhurst it was contended that the assessments appealed against were wrongly made, the amounts received by him being in no sense income. H

On behalf of the inspector it was contended (inter alia):

(i) That regard must be had to the true legal nature and substance of the payments in question rather than to the particular words by which they were described in the articles and resolutions.

(ii) That art. 109 formed part of the respondent's original contract of service and under it the respondent had an absolute right to the payment therein mentioned upon fulfilment of the prescribed conditions. I

(iii) That the payments in fact made to the respondent were not (as contended on his behalf) payments made as compensation for relinquishing his rights under art. 109. The whole essence of the transaction was not that the respondent should give up his rights under that article, but that he should receive the payment which had accrued due to him thereunder, in 1923, instead of on his subsequent retirement. The arrangement was simply a modification by mutual consent of the terms of the original contract of service.

(iv) The payments of £10,000 and £2,900 in question flowed from and were payable by virtue of the respondent's original contract of service as subsequently modified and formed part of the consideration for his services. They were, therefore, payments for his services and profits of his office.

(v) Even if the time of payment had been the termination of the office, this would have been immaterial, but in point of fact the office in respect of which the payments were made, namely, that of director, had not terminated at the time of payment or subsequently.

(vi) The fact that the payments took the form of a lump sum did not prevent their being profits of the office.

(vii) The payments were neither compensation for loss of income, nor a solatium or testimonial, but were profits of the office and were income.

(viii) That the said assessments were rightly made and should be confirmed.

The commissioners who heard the appeal considered that the payments were not to be regarded as remuneration paid to directors qua directors and continuing to be directors, but as given to the directors when they resigned and because they had resigned. They held, therefore, that they were not payments for services, but a "solatium" given upon retirement. Such payments were not in their opinion "taxable as a profit": (see *Joseph Chibbett* v. *Robinson & Sons* (1). They accordingly discharged the assessment.

Immediately upon the appeal being determined by the commissioners, the inspector of taxes expressed to them his dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149. The Court of Appeal held, reversing the decision of ROWLATT, J., that payments made under art. 109 to directors were not in the nature of fortuitous payments but in respect of services rendered as directors, there being a direct relation between the holding of the office of director and the right to payment of the sums, and the company contracted by the articles of association to make such payments as part of the remuneration of directors. The sum payable was a profit from the holding of the office of director, the payment of which could have been enforced by action. Commander Dewhurst having died since the decision of the Court of Appeal, his personal representatives appealed.

Raymond Needham, K.C., and *J. H. Stamp* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*), the *Solicitor-General* (*Sir Boyd Merriman, K.C.*) and *R. P. Hills* for the respondent.

The House took time for consideration.

April 14. The following opinions were read.

LORD DUNEDIN.—The question in this Case is whether certain sums of money which were paid by a company, G. and R. Dewhurst, Ltd., to the late Commander Dewhurst, who was a director, were liable to be assessed for income tax under Sched. E. Commander Dewhurst was, as said, a director of the limited company, and his remuneration depended on two articles of association, art. 104 and art. 109, which were in the following terms: [His Lordship read the articles and continued:] There were among the other directors two directors, Arthur and Joseph Foster.

At an extraordinary general meeting of the company held on May 11, 1920, the following resolution was passed:

> "That the remuneration of the directors commencing from March 31, 1920, shall be £12,500 per annum, to be divided in the proportions as fixed and approved of at the directors' meeting held April 27 last, namely:—

	Per annum.
Harry Dewhurst	£2,500
Gerard P. Dewhurst	2,500
Cyril Dewhurst	2,500
T. P. Shelmerdine	1,000
M. G. D. Melville	1,000
E. S. Arliss	1,000
Joseph Foster	1,000
Arthur Foster	1,000

> all payable half-yearly on March 31, and Sept. 30, income tax on the same to be borne by the company." A

Arthur Foster resigned on Jan. 1, 1926, and Joseph Foster on Nov. 10, 1927. In both cases sums were calculated under the terms of art. 109 and paid. As to Arthur no question was raised. As to Joseph there were certain questions, but they may be disregarded. In the end he was paid the sums which were agreed to be due under art. 109. Commander Dewhurst wished to retire in 1923, but the other directors wished to keep B him although he was going to change his residence and would not be able to attend the company's meetings with the same regularity as before. Commander Dewhurst, on July 10, 1923, wrote the following letter:

> "July 10, 1923. My Dear Powys,—I wish to give you notice that, at the next meeting of the directors of the company, it is my intention to resign my office as chairman. C With regard to my future position in the company, and to the suggestions you submitted a short time ago, I have carefully considered these and venture to put the following proposal before you and my fellow directors: I waive any future claim under s. 109 in the articles of association. I be paid the sum of £10,000 (ten thousand) in cash. I remain on the board of the company, with a remuneration of £250 (two hundred and fifty) per annum free of income tax. Will you be good enough to submit these proposals at the next meeting.—Yours ever, (Signed) D HARRY DEWHURST."

The following resolution was passed at the meeting of directors held on Aug. 9, 1923:

> "That the board accept with great regret the resignation of Commander Harry Dewhurst as chairman of the company and that he be paid the sum of £10,000 as compensation for loss of office, in lieu of the provisions under cl. 109 of the articles E of association of the company and that he be paid the sum of £250 per annum free of income tax as director of the company as from Aug. 1 last."

In pursuance of the above resolution £5,000 was paid to the respondent on Dec. 1, 1923, and a further £5,000 on Dec. 31, 1923.

When the Fosters were both settled with, the directors, without any application by Commander Dewhurst, on Feb. 2, 1926, passed the following resolution: F

> "That the sum of £2,900 be paid to Mr. Harry Dewhurst representing five years' income tax in respect of the amounts paid to him on Dec. 1 and 31, 1923, as compensation for loss of office in full settlement of any sum due or to become due to him under art. 109 of the articles of association of the company."

The additional commissioner for the city of Manchester assessed for income tax the G said sums of £10,000 and £2,900, and also the sums paid to the Fosters. All three appealed to the Commissioners for Special Purposes who discharged the assessments but stated a special case. ROWLATT, J., confirmed the judgment of the Special Commissioners. Appeal being taken by the inspector of taxes, the Court of Appeal reversed the judgment of ROWLATT, J., and restored the amount taxed by the additional commissioner. The two Fosters have not appealed, but Commander Dewhurst has appealed. He has since died and his executors are substituted for him. H

ROWLATT, J., treated all three cases as raising the same point and decided them on that point. He considered that the sums in question did not fall within the description in Sched. E, holding that they were not paid in respect of the office of director but were compensation for retirement from the office. He considered that what he was holding was in accordance with what had been laid down in the case of *Duncan's Trustees* v. *Inland Revenue* (2) and alluded to a sentence of mine in my judgment in that case. I The sentence in question is, I believe, the following (1909 S.C. at p. 1215):

> "I confess I have never been able to see how it could possibly be said to be in respect of his office, when the whole reason it was given to him was that he was no longer in the office."

Duncan v. *Farmer* (3) is not binding on your Lordships, but I think that it was rightly decided, and I had in accordance with my own view the weighty authority of LORD KINNEAR. But what were the facts? A completely extraneous society granted Mr.

Duncan, the minister of the parish of Crichton, an annuity of £100 a year on condition of his complete resignation of the position of minister. He did resign, and was then given the annuity. Applied to the facts, I think the sentence quoted was correct. The payment came to him in no sense by virtue of his office, but I think it has no relation to the facts here. Here the payment made was part of the contract under which they all served and in respect of the services rendered while they served. I do not consider that the mention of the words "in consideration of loss of office" can be allowed to make a change in the true nature of the payment and the true nature of the payment, in my opinion, was just deferred remuneration. The distinction between *Duncan's Case* (3) and a case of this sort was seen and commented on by the Master of the Rolls in *Cowan* v. *Seymour* (4). Nor do I think that *Chibbett's Case* (1), which, of course, does not bind me, is really antagonistic to what I am saying. I do not need to say that I think the decision in *Chibbett's Case* (1) was wrong. Indeed, I think that it was right. In that case the payment was purely voluntary. The ex post facto alteration of the articles did not make it contractual. The mere statement that it was in respect of the loss of service as manager does not alter the voluntary quality of the payment. Here the whole point is that the payment is contractual and the contract is as to the terms of remuneration for the office.

Assuming, however, that the view of the Court of Appeal, and my own view, is right, on consideration of how the question stood on the sole consideration of the rights arising under art. 109, it is obvious that there is still another question to be raised before the present case can be disposed of. Commander Dewhurst was not paid in terms of art. 109. He entered into a new bargain which was concluded by the letter quoted. Now it is urged for him that the payment of £10,000—and the other payment is a mere corollary to it—was a lump sum given in consideration, not of ceasing to be a director, for he did not cease, but of giving up his potential claims under art. 109, and that that is not income. The reason for the arrangement is clear enough. If it had not been made and his salary had been reduced to £250, then if he still remained a director for some time the five years calculated under art. 109 would be on a very reduced figure. Therefore, he said, give me £10,000 down and pay me £250, and I will give up all claim under art. 109.

In my opinion that was a mere change of calculation and the quality of the payment remained as before and, as I have said, was deferred payment for past services rendered. I am, therefore, of the opinion that the appeal should be dismissed with costs.

LORD WARRINGTON.—The appellants are the executors of Commander Harry Dewhurst, deceased, and the question is whether the said Harry Dewhurst was liable to be assessed to income tax under Sched. E in respect of three sums of £5,000, £5,000, and £2,900 paid to him by Geo. and R. Dewhurst (1920), Ltd., as to the two sums of £5,000 each in December, 1923, and as to the sum of £2,900 in February, 1926, as being profits from his employment as a director of the company. The Special Commissioners decided against the Crown, and their decision was upheld by ROWLATT, J., but his judgment was reversed by the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.JJ.). Harry Dewhurst died on June 27, 1931, and the present appellants were made parties to the proceedings in his place.

Geo. and R. Dewhurst (1920), Ltd., hereinafter called "the company," was incorporated in 1920 to take over an old-established cotton-spinning business then carried on by Geo. and R. Dewhurst, Ltd. The said Harry Dewhurst had been a director of that company, and was an original director and chairman of the company.

The remuneration of the directors was fixed by the joint operation of art. 104 of the articles of association, and by a resolution of an extraordinary meeting of the company held on May 11, 1920, at the sum of £12,500, of which the share of the said Harry Dewhurst was £2,500, free of income tax, which was borne and paid by the company. By art. 109 of the articles of association provision was made for the payment to a director who resigned his office "by way of compensation for the loss of office," of a sum equal to the total amount of his remuneration for the preceding five years, including in the case of a director of the old company his service with that company, and sums deducted for income tax were to be treated as part of his fees.

The total remuneration of the said Harry Dewhurst for the five years 1918 to 1922 inclusive was £10,150, and the income tax thereon amounted to £4,147. Accordingly, had he retired in July, 1923, he would, under his then existing contract with the company have been entitled to receive under art. 109, "by way of compensation for loss of office," £14,297.

In 1923 he had removed his home to Scotland from Cheshire and wished to retire from active management of the company. After consulting with his fellow directors who wished still to consult him about the business he wrote to the secretary of the company a letter dated July 10, 1923, in the following terms:

> "I wish to give you notice that at the next meeting of the directors of the company it is my intention to resign my office as chairman.
>
> "With regard to my future position in the company and to the suggestion you submitted a short time ago, I have carefully considered these, and venture to put the following proposals before you and my fellow directors: I waive any future claim under sect. 109 of the articles of association. I be paid the sum of £10,000 in cash. I remain on the board with a remuneration of £250 per annum free of income tax. Will you be good enough to submit these proposals at the next meeting."

On Aug. 9, 1923, the directors passed the following resolution:

> "That the board accept with great regret the resignation of Commander Harry Dewhurst as chairman of the company and that he be paid the sum of £10,000 as compensation for loss of office in view of the provisions under cl. 109 of the articles of association of the company and that he be paid the sum of £250 per annum free of income tax as director of the company as from Aug. 1 last."

The sum of £10,000 was paid to Harry Dewhurst in two cheques of £5,000 each, one on Dec. 1, 1923, and the other on Dec. 31, 1923. Subsequently, namely, in the year 1926, the directors, without any request in that behalf from Harry Dewhurst, reconsidered the amount paid to him, and on Feb. 2, in that year passed the following resolution:

> "That the sum of £2,900 be paid to Mr. Harry Dewhurst, representing five years' income tax in respect of the amounts paid to him on Dec. 1 and 31, 1923, as compensation for the loss of office in full settlement of any sum due or to become due to him under art. 109 of the articles of association of the company."

This sum of £2,900 was duly paid in accordance with the resolution. It is agreed that this sum was not arrived at by an exact calculation of the amount of income tax.

The question then is: Can the sums of £10,000 and £2,900 properly be regarded as forming part of the annual income of Harry Dewhurst for the years 1923–24 and 1925–26 respectively?

It is hardly necessary to state that the tax in question is a tax on income under whichever of the schedules it is charged. In the present case the tax is charged under Sched. E. namely, in respect of every public office or employment of profit . . . for every 20s. of the annual amount thereof. "Thereof" must in this connection mean "of such profit." Under r. 1 the tax is to be annually charged on every person exercising an office or employment of profit mentioned in the schedule in respect of all salaries, fees, perquisites or profits whatsoever therefrom for the year of assessment. Amongst the offices of profit mentioned in the schedule are offices or employment of profit under any company, or society, whether corporate or not corporate. "Profits therefrom" seem to mean profits from the office. That the mere fact that the payment in question is made to the employee as the result of or in connection with his employment is not enough to render it liable to tax is shown by *Seymour* v. *Reed* (5). The circumstances under which the payment was made must all be taken into account.

This case may, in my opinion, be decided against the Crown on the very special circumstances under which the payments in question were made. The two sums of £5,000 each, being instalments of the sum of £10,000, were paid in performance of one item in a complex agreement, the main object of which was to enable Harry Dewhurst to be relieved of the necessity of regular attendance at the company's offices or works as chairman, and at the same time to avoid his complete retirement from the board. He was desirous of going to live in Scotland, and the company were willing that he should do so, and attend occasionally only as a director. He was not retiring altogether, and therefore had no claim under art. 109, but unless some arrangement were made there would be a claim on his future retirement or death and the amount would diminish with every year owing to the low salary payable to him as director under the new arrangements, and accordingly he disclaimed all rights for himself and his executors under art. 109; the directors on the other hand agreeing to pay the sum in question.

In my opinion this sum was not a profit from his employment as director. It was paid not by way of remuneration for past services or of services thereafter to be performed, but in performance of an arrangement under which Harry Dewhurst was enabled to give only occasional attendance at the board and thereby enjoy his residence in Scotland while at the same time the company did not lose altogether the benefit of his help. No part of the sum so paid represented salary retained either in the past or in the future. On the whole I think in the special circumstances of this case the sum of £10,000 cannot according to the true construction of the statute be held liable to income tax as profits arising from the employment. In the case of the £2,900, I think the same result must follow. This sum was a mere voluntary accretion to the original £10,000.

As this case, in my opinion, may be decided on its special circumstances, I think it is undesirable to discuss the more general question as to the position of sums payable under art. 109 or similar provisions. This question arose in the two cases relating to the retirement of the two Messrs. Foster heard in the Court of Appeal prior to, and followed by them in, the present case, and may come before this House, and therefore should, I think, be left open. For myself, all I decide is that these sums are under the special circumstances purely capital sums paid as such under a special agreement and are therefore not liable to be charged as "profits," from the employment.

In my opinion the appeal should be allowed with costs here and below, and the order of ROWLATT, J., should be restored.

LORD ATKIN (read by LORD TOMLIN).—The question is whether the sums of £10,000 paid to the appellant in 1923 and £2,900 paid to him in February, 1926, were payable to him as "salaries, fees, wages, perquisites or profits whatsoever from" his office of director of Geo. R. Dewhurst (1920) Ltd., pursuant to Sched. E of the Income Tax Act, 1918. Under the terms of the articles of association and resolution of the company of May 11, 1920, the appellant was a director entitled until the company should otherwise resolve to remuneration of £2,500. He would also be entitled under the articles at any time that he vacated his office of director to a lump sum payment equal to the total remuneration he had received for the last five years. This sum is expressed in the article to be "by way of compensation for loss of office." I will assume, without expressing any opinion on the matter, that this sum if received by any ex-director would fall within the words "salary or profit whatsoever," and would come "from" the office of director, as being part of the remuneration which he was entitled to under his contract of employment. But the circumstances in which the first payment was made seem to me to negative the proposition that the payment was received "from" the office. Rule 1 appears to me to indicate emoluments either received from the employer or from some third party (such as tips, permitted commission, and the like) as a reward for services rendered in the course of the employment. In the case of Commander Dewhurst the sum received was paid to him in consideration that he should not receive remuneration for his services as agreed. He desired to do his work in circumstances in which he could not expect the company to permit him to receive £2,500 per annum. His alternative was to retire, in which case he would be entitled to receive under art. 109 a sum in excess of £10,000, or to continue as a director at a smaller remuneration, in which case on retirement he would get under the article a much smaller lump sum. To induce him not to retire the company agreed to give him a lump sum of £10,000 in consideration of which he agreed to release them from the obligations under art. 109 both in the past and in the future. He entered into no bargain to serve the company for any particular time; the only arrangement was that as long as he remained a director he was to get a salary of £250 a year with no recourse to art. 109. The company were obviously content with this, for though he might retire at any time they were under no obligation to pay him A more, indeed, they had agreed to pay him less, than he could have claimed if he had retired at the time the arrangment was made. The £10,000 was not paid for past remuneration; for the condition of its becoming payable, i.e., loss of office, never was performed. It was not paid for future remuneration, for that was expressed to be £250 per annum, which was to be the sole remuneration. It seems to me that a sum of money paid to obtain a release from a contingent liability under a contract of employment B cannot be said to be received "under" the contract of employment, is not remuneration for services rendered or to be rendered under the contract of employment, and is not received "from" the contract of employment. On this short ground I think that the decision of the Special Commissioners and of ROWLATT, J., were right, and that this appeal should be allowed and the decision of ROWLATT, J., restored with costs here and below. C

LORD THANKERTON.—The question in this appeal is whether the late Commander H. Dewhurst was liable to be charged income tax under Sched. E of the Income Tax Act, 1918, in respect of two sums of £10,000 and £2,900 paid to him by Geo. and R. Dewhurst (1920), Ltd., of which company he was a director, as being profits arising to him from the office of director of the company. D

Geo. and R. Dewhurst (1920), Ltd. (hereinafter called "the company"), was incorporated in March, 1920, to take over an old-established cotton-spinning business, which had belonged formerly to a partnership of Geo. and R. Dewhurst, and later to a company known as Geo. and R. Dewhurst, Ltd. Commander Dewhurst was a partner in Geo. and R. Dewhurst, a director of Geo. and R. Dewhurst, Ltd., and original director and chairman of the company. He had no written contract of service with the company, E but the terms of his service rested on the articles of association and certain resolutions of the company referred to later.

Article 104 and art. 109 of the company provide as follows. [His Lordship read the articles and continued:] By resolutions of the directors of April 27, 1920, Commander Dewhurst was appointed chairman of the meetings of directors and the proportions were fixed for division among the eight directors of the total yearly sum for directors' fees F which might be voted by the company in general meeting. In 1923 Commander Dewhurst had removed his home to Scotland from Cheshire and wished to retire from active management of the company. After consulting his fellow directors, who wished to be able still to consult him about the business, he wrote a letter dated July 10, 1923, in which he gave notice of his intention to resign his office as chairman at the next meeting of directors, and further stated: G

> "With regard to my future position in the company, and to the suggestions you submitted a short time ago, I have carefully considered these and venture to put the following proposals before you and my fellow directors:
>
> "'I waive any future claim under s. 109 in the articles of association. I be paid the sum of £10,000 (ten thousand) in cash. I remain on the board of the company, with a remuneration of £250 (two hundred and fifty) per annum free of income tax. H Will you be good enough to submit these proposals at the next meeting.'"

At the meeting of directors held on Aug. 9, 1923, the following resolution was passed:

> "That the board accept with great regret the resignation of Commander Harry Dewhurst as chairman of the company, and that he be paid the sum of £10,000 as compensation for loss of office, in lieu of the provisions under clause 109 of the articles I of association of the company, and that he be paid the sum of £250 per annum free of income tax as director of the company as from Aug. 1 last."

In pursuance of the above resolution £5,000 was paid to Commander Dewhurst on Dec. 1, 1923, and a further £5,000 on Dec. 31.

In January, 1926, Mr. Arthur Foster, who was also a director of the company, resigned his directorship and was paid compensation as provided by art. 109 of the company. On receipt of a cheque for the amount, Mr. Foster questioned its accuracy in respect that in computing the fees received by him for the preceding five years, the provision of art.

109 that any sums deducted therefrom for income tax should be reckoned as part of the fees and had not been taken into account; the error was corrected and a further cheque was sent to Mr. Foster. Having realised that this point had been absent from their minds also in the case of Commander Dewhurst, the directors—without any request from him—reconsidered the amount paid to him, and on Feb. 2, 1926, passed the following resolution:

> "That the sum of £2,900 be paid to Mr. Harry Dewhurst representing five years' income tax in respect of the amounts paid to him on Dec. 1 and 31, 1923, as compensation for loss of office in full settlement of any sum due or to become due to him under art. 109 of the articles of association of the company."

In respect of the two sums of £10,000 and £2,900 so paid, Commander Dewhurst was assessed to income tax under Sched. E for the years 1923–24 and 1925–26, and he appealed to the Special Commissioners. At the same time, appeals were also taken by Mr. Arthur Foster, above mentioned, and Mr. Joseph Foster, a third director who had also resigned and received compensation payable by reference to art. 109, against assessments made upon them under Sched. E in respect of the sums paid to them on resignation. The commissioners sustained all three appeals, which were heard at the same time, and discharged the assessments. Their reasons are given in the stated Case as follows:

> "We did not think that we could or ought to draw any distinction between the three cases, although payment under art. 109 in one case—that of Mr. Arthur Foster—was made directly under the article; in the second case—that of Mr. Joseph Foster—was made to some extent as the result of negotiation; and in the present case was made by way of compromise of existing and future rights Commander Dewhurst remaining on as a director, but upon a reduced scale. We considered that the payments in all three cases were not to be regarded as remuneration paid to directors qua directors and continuing to be directors, but as given to directors when they resigned and because they had resigned. We held, therefore, that they were not payments for services, but a 'solatium' given upon retirement. Such payments are not, in our opinion, 'taxable as a profit': (see *Chibbett* v. *Joseph Robinson & Sons* (1))."

On an appeal by the Crown in the three cases, the decision of the commissioners was affirmed by ROWLATT, J., who also heard the cases together. On a further appeal by the Crown, the Court of Appeal in each case allowed the appeal and reversed the determination of the commissioners, although the appeal in Commander Dewhurst's case was heard and decided at a later date than the other two cases. No appeal has been taken against the order of the Court of Appeal in the two cases of Messrs. Foster, but, Commander Dewhurst having died shortly after the decision of the Court of Appeal, the present appeal is taken by his executors.

The decision of the appeal appears to depend on the answer to two questions, namely, (a) whether the two sums of £10,000 and £2,900 arose from the office of director within the meaning of Sched. E, r. 1; and (b) whether these sums constituted income or were of a capital nature?

In order to answer the first question it is necessary to have particular attention to the nature of the circumstances under which these two sums were paid to Commander Dewhurst. At the time when the £10,000 was paid he could have chosen to resign his office of director and would then have been entitled under art. 109 to a sum equal to the previous five years' fees, which amounted to £10,150, along with the amount of income tax deducted therefrom, which came to £4,147; as already explained, this latter point was not taken into account when the £10,000 was paid. But he remained a director, and the payments made to him were not made under art. 109; on the contrary, though he remained a director he entered into a new contract with the company, under which he released the company from their obligations under art. 104 and art. 109, and received the sums of £10,000 and £2,900 and £250 per annum free of tax as director's remuneration, on the footing that his attendance as such would be only occasional. Accordingly, the £10,000 was not a voluntary payment or gift, but was an obligatory payment under the new contract, and, looking at the substance of the transaction, there can be little doubt that it formed the consideration for the company's release from their contingent obligations under art. 109. Although the £2,900 was not paid until over two years later, under the circumstances already referred to neither party sought to differentiate it from the £10,000 in argument, and I therefore treat it as a payment of identical character with the £10,000 payment, although there would appear to be some ground for maintaining that it was a voluntary gift.

In the first place, it seems clear to me that the £10,000 did not, in any sense, represent a reward or return for services rendered as a director under the previous arrangement with the company, and it is clear that it was not a reward or return for services as a director to be rendered in the future, for the payment of the £10,000 was in no way conditional on such service, and the remuneration for such service was otherwise provided for by the new arrangement. It is clear, in my opinion, that a payment in terms of art. 109 to a director, who has in fact resigned, is contractually part of the consideration for his services as a director, and would be correctly described as arising from the office of director, but there would remain the question whether it was in the nature of income or not. In the view that I take in this case I find it unnecessary to resolve that question.

The payments to Commander Dewhurst, although the basis of their calculation was similar to that of art. 109, were made at a time when his rights under art. 109 were contingent only and they were not made under that article, but in respect of the release of the company from their contingent liability. It also relieved Commander Dewhurst from the risk of misconduct, bankruptcy, lunacy or incompetence, and from the period of service in respect of which the right would accrue. They were payments for release from the obligations of art. 109, and they did not arise from the contract of service; in my opinion, accordingly, they did not arise from the office of director, but in spite of it. It seems to follow clearly that they were not in the nature of income at all, but an isolated payment once and for all.

The whole question in the present case turns on the existence of the contractual art. 109, and therefore cases of payments by parties other than the employer, such as *Duncan's Trustees* v. *Inland Revenue* (2) and *Cowan* v. *Seymour* (4), the case of a gift by shareholders, appear to have little bearing on the present case. Nor do I find the other cases under Sched. E, which were cited, of much assistance, as none of them involved the release of an obligation in the contract of service: (*Smyth* v. *Stretton* (6), which was not actually cited; *Seymour* v. *Reed* (5); *Davis* v. *Harrison* (7)). Similarly, cases under Sched. D have little relevance to the question whether a payment arises from an office within the meaning of Sched. E.

I am therefore of opinion that the appeal should be allowed, and that the judgment of the King's Bench Division, affirming the decision of the Special Commissioners, ought to be restored.

LORD MACMILLAN.—The appellants are the executors of the late Commander Dewhurst who was a director of Geo. and R. Dewhurst (1920), Ltd., a company which was incorporated on March 16, 1920, to take over as a going concern the business of a company known as Geo. R. Dewhurst, Ltd. Prior to his entering into the arrangement with the company which has given rise to the present question, Commander Dewhurst was entitled under art. 104 of the company's articles of association and a relative resolution of the company of May 11, 1920, to receive for his services as director an annual sum of £2,500 free of income tax. He was also entitled under art. 109, in the event inter alia of his resigning his office as director, to payment from the company, "by way of compensation for the loss of office," of a sum equal to the total amount of the remuneration received by him as a director during his five years of office preceding the commencement of the financial year in which his resignation should occur. It was provided that directors who, as was the case with Commander Dewhurst, had previously been directors of the old company, whose business had been taken over by the present company, should be allowed, for the purpose of calculating the payment to them on resignation, to reckon their years of service with the old company as years of service with the new company. Any sums deducted from a director's remuneration for income tax were to be reckoned as part of his fees for the purpose of computing the payment.

What happened was that Commander Dewhurst in 1923 proposed for personal reasons to retire from the board. On his resignation he would have been entitled to receive payment from the company of a sum calculated in terms of art. 109. His colleagues, however, desired him to remain on the board for purposes of consultation and he accordingly put before them on July 10, 1923, a proposal that (i) he should resign his office as chairman, (ii) he should waive any future claim under art. 109, (iii) he should be paid £10,000 in cash, and (iv) he should remain on the board with a remuneration for the future of £250 per annum free of tax. The board on Aug. 9, 1923, accepted his resignation of the chairmanship and resolved that:

> "he be paid £10,000 as compensation for loss of office in lieu of the provisions under cl. 109 of the articles of association of the company and that he be paid the sum of £250 per annum free of income tax as director of the company as from Aug. 1 last."

The sum of £10,000 was duly paid to him. It was subsequently realised that in making this payment the provision in art. 109 that income tax deducted from a director's fees should be reckoned as part of his fees for the purpose of computing the payment to be made under that article had been overlooked. The directors accordingly on Feb. 2, 1926, without any request from Commander Dewhurst, reconsidered the amount paid to him and resolved to pay him £2,900 representing five years' income tax in respect of the £10,000 previously paid to him. This additional sum was thereupon also paid to him. The sum of £2,900 did not represent the result of an exact calculation of the income tax. Both sums were allowed as deduction in the assessments on the company under Sched. D.

Assessments under Sched. E having been made on Commander Dewhurst in respect of the sum of £10,000 for the year 1923–24 and in respect of the sum of £2,900 for the year 1925–26, the Special Commissioners discharged these assessments on the ground that the sums in question had not been paid as remuneration for services but had been given as a "solatium" on retirement. They referred in support of this view to *Chibbett* v. *Joseph Robinson & Sons* (1). ROWLATT, J., on appeal affirmed the decision of the Special Commissioners, his ground of judgment being that the sums in question were paid not in respect of services rendered in the office of director but in respect of the cessation of that office. The learned judge quoted and held applicable the following words which he had used in giving judgment in the case of *Chibbett* v. *Joseph Robinson & Sons* (1) (9 Tax Cas. at p. 61):

> "If it was a payment in respect of the termination of their employment I do not think that is taxable. I do not think that is taxable as a profit. It seems to me that a payment to make up for the cessation for the future of annual taxable profits is not itself an annual profit at all."

He also cited the Scottish case of *Duncan's Trustees* v. *Inland Revenue* (2) as authority for the proposition that a payment in respect of ceasing to hold an office cannot be taxable as a profit of that office.

The Crown appealed from the decision of ROWLATT, J., to the Court of Appeal, which unanimously reversed his judgment, holding that the payments came directly within the language of rule 1 applicable to Sched. E. The question is now before your Lordships on the appeal of Commander Dewhurst's executors.

Under r. 1 of the Rules applicable to Sched. E "all salaries, fees, wages, perquisites or profits" from any public office or office of employment for the year of assessment are brought into charge. Do the two payments made to Commander Dewhurst fall within these comprehensive words? In my opinion they do. He received these payments in consideration of his agreeing to vary the existing terms on which he held his office of director and consenting to continue to hold that office on those altered terms. If he had not been prevailed upon to alter his original intention and had finally resigned his position of director he would have been entitled there and then to payment from the company of a sum calculated under art. 109. That payment would have been made to him in pursuance of the terms on which he had held his office of director and as such would have been a profit directly arising from his office. The circumstance that a payment is described as "compensation for loss of office" is to my mind immaterial if the payment be in truth made as part of the bargain for remuneration on which the services in the office have been rendered.

As it happens, the cases of two of the other directors of this company, Mr. Arthur and Mr. Joseph Foster, who resigned in 1926 and 1927 and received payments under art. 109, have been the subject of decision in the Court of Appeal where it was held that the payments so made to them were taxable as profits arising from the office of director held by them. That decision has not been appealed to your Lordships' House, but the judgments of the lords justices are before your Lordships and show that they regarded the present case as covered by it, if not indeed a fortiori of it. If that decision was well founded, as I think it was, then what Commander Dewhurst did in accepting £10,000 down (with a sum subsequently added in name of income tax) "in lieu of the provisions of art. 109," to quote the board's resolution, was to take a substituted sum in place of a sum which would have been liable to tax as profits of his office of director. I cannot see why this substituted sum should be exempt if the sum for which it was substituted would not have been. Moreover, Commander Dewhurst did not lose his office of director; he agreed to continue to hold it but on a reduced remuneration and in consideration of a payment in cash down. The whole arrangement was nothing but a new bargain as to the payments he should receive from the company in respect of his services to it.

I would only add that the facts in *Duncan's Case* (2) differ widely from those of the present case. There the retiring minister had no legal right to receive the annuity which the committee of a charitable fund of the Church of Scotland voted him. It was given to him not in respect of his services but in respect of his agreeing to cease to give his services. And as to *Chibbett's Case* (1), there a firm of ship managers who had been employed by a steamship company lost the benefit of this employment in consequence of the company going into liquidation and received by way of compensation a sum of money out of the surplus assets of the company. The terms on which the ship managers had been employed gave them no right whatever to this sum and their services had already received full remuneration. It was in the course of his judgment holding the payment to the ship managers not to be a taxable profit of their employment that ROWLATT, J., used the words which I have quoted above and which he himself quoted in his judgment in the present case. I am disposed to regard them as too widely expressed, for remuneration for services may take in part the form of a payment at the end of the employment, and a payment does not necessarily cease to be remuneration for services because it is payable when the services come to an end. Here, however, the circumstances, as I have pointed out, are quite different from those in *Chibbett's Case* (1).

I am accordingly of opinion with your Lordship on the woolsack that the appeal should be dismissed.

Appeal allowed.

Solicitors: *Pritchard, Englefield & Co.* for *Wilson, Wright, Earle & Co.*, Manchester; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

R. v. JUDGE CLEMENTS. Ex parte FERRIDGE.

[KING'S BENCH DIVISION, (Lord Hewart, C.J., Avory and MacNaghten, JJ.), April 26, 1932]

[Reported [1932] 2 K.B. 535; 101 L.J.K.B. 603; 147 L.T. 353; 76 Sol. Jo. 414]

Tithe—Rentcharge—Distress—Attempted sale by auction—Sale rendered abortive by action of public—Person liable to pay party to that action—Order for second distress and sale by tender—Earlier order still in existence—Validity of later order—Tithe Act, 1836 (6 *&* 7 *Will.* 4, *c.* 71), *s.* 81, *s.* 85—*Tithe Act*, 1891 (54 *&* 55 Vict., *c.* 8), *s.* 2 (1), (2).

A county court judge made an order under s. 2 of the Tithe Act, 1891, for the recovery of a certain sum in respect of tithe rentcharge. Goods of the person liable to pay the rentcharge were distrained upon by an officer of the court and offered for sale by auction, but the sale was rendered abortive by concerted action on the part of a number of farmers in the district, including the person liable to pay the rentcharge. On an application by the owners of the rentcharge, the county court judge made a further order, directing the officer of the court to levy a second distress and to sell the goods distrained by tender. At the date when the second order was made the earlier order was still in existence.

Held: as the attempted sale by auction had been rendered abortive by a combination to set the law at naught, it was within the jurisdiction of the county court judge to make a further order for a second distress and sale by tender, particularly in view of the fact that the person liable to pay the tithe rentcharge had been a party to the combination; it was immaterial that the application for the second order was made by the owners of the tithe rentcharge and not by an officer of the court; and, therefore, the county court judge had not exceeded his jurisdiction.

Notes. Section 10 (2) of the Tithe Act, 1891, was repealed by the Statute Law Revision Act, 1953.

Applied: *Rawlence and Squarey* v. *Spicer, Withers & Co.* v. *Spicer*, [1935] 1 K.B. 412. Referred to: *Queen Anne's Bounty* v. *Blacklock's Executors*, [1934] 1 K.B. 599.

As to tithe and payments in lieu thereof, see 13 HALSBURY'S LAWS (3rd Edn.) 457 et seq., and for cases see 19 DIGEST 476 et seq. For Tithe Acts, 1836 and 1891, see 25 HALSBURY'S STATUTES (2nd Edn.) 185 and 259.

Case referred to:

(1) *Lee* v. *Cooke* (1858), 3 H. & N. 203; 27 L.J.Ex. 337; 30 L.T.O.S. 335; 22 J.P. 177; 4 Jur. N.S. 168; 6 W.R. 284; 157 E.R. 444, Ex. Ch.; 18 Digest 420, *1588*.

Rule Nisi for certiorari.

On March 28, 1931, the agents for the Governors of Queen Anne's Bounty gave notice that they would apply to the Ashford County Court for an order for the recovery of £2 16s. 3d. due in respect of tithe rent-charge issuing out of certain lands owned and occupied by one Ferridge for the period of one half-year ending Oct. 1, 1930. On May 4, 1931, the county court judge made an order for the recovery of that sum, and ordered that for the purpose of the recovery an officer of the court should distrain upon the lands in question and also upon lands liable to be distrained upon under s. 85 of the Tithe Act, 1836, for the above sum, together with 2s. 6d. for costs, and also for the costs of the distress. In pursuance of the above order the officer appointed by the court distrained upon goods and chattels belonging to Ferridge of more than sufficient value to satisfy the amount of the tithe rentcharge and costs. After retaining possession for the requisite period, he offered for sale by auction these goods, and also at the same time offered goods seized by him under four similar orders made on the same date. On Sept. 15, 1931, the officer attempted to sell by auction goods seized under four orders for the recovery of tithe, including the order made against Ferridge, and on the following day attempted to sell goods similarly seized under another order. All the sales took

A place in the same district, but they were rendered abortive by concerted action among the farmers of the district, including (as the county court judge found) Ferridge, who offered prices either too low to be of any service or too high to be taken seriously. On Nov. 9, 1931, the agents for the Governors of Queen Anne's Bounty applied to the county court judge for a further order appointing an officer to levy a distress to recover the sum ordered to be recovered by the original order of May 4, 1931, together with B the costs and expenses of the abortive sale. The county court judge ordered that the second distress be levied for the sum of £2 16s. 3d. and costs, in respect of tithe rent-charge issuing out of the lands described in the schedule to the order, and directed the officer to distrain on those lands and also on the lands liable to be distrained on under s. 85 of the Tithe Act, 1836, for the above sum, together with £12 13s. 4d. for costs and £1 16s. 10d. for costs of the abortive auction sale, and also for the costs of the distress. C The order further provided that the goods and chattels seized might be sold by tender.

A rule nisi was obtained at the instance of Ferridge, calling upon the county court judge to show cause why a writ of certiorari should not issue to remove into the High Court the order of Nov. 9, 1931. In support of the rule, it was contended that the order was invalid on the grounds that (i) the judge had exhausted the powers conferred on him by the Tithe Acts when he had made the order of May 4, 1931; (ii) there was no D jurisdiction to make a second similar order for the recovery of tithe already ordered to be recovered under the said Acts; and (iii) the order exceeded the jurisdiction conferred upon the said learned judge in that (a) it failed to have regard to the limitation imposed by s. 10 (2) of the Tithe Act, 1891; (b) it included an order for sale by tender, which order could only be made (if at all) upon the application of the said officer and not upon the applicants' application, and only upon an application in the proceedings in which E the order of May 4, 1931, had been made; (c) it exceeded the jurisdiction of the county court with regard to costs recoverable by distress; and (d) by making the said order the judge brought into existence two orders for recovery by distress of the same tithe rent-charge at the same time.

By the Tithe Act, 1836, s. 81, the same right of distress is given to the owner of a tithe rent-charge for the recovery of arrears as is given to a landlord for arrears of rent. F By s. 85:

> "Whenever any rent-charge payable under the provisions of this Act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been G charged, whether such land shall be occupied by the person occupying the same as the owner thereof or as tenant thereof holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands H so occupied or holden: provided always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty."

The Tithe Act, 1891, provides:

> I "Section 2 (1) Where any sum due on account of tithe rent-charge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and tithe rent-charge as defined by this Act shall not be recovered in any other manner. (2) Where it is shown to the court that the lands

are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rent-charge for the recovery of arrears of tithe rent-charge, and no greater or other powers; and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the lands under s. 82 of the Tithe Act, 1836."

Section 10 (2):

> "A sum on account of tithe rent-charge shall not be recoverable under this Act unless proceedings for such recovery have been commenced before the expiration of two years from the date at which it became payable."

D. N. Pritt, K.C., *W. H. Duckworth*, and *A. H. Armstrong* showed cause.
H. J. Wallington and *H. M. Cross* supported the rule.

LORD HEWART, C.J.—This is a rule nisi for a writ of certiorari to be addressed to the learned judge of the county court of Kent, holden at Ashford, to remove into this court a certain order made by him and dated Nov. 9, 1931, in proceedings between Queen Anne's Bounty, applicants, and Henry Arthur Ferridge, respondent. A long series of grounds is set out in support of the rule, but when one examines them they prove really to be particulars of the main proposition that the learned judge had no jurisdiction to entertain or adjudicate upon the said application, or to make the said order by reason of the facts which are alleged.

The order referred to was an order that a second distress be levied for the sum of £2 16s. 3d., together with costs in respect of tithe rent-charge issuing out of the lands described in the first part of the schedule to the order during the period of one half-year. Then the order goes on to direct Mr. Joy, an officer appointed by the court, to distrain upon the lands, and also upon the lands which are liable to be distrained on under s. 85 of the Tithe Act, 1836, for the said sum, that is, £2 16s. 3d., together with £12 13s. 4d. for costs and £1 16s. 10d. being costs of the abortive auction sale, and also for the costs of the distress, and that for the making of such distress this order should be such officer's warrant. The affidavits show, and, indeed, it is common ground, that an order was made on May 4, and the auction sale was rendered abortive. It was made ridiculous by the offer of prices which were either obviously too low to be of any service, or too high to be taken seriously; and then came the application which matured in the order of Nov. 9, designed to implement the abortive order of May 4. It is said that the learned judge exceeded his jurisdiction in making the second order after he had made the first. By s. 2 (1) of the Tithe Act, 1891, it is provided:

> "Where any sum due on account of tithe rent-charge issuing out of any lands is in arrear for not less than three months, the person entitled to such sum may, whatever is the amount, apply to the county court of the district in which the lands or any part thereof are situate, and the county court, after such service on the owner of the lands as may be prescribed, and after hearing such owner if he appears and desires to be heard, may order that the said sum, or such part thereof as appears to the court to be due, be, together with the costs, recovered in manner provided by this Act, and the tithe rent-charge as defined by this Act shall not be recovered in any other manner."

Then comes sub-s. (2), which deals with the case where lands are occupied by the owner:

> "Where it is shown to the court that the lands are occupied by the owner thereof, the order shall be executed by the appointment by the court of an officer who, subject to the direction of the court, shall have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts on the owner of a tithe rent-charge for the recovery of arrears . . . and if there is no sufficient distress the person entitled to the sum ordered to be recovered may proceed to obtain possession of the lands under s. 82 of the Tithe Act, 1836."

It seems to me that there is no ground at all for the suggestion that the learned judge has either usurped or exceeded his jurisdiction. This case is very like *Lee* v. *Cooke* (1), where it was held that, where the purchaser of goods sold under a distress had not paid for them, a second distress was lawful. That case went to the Exchequer Chamber, and CROMPTON, J., put the matter into a sentence (27 L.J.Ex. at p. 340): A

> "If the lessee prevents the lessor making the first distress available, the latter may make a second distress." B

I think there were materials here from which the judge could hold that the applicant for this rule was a party to the concerted proceedings which made the original attempt to sell by auction abortive. But, even if it had been otherwise, I see no sufficient reason why there should not be a further application under the Tithe Act, 1891, for an order which would in the circumstances be effective. It has been argued that the effect C of what has been done was really to make two orders for the same thing coincide, but that, I think, is an untenable argument. The second order was not a new order; it was described on its face as an order for a second distress, and the reason for making it was that the auction sale under the first order was abortive. The grounds which are alleged are various ways of stating and re-stating the same proposition, that the learned judge had no jurisdiction. It is said that he had exhausted his powers; that he could D not make a second similar order; that the latter order exceeded his jurisdiction, and that it failed to impose or to have regard to the limitation imposed by s. 10 (2) of the Tithe Act, 1891, that is to say, the limitation which provides that a sum on account of tithe rent-charge shall not be recoverable unless proceedings for recovery have been commenced before the expiration of two years from the date on which it became payable. I think a sufficient answer to that argument is that the order was made to E recover the tithe rent-charge which was due, and there was no suggestion in the court below that the application was out of time, or that the period of two years was exceeded. Then it is said that the order of Nov. 9 included an order for sale by tender. That is quite true, but in the circumstances that order seems to me to be free from objection. Finally, it is said once more that the order exceeds the jurisdiction of the county court with regard to the costs recoverable by distress—a matter entirely within the juris- F diction of the county court—and that by making the order the learned judge brought into existence two orders for recovery by distress of the same tithe rent-charge at the same time—a repetition of what has been said already.

The basis of certiorari is that there has been an usurpation of jurisdiction, or an act done in excess of jurisdiction, which is much the same thing. I have listened very carefully to the argument of counsel in support of the rule, but I see no ground here for G supposing that the learned judge did either of those acts. I think that the order of Nov. 9 was, in the particular circumstances of this case, within his jurisdiction, and that therefore this rule ought to be discharged.

AVORY, J.—I am of the same opinion. The substance of the objection which is taken to the order of the learned county court judge of Nov. 9, 1931, is that he had H exhausted his powers when he had made the order of May 4, 1931. It is said that he had no jurisdiction to make a second order for the recovery of tithe already ordered to be recovered on May 4, and it is only saying the same thing when it is alleged that by making the second order he brought into existence two orders for the recovery by distress of the same tithe rent-charge at the same time. It is to be observed that under the Tithe Act, 1891, the officer of the court is, subject to the direction of the court, to I have the like powers of distraint for the recovery of the sum ordered to be paid as are conferred by the Tithe Acts upon the owner of a tithe rent-charge. That refers back to the Act of 1836, which, by s. 81, gives the tithe owner the same right of distress as is given to a landlord for arrears of rent by the common law and by statute.

So it appears to me that the question in this case might really be answered by inquiring whether a landlord could in circumstances analogous to the present make a second distress for the same rent. Apart from *Lee* v. *Cooke* (1) which is a clear authority that, if the first distress is rendered abortive by the action of the tenant himself, the landlord has a right to make a second, there appears to be authority for suggesting that a second distress is justified where there is not sufficient on the premises to satisfy the entire sum due, or if the landlord abandons the distress on the ground of insufficiency, which is really the same point. So again it has been held that if he withdraws at the request of the tenant, or in consequence of a false statement made to him, he may make a second distress. I think it follows that he may make a second distress if there is, as I think undoubtedly there was in the present case, a combination to set the law at naught. There was ample evidence upon which the learned judge could come to the conclusion that there was in this case such a combination. In giving his judgment he is reported to have said:

> "The farmers having by their conduct prevented the law from taking its course, it is my duty to see that they do not ultimately succeed, and the only way I can deal with it now is to order a sale to take place. The previous sales were abortive, and in order that a proper sale may take place, and seeing what was the conduct of the company at the other sales, I must order that the sale be by tender."

Some other objections are set out in this rule, under this heading:

> "The said order exceeds the jurisdiction conferred upon the said learned judge in that it fails to impose or respect or have regard to the limitation imposed by s. 10 (2) of the Tithe Act, 1891."

That is the section which imposes a limitation of two years for the recovery of tithe, and it is said that this order and that of May 4, 1931, are both defective on the face, in that it does not appear at what date the tithe rent-charge became due, and, therefore, that it does not appear on the face of either order that it became due within the two years. The answer to that point appears to me to be that the origin of the proceedings is to be found in a notice dated March 28, 1931, in which the solicitors for Queen Anne's Bounty gave notice that they would apply for an order for the recovery of £2 16s. 3d. due in respect of the tithe rent-charge issuing out of these lands for the period of one half-year which became payable on Oct. 1, 1930. So that there was on the original notice a clear specification of the date upon which this sum of money became due. That, I think, is a complete answer to the point that the order made in pursuance of that notice does not show that it was made within the two years. The second point taken under this head is that the order of November, 1931,

> "includes an order for sale by tender, which order could only be made (if at all) upon the application of the said officer in the proceedings in which the order of May 4, 1931, had been made, and not upon the application of the applicant."

I think the answer to that is that the application in November was an application in the proceedings in which the order of May 4 had been made; and, with reference to the point that the application is not made by the officer of the court, I see no force in that objection. The application was made by the person interested in getting the order made and was an application to the court to give directions to its own officer. I do not think that the statute in any way requires that the officer is to be the person who is actually to appear in court, and orally make the application for directions to be given to himself. I see no reason why the tithe owner should not apply to the court to give directions to its own officer. For these reasons I think this rule should be discharged.

MACNAGHTEN, J.—I am of the same opinion, and for the same reasons, and there is only one point on which I should like to add anything at all. Counsel in support of the rule contended that the governors of Queen Anne's Bounty, having obtained the order of May 4, had no right to go back to the county court judge, and that, if any application was to be made in the matter, it could only be made by the officer appointed to levy the distress, and that the judge ought to have refused to listen to anyone except him. In my view, this contention is quite baseless. Speaking generally, any party in any matter before the court, and, indeed, any person, who, although not a party, yet deems himself to be affected by the order, is at liberty—and the word "liberty" is more appropriate than "entitled"—to apply to the court as he may be advised. The application, of course, may be mistaken, and if on the application he brings somebody else there, he may be directed to pay the costs; but the courts are open, and any person who is affected by the order is, generally speaking, always entitled to apply to the court, and I have no doubt that the Governors of Queen Anne's Bounty, after the order of May 4, were at all times at liberty to apply to the county court as they might be advised. The order of Nov. 9 was made on their application, but the order of May 4 having proved fruitless they were quite entitled to make an application with a view to getting the order made fruitful. It seems to me that not only were they entitled to apply, but their application was in substance an application that the learned judge should give further directions to the officer of the court with a view to making the order of May 4 effective. I would only add this, that if it be true, as counsel in support of the rule rather half-heartedly suggested, that Mr. Ferridge was no party to the conspiracy of his fellow farmers to set the order of the court at naught, if in fact he was tacitly disapproving of the order, he, Mr. Ferridge, was a person who was very much interested in a proper price being secured for the goods which belonged to him, and on which the distress was being levied. I agree that the rule should be discharged.

Rule discharged.

Solicitors: *Moodie, Sons, & Brown,* for *Fielding & Pembrook,* Canterbury; *Edward F. Iwi.*

[*Reported by* T. R. FITZWALTER BUTLER, Esq., *Barrister-at-Law.*]

BYWATER *v.* STOTHERT AND PITT, LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), July 29, 1932]

[Reported 102 L.J.K.B. 1; 148 L.T. 12; 25 B.W.C.C. 422]

Workmen's Compensation—Compensation—Total incapacity—Injury to eye—Return to work for eight years—Increase of wages—Workman discharged through lack of work—Inability to obtain other work through defect in eye—Workmen's Compensation Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 84), *s.* 9.

In March, 1924, the workman was working for the employers when his right eye was injured by a piece of steel flying into it. He was then nineteen years old, and was earning 19s. 6d. a week. He received full compensation from the employers until he was able to return to his work with them in May, 1924, after which he gradually earned more wages, though the sight of the eye was defective. In March, 1925, a declaration of liability was filed. In January, 1932, when he was receiving as wages £2 12s. a week, he was discharged owing to bad trade conditions. In April, 1932, he claimed compensation under s. 9 (4) of the Workmen's Compensation Act, 1925, as amended by s. 1 of the Workmen's Compensation Act, 1931, on the basis of total incapacity, on the ground that owing to his defective eye he was unable to obtain work.

Held: (i) physical incapacity was to be measured, not merely by apparent physical incapacity, but also by a lessening of the capacity to get work, and, therefore, there was evidence on which the county court judge ought to make an award of compensation based on total incapacity;

(ii) but the compensation must be assessed on the workman's average earnings during the twelve months before the accident in March, 1924, and not during those before the assessment of compensation in 1932.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1). By s. 12, which prescribes the principles on which disablement benefit is to be assessed, regard must be had to the condition of the claimant at the date of the assessment. See also s. 13 and following sections.

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq., and for cases see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202, and for National Insurance (Industrial Injuries) Act, 1946, see ibid. 797.

Cases referred to:

(1) *Ball* v. *William Hunt & Sons, Ltd.*, [1911] 1 K.B. 1048; 80 L.J.K.B. 655; 104 L.T. 327; 27 T.L.R. 323; 55 Sol. Jo. 383; on appeal, [1912] A.C. 496; 81 L.J.K.B. 782; 106 L.T. 911; 28 T.L.R. 428; 56 Sol. Jo. 550; 5 B.W.C.C. 459, H.L.; 34 Digest 395, *3228*.

(2) *Perry* v. *Wright, Cain* v. *Leyland & Co.* (1900), *Ltd., Bailey* v. *Kenworthy, Ltd., Gough* v. *Crawshay Bros., Cyfartha, Ltd.*, [1908] 1 K.B. 441; 77 L.J.K.B. 236; 98 L.T. 327; 24 T.L.R. 186; 52 Sol. Jo. 146; 1 B.W.C.C. 351, C.A.; 34 Digest 409, *3329*.

Appeal by the employers from an award made by HIS HONOUR JUDGE GWYNNE-JAMES in the Bath County Court of Somersetshire.

By a memorandum of agreement dated March 6, 1925, and made between the workman, H. A. Bywater, by his father and next friend, W. L. Bywater, and the employers, Stothert and Pitt, Ltd., it was provided:

> "Be it remembered that on March 6, 1924, personal injury was caused to the workman, who was employed by the employer, by accident arising out of and in the course of his employment in the capacity of an apprentice turner, whereby he was totally disabled for work, and in respect of which he has made a claim for compensation under the Workmen's Compensation Acts, 1906 to 1923. And that on or about March 6, 1925, the following verbal agreement was come to by and between the said parties, that is to say: In the event of the said workman being hereafter incapacitated by reason of or on account of the above accident, the said employer will pay the said workman in accordance with the provisions of the above Workmen's Compensation Acts the amount of such compensation, to be ascertained failing agreement by arbitration under the said Acts."

This memorandum was recorded on March 21, 1925, in the county court.

In his award the learned county court judge stated:

> "The applicant, while in the employ of the respondents, Stothert and Pitt, in March, 1924, met with an accident arising out of and in the course of his employment. The accident caused an injury to his eye. At that date his wages were 19s. 6d. a week, and he was a minor. He continued for upwards of eight years in the employ of respondents. In January of the present year [1932] he ceased to be in their employment owing to slackness of work. For twelve months previously his average wage was £2 12s. a week. At that time he had practically lost the entire use of his right eye. I find that, owing to the loss of that eye, there was, on Jan. 18, 1932, and that there has continued since then, total incapacity for work, as there is total incapacity to get work owing to the result of his eye injury since the date I have mentioned. I also find that the applicant has taken every reasonable step to obtain employment. On these findings, my award is that he is entitled to compensation for total incapacity."

The employers appealed.

Harold Darbyshire, K.C., and *R. F. Lyne* for the employers.

D. B. Somervell, K.C., and *Geoffrey Hutchinson* for the workman.

LORD HANWORTH, M.R.—This appeal raises two interesting points. The workman, a young man, was born in 1905, and at the age of eighteen he was working for the respondents, the appellants on this appeal. In March, 1924, his right eye was injured A by a piece of steel flying into it, his earnings at that time being 19s. 6d. a week. The injury to the eye was serious, but happily it did not cause loss of sight in that eye altogether, and on May 19 of that year he was able to return to work. He was kept in his employment, where he gradually earned more wages, so that he eventually earned £2 12s. a week. In January, 1932, he was dismissed, owing to the unfortunate slackness of trade, and on April 23 he made an application for compensation, alleging that B the injury to his eye reduced his power to obtain employment, and his claim was based on total incapacity as from January, 1932. On June 23 the county court judge held that he was totally incapacitated, and he awarded him full compensation at the rate of £1 6s. a week.

Two points are taken by the appellants. It is said that the applicant overstepped his right to claim in alleging that he was totally incapacitated. He admitted that the C injury to his eye had not interfered with his power to work and earn the normal wages, and he admitted that he was able to play cricket. Moreover, he was told by his employers that he would be taken on again when work was available; there is no doubt, indeed, that he has been treated with consideration by his employers. It is said that there was no evidence to justify the county court judge in treating this man as suffering from total incapacity. The learned judge could treat him as totally incapacitated by D the terms of the Workmen's Compensation Act, 1931, and the effect of that Act may, shortly, be put in this way: If it were probable that the workman would, but for the injury, be able to obtain work; if the failure to get work were due to the injury; and if the workman had taken all reasonable steps to obtain work, then he ought to be treated as if he were totally incapacitated, and compensated on that basis. But counsel for the employers say that there was no evidence on which that conclusion could be E reached, because the workman admitted that the injury to his eye had not interfered with his work, but he had gone on working and earned increasing wages and was able even to play cricket. To say that he was incapacitated was, said counsel, entirely to misread the facts.

The point which we have to determine is this. In *Ball* v. *William Hunt & Sons, Ltd.* (1), there was a decision which shows that it is not only physical incapacity which F is dealt with in these cases. Incapacity for work may include inability to get work, and LORD LOREBURN says ([1912] A.C. at p. 499):

> "In the ordinary and popular meaning which we are to attach to the language of this statute, I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him . . . G certainly the opposite view would leave a workman uncompensated for what may be very real and direct consequences of an injury."

"Yes," says the employers' counsel, "but the Lord Chancellor was speaking of a physical defect which was plain and apparent; he was speaking then of a man whose eye had been removed, and the principle of the decision in *Ball's Case* (1) ought to be confined to such cases." But a close examination of *Ball's Case* (1) prevents that conclusion. H In the Court of Appeal, FLETCHER-MOULTON, L.J., had dissented, and, if attention is paid to his judgment, it is clear that he is speaking of, and meant to include, cases where the injury might not be apparent. He says ([1911] 1 K. B. at p. 1053):

> "In what precedes I have taken instances in which the workman's employment depends to some extent upon personal appearance. But the same principle applies where this is not the case. The question presents itself in its most serious form in I the case where a workman has sustained a personal injury which is permanent, but the effect of which upon his powers of work he has overcome by his own resolute efforts so that he is able to do his work as efficiently as before. Take the case of a man who has lost a finger by an accident arising out of and in the course of the employment and whose employment requires a firm grasp of his tools. His desire to earn his livelihood may have made him develop the powers of the injured hand so as to overcome the disadvantage under which he labours as compared with other men. He can in fact hold his tools as firmly as he did before. The physical in-

A capacity has ceased. But he finds that he cannot get employers to believe that he has so far succeeded in this respect as to make himself as efficient as before. He, therefore, cannot get work."

Later he says:

> "Supposing such a man has done his best to get work assuring the employers, but B in vain, that he has overcome his disability. On an application for compensation he would be forced on cross-examination to admit that he had applied for work of the old kind, that he had stated that he could do it as well as ever, and that such statement was true. The opposing counsel would then turn triumphantly to the court and say that the workman had put himself out of court, because he had admitted that incapacity had ceased."

C Condensing the judgment of FLETCHER-MOULTON, L.J., I think it shows that physical incapacity is to be measured, not merely by apparent physical incapacity, but also by a lessening of the capacity to get work. In the same case in the House of Lords, LORD MACNAGHTEN says ([1912] A.C. at p. 501):

> "It seems to me that the injury for which the statute gives compensation is not D mutilation or disfigurement, or loss of physical power, but loss or diminution of the capacity to earn wages in the employment in which the injured workman was engaged at the time of the accident. At that time this man was earning 20s. a week as an edge tool moulder. That is what he was worth then. What is he worth now? As he is now, no one will take him on at that work. Everybody would say offhand two eyes are better than one for such a job as that. So he is heavily handicapped E in seeking employment. This disadvantage or disqualification, whatever you choose to call it, has resulted from the accident."

It seems to me that LORD MACNAGHTEN put in these words "mutilation or disfigurement, or loss of physical power," to show that he was not dealing only with apparent defects, but also with loss of physical power not made plain. Therefore, I think it was possible for the judge here to hold that there was a loss of power to obtain employment, F which might justify an award for total incapacity. Counsel for the employers says that there is no evidence that the workman had shown himself anxious to get work, but there is the evidence of the man himself, and he had been a good worker, and he shows that he did go to some places to which he was referred, and to Devonport Dockyard. It is for the county court judge to estimate the value of the evidence; we ought not to express our opinion upon how that evidence would have appealed to us. I think G there was ample evidence upon which the learned judge could come to the decision that there was, in the legal sense, total incapacity, and his award cannot, on that ground, be set aside.

Then comes a point involving a consideration of the actual words of the statute. The workman at the time of the accident was only earning 19s. 6d. a week, and if we have to look at what he was earning then for the measure of the compensation it is H difficult to reconcile the amount to which he is entitled with that awarded by the county court judge, who has awarded 26s. a week. It is laid down in s. 9 of the Workman's Compensation Act, 1925, that in cases of total and partial incapacity the compensation is to be assessed according to certain rules. In the former case it is to be a sum

> "not exceeding 50 per cent. of the workman's average weekly earnings during the previous twelve months,"

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with a certain addition where the maximum weekly payment during those twelve months was less than 25s. Do those words "during the previous twelve months" mean the twelve months before the accident or before the assessment of compensation? I think that the answer is to be found in terms of the Act. I look at s. 10, which contains the rules for determining the earnings. Rule 1 provides that where for various reasons specified it is impracticable "at the date of the accident" to compute the earnings,

> "regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person on the same grade,"

&c. Rules 2 and 3 also refer to the employment "at the time of the accident." It seems to me clear that when you are dealing with average weekly earnings under s. 9 you have to interpret the application of the section in the light of the rules laid down by s. 10, and that earnings during the previous twelve months means earnings during the twelve months previous to the accident, not during the twelve months previous to the determination of the amount. It may be said that that interpretation works harshly in this case, but the answer to that is to be found in s. 11, which provides for a review of weekly payments, and which, as amended by s. 1 of the Workmen's Compensation Act, 1926, provides that the wages of a workman earning small wages by reason of his being a minor may be increased on review, provided that the application is made within six months of the workman attaining twenty-one. In other words, liberty was given to this young man when he became twenty-one by later steps to free himself from the limitation of the small sum he earned while under age. No such steps were taken here; the time limit was not complied with, and so we have the case of a young man who has not availed himself of the protection given by s. 11, and, therefore, he is not able to obtain more than compensation on the scale of his pre-accident earnings, which works out at a figure of about 14s. a week. This is a case where the court cannot go outside the rules which have been laid down for its guidance. It is quite true that during the time when the workman was being paid wages he was not entitled to receive weekly payments of compensation, and so he may in a sense have been lulled into inactivity. He was earning more than he would have been entitled to receive as compensation, either for total or for partial incapacity; but there are many cases where workmen in order to avail themselves of the protection of the Act, must act within the time limits imposed for the protection of the employer, and if they do not do so it is not open to the court to help them. I think that the appeal fails upon the first point, that no compensation was payable, but succeeds upon the second point that the compensation awarded was too large. The appeal will be allowed, and the award amended to 14s. 7½d. a week. There will be no costs of the appeal.

SLESSER, L.J.—I agree. If there were sufficient evidence for the county court judge to find incapacity, it is not for this court to disturb the finding. I think that there was ample evidence, and that he has not offended against any principle of law. In *Ball* v. *William Hunt & Sons, Ltd.* (1), the workman had lost an eye in such a manner that the injury was visible, but if a workman injured by an accident is unable to obtain work I do not see that it matters whether that is due to the fact that the employer could easily see his defect. In other words, I see no such limitation imposed by the decision in *Ball's Case* (1), and I think it is impossible to say that the county court judge, in this case, was wrong when he came to take what was evidently the view of LORD LOREBURN in *Ball's Case* (1).

As to the second point, it is not disputed that the workman failed to make application for review of the compensation within six months of attaining twenty-one, and, therefore, that he is not now entitled to a review under s. 11, and so he says that the proper course, under s. 9, is to go back not to the date of the accident, but to the date of the incapacity. For myself, I am not satisfied that the incapacity did not date from the time of the accident. It may well have been that for the whole period he would have been entitled to a declaration of liability. I do not accept counsel's contention that the date of the accident was not the date of the incapacity. I agree with my Lord that under s. 9 the time to be regarded is the time of the accident and I agree with every word in which he has stated that.

ROMER, L.J.—I agree. It seems to me impossible to say that the rule in *Ball* v. *William Hunt & Sons, Ltd.* (1), is confined to cases where the physical incapacity is apparent to the eye. I do not think that LORD LOREBURN'S words are to be so limited, viewing the provisions of the statute as to incapacity as he does, according to their "ordinary and popular meaning." It is said that so to hold would be to encourage workmen to make much of their injuries in order to obtain compensation. I am not impressed by that argument, for the provisions of the Act must be complied with, whatever the result in practice, and moreover the compensation obtainable would probably be far less than the workman would in the ordinary way be able to earn. As to the second point, it is obvious that the reference to the "previous twelve months" in s. 9 of the Act means the twelve months preceding the date of the accident. That is clear from the references in sub-s. (3) to before and after the accident, and I do not think a workman is entitled to choose any twelve months he may think convenient as a basis for his claim. That also appears, I think, quite clearly from the words and the references to the time of the accident in s. 10, and by what was said by FLETCHER-MOULTON, L.J., in *Perry* v. *Wright* (2).

Appeal allowed.

Solicitors: *Arthur Taylor & Co.*, for *Tetley, Long, & Vale*, Bath; *Mills, Lockyer, Church, & Evill.*

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

DUNNING *v.* C. E. BINDING (TRADING AS GLOBE CARRIER BAG CO.)

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), December 20, 1932]

[Reported 148 L.T. 378; 25 B.W.C.C. 655]

Workman's Compensation—"Arising out of and in course of employment"—Act in discharge of duty owed to employer—Commercial traveller—Killed at railway station while awaiting train to return home—Workmen's Compensation Act, 1925 (15 & 16 Geo. 5, c. 84), s. 1 (1).

The workman was employed by the respondents as a commercial traveller to travel the B. district. Of his own choice he resided ten miles out of B., and had a railway season ticket for the journey from his home and back each day. He was run over by a train and killed one evening while waiting for his train back home. He was accustomed to write up the orders he had obtained each day when he returned home, and a substantial number of customers in the neighbourhood of his home gave him orders when he visited them or when they called on him. The county court judge held that the accident did not arise out of and in the course of the employment, as the deceased at the time of the accident was doing no act in discharge of a duty owed to his employers.

Held: the county court judge had applied the right test and directed himself correctly in accordance with the authorities and there was abundant evidence on which he could come to the conclusion he did.

Notes. The Workmen's Compensation Act, 1925, was repealed by the National Insurance (Industrial Injuries) Act, 1946, which prescribes a system of insurance against injuries caused by industrial accidents, but s. 1 (1) of the latter Act provides that the insurance shall be "against personal injury caused . . . by accident arising out of and in the course of" employment, thus adopting the wording of s. 1 (1) of the Act of 1925. See also s. 7 (1).

As to "accidents" within the Workmen's Compensation Acts, see 34 HALSBURY'S LAWS (2nd Edn.) 816 et seq., and for cases see 34 DIGEST 266 et seq. For Workmen's Compensation Act, 1925, see 16 HALSBURY'S STATUTES (2nd Edn.) 202, and for National Insurance (Industrial Injuries) Act, 1946, see ibid. 797.

Cases referred to:

(1) *Dickinson* v. "*Barmak,*" *Ltd.* (1908), 124 L.T. Jo. 403, C.A.; 34 Digest 278, *2349.*

(2) *Brentnall* v. *London and North-Eastern Rail. Co.* (1932), 48 T.L.R. 544; [1932] W.C. & I. Rep. 200; on appeal, [1933] A.C. 489; 102 L.J.K.B. 438; 148 L.T. 530; 49 T.L.R. 229; 77 Sol. Jo. 116; 26 B.W.C.C. 225, H.L.; Digest Supp.

(3) *Evans* v. *Postmaster-General* (1924), 132 L.T. 137; 40 T.L.R. 856; 69 Sol. Jo. 9; 17 B.W.C.C. 151, C.A.; 34 Digest 278, *2348.*

(4) *St. Helens Colliery Co., Ltd.* v. *Hewitson,* [1924] A.C. 59; 93 L.J.K.B. 177; 130 L.T. 291; 40 T.L.R. 125; 68 Sol. Jo. 163; 16 B.W.C.C. 230, H.L.; 34 Digest 280, *2364.*

(5) *Sparey* v. *Bath Rural District Council* (1931), 146 L.T. 285; 48 T.L.R. 87; 75 Sol. Jo. 813; 24 B.W.C.C. 414, H.L.; Digest Supp.

Appeal by the widow of a deceased workman from an award made by HIS HONOUR JUDGE PARSONS at Bristol County Court.

The workman, George Dunning, was employed by the respondent employers as a commercial traveller to obtain orders in the Bristol district. Of his own choice he lived at Pilning, ten miles from Bristol, and had a railway season ticket to Bristol. When he returned home in the evening he was accustomed to write up the orders obtained during the day. He had a fairly substantial number of customers at Pilning whom he visited to obtain orders for his employers or to collect accounts and who sometimes called at his home to give orders. He left home and returned at the same hour each day. On the occasion which gave rise to this claim by his widow, while waiting for his evening train in Bristol he fell in front of another train and was killed. His widow claimed compensation. In his award the learned county court judge said that it had been suggested that he ought to find by inference or otherwise that the workman, when he met his death, was doing something in the interests of his employer. What was he doing in the interests of his employer? He was waiting to go from the railway station at Bristol to Pilning—certainly to his own home, and perhaps also to call upon one of his customers. He might have been intending to call somewhere with a view to collecting an account. Perhaps he was going to do some further work at Pilning before going home. There was no evidence that the deceased man was intending after he reached the station at Bristol to do any more work for his employer on that day, beyond, perhaps, such as was involved in writing out his orders when he reached home and in sending them on to his employers. In those circumstances there was no ground on which he was entitled to say the accident arose "out of and in the course of" the workman's employment, and his award must be made for the employers.

The widow of the workman appealed.

E. W. Cave, K.C., and *F. A. Wilshire* for the appellant.

Edgar Dale for the employers.

LORD HANWORTH, M.R.—This appeal fails. It has already been before us, and we sent it back for a new trial because we were not quite clear as to what the county court judge meant in the note which he had appended to his notes of the evidence in which he said:

> "I was satisfied that the death in this case was due to accident. I considered that, as a commercial traveller, the deceased was in the course of his employment while travelling to his 'home station' at the conclusion of the day's business for his employer."

If he had meant by that that the work of the day was over and the man was no longer doing anything which he did do because of a duty to his employer, it seemed that the county court judge had gone too far. At the same time, we did not wish to attribute to those words a meaning which they might not have been intended to convey. So we sent the case back for a new trial, indicating that we did not agree with *Dickinson* v. "*Barmak,*" *Ltd.* (1), or that it could be held at the present time, when the law has been cleared up on some of these points, that a commercial traveller was in the same position as a seaman on board a ship and was to be treated at all times and for all purposes as holding a status which entitled him to impute any accident which he suffered to his employers. We sent this case back to the county court judge for him to consider the matter afresh. Counsel on either side wisely agreed that the evidence which had been given at the trial before the county court judge in May should stand good and be used as part of the evidence at the new trial. There was some additional evidence given which indicated that at his home at Pilning the deceased man used from time to time to obtain some orders which he transmitted to his employers, and that he had some books at home which had reference to his business. But when the county court judge came to form his conclusion upon the question of fact, he held that the present applicant had not established that the accident had happened in the course of the workman's employment. He reached that conclusion by steps. He accepted the view which we had directed him to hold that there was no special status to be attributed to a commercial traveller. Next, he held upon the facts that the deceased man's residence at Pilning was according to his voluntary choice and not in accordance with any requirements of his employers. That was an important fact to have determined. If he had been compelled to go back to Pilning because the employers had required him to live at Pilning, it might have been said that *Brentnall* v. *London and North-Eastern Rail. Co.* (2) might be applied. There a man, who was a train driver, had to drive a train a considerable distance outwards and then wait until next day when he drove the train the same distance back towards London, and we held that the hostel, to which he went, where the accident occurred, was one to which the men were expected to go for reasonable rest as a part of their duty to their employers, and if a man wanted to go elsewhere it was necessary for him to give some reason justifying the choice of an alternative. Those, we thought, were sufficient facts to establish that the choice of the place where the rest was provided was not entirely one exercised by the workman.

In the present case, upon materials which are abundant for the purpose, the county court judge held that the deceased man's residence was according to his voluntary choice and not in accordance with any requirements of his employment. He was in the course of returning to his home, the home of his choice, and the rules which have been tabulated in Mr. Willis's Workmen's Compensation Acts seem correctly to codify the principles adopted in a number of cases. As a general rule it is quite true a man's employment does not begin until he has reached the place where he has to work, or the ambit or scope or scene of his duty, and it does not continue after he has left, and the periods of going and returning are generally excluded. A number of cases can be held to establish that. As an illustration, I may refer to *Evans* v. *Postmaster-General* (3), but there are exceptions to it. It may be that under the contract of employment, expressly or impliedly, the time taken by a workman in getting to or from his place of work is to be estimated as in the course of his employment. There are other exceptions, but those exceptions are deduced from particular facts. It is far better to apply the test which has now been considered and re-considered in a number of cases, a test which is laid down by Lord Atkinson in *St. Helens Colliery Co., Ltd.* v. *Hewitson* (4):

> "A workman is acting in the course of his employment when he is engaged 'in doing something he is employed to do,' or what is, in other and, I think, better words, in effect the same thing, namely, when he is doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of service."

The fact that the workman in the present case was travelling back to Pilning, the residence of his own choice, does not necessarily establish that he was acting in the course of a duty owed to his employer. It is possible he may have been so doing or he may not. He may have had a right to take and include as in the course of his employment the time of going into the Bristol area, taking that in a narrow sense, or coming back from the Bristol area. But this finding of the county court judge does not enable him at once to say: "Obviously the man was in the course of his employment because he was travelling back to Pilning." One has to ask another question: Was the transit to Pilning because he wanted still to do some work on behalf of his employer, for the purpose of his employment? There were certain facts which might lead in that direction. The county court judge says this:

> "I do not think there is evidence on which I should be entitled to find that he was going to do some further work for his employers at Pilning. I can only say that the evidence does not satisfy me that the deceased was intending, after he reached [the railway station at Bristol] to do any more work for his employers on that day beyond such as was involved, or might have been involved, in writing out his orders."

He would have to do some work in writing, I suppose, wherever he lived, and that did not provide a necessary test. One comes back to this, that in all these cases one must apply one's common sense to the facts and answer the broad test laid down by Lord Atkinson as to whether or not the applicant has established that the accident happened when he was in the course of discharging a duty, directly or indirectly imposed upon him by his contract of service. In one of the last cases, *Sparey* v. *Bath Rural District Council* (5), Lord Buckmaster in the course of his speech says:

> "The course of employment continues while the workman is lawfully upon his employer's premises. Hazards which he then encounters will if they result in accident, be risks which the workman has run in the course of his employment, but when once the premises are left and the workman is no longer under any control, and in all respects and for all purposes in the same position as an ordinary member of the public enjoying the same liberty and sharing the same risks, the danger he there encounters is one which other members of the public equally share."

Lord Warrington points out what I have already said, that the course of employment does not necessarily begin when he reaches the sphere of his actual work, nor does it necessarily end when he leaves it. The truth is that it must be a question of degree. It would be idle to my mind to contend that because a man is a commercial traveller, an accident which happened at home when he was engaged in some household duty, quite apart from his work, was attributable to his employer. It must be a question of degree and a question of fact.

In those circumstances, although it would, perhaps, have been possible for the decision to have been otherwise, the county court judge has found upon the facts, applying his mind properly to the law and directing himself in accordance with the cases, that he could not hold that the man at the time he was going back was engaged at that time and at that place for the purpose of carrying out the behests of his employer. He had his own will to exercise as to what time he would go, whether he would go from one station or the other, and it appears to me that there is abundant evidence on which the county court judge could reach the conclusion he has, and it is one which we have no right to disturb. The appeal must be dismissed with costs.

SLESSER, L.J.—I am of the same opinion. I am unable to find that the learned judge has misdirected himself in law in this case. He has, upon a direction from this court, properly applied the tests laid down by Lord Atkinson and by other learned Lords, and as to that I will say no more because those tests have been fully stated by this court and repeated by my Lord in his present judgment. Applying those tests. one looks to see what the finding of the learned judge was on the evidence presented to him. He finds as a fact that the deceased man's residence at Pilning was according to his voluntary choice and not in accordance with any requirements of his employment, Secondly, he finds he was waiting to go from Stapleton Road Station to Pilning to his own home, that own home being the residence of his voluntary choice, as already stated. Then he goes on,

> "perhaps also to call upon one of his customers, who have said that they generally gave their orders to him in the evening. He may have been intending to call somewhere with a view to collecting an account. I do not know. . . . I do not think there is evidence on which I should be entitled so to find, and, therefore, in that connection I can only say that the evidence does not satisfy me that the deceased man was intending, after he reached [the station at Bristol] to do any

more work for his employer on that day, beyond perhaps such as may have been involved, or might have been involved, in writing out his orders when he reached home and in sending them to his employer."

The learned judge refused to draw any inference of fact that this man was, at the time he was killed, engaged in performing any duties to his employer. That refusal of the learned judge to draw that inference, which he was perfectly entitled to refuse to do, seems to me to determine this case. The facts emerge that there is no finding of the learned judge that this man, at the time he was killed, was engaged in performing any duty to his employer. If that be so, unless the learned judge can be shown to be under some compulsion to draw inferences which he has declined to draw, I am unable to see that there is any ground for this appeal. The only possible ground for this appeal is that *Dickinson* v. "*Barmak,*" *Ltd.* (1), is still good law, that a commercial traveller has some peculiar status, and the tests applied generally do not apply in this case, but that is a view which cannot be argued in this court, as the court has already expressed an opinion upon it. It can only be dealt with by another place.

ROMER, L.J.—I agree.

Appeal dismissed.

Solicitors: *Rollit, Son, & Haydon,* for *Crossman & Co.*, Thornbury, Gloucestershire; *Berrymans* for *F. E. Metcalfe*, Bristol.

[*Reported by* G. P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

CRUSE *v.* MOUNT

[CHANCERY DIVISION (Maugham, J.), November 11, 14, 15, 1932]

[Reported [1933] Ch. 278; 102 L.J.Ch. 74; 148 L.T. 259; 49 T.L.R. 87; 76 Sol. Jo. 902]

Landlord and Tenant—Flat—Unfurnished flat—No warranty as to fitness for human habitation.

Where an unfurnished flat is let there is no implied warranty of fitness for human habitation.

Manchester Bonded Warehouse Co. v. *Carr* (1) (1880), 5 C.P.D. 507, followed.

Notes. As to warranty of fitness for habitation of an unfurnished dwelling-house, see 23 HALSBURY'S LAWS (3rd Edn.) 574–577; and for cases on the subject see 31 DIGEST (Repl.) 194–195, *3254–3264*.

Cases referred to:

(1) *Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C.P.D. 507; 49 L.J.Q.B. 809; 43 L.T. 476; 45 J.P. 7; 29 W.R. 354; 31 Digest (Repl.) 197, *3302*.

(2) *Angel* v. *Jay*, [1911] 1 K.B. 666; 80 L.J.K.B. 458; 103 L.T. 809; 55 Sol. Jo. 140, D.C.; 30 Digest (Repl.) 504, *1451*.

(3) *First National Reinsurance Co.* v. *Greenfield*, [1921] 2 K.B. 260; 90 L.J.K.B. 617; 125 L.T. 171; 37 T.L.R. 235; 9 Digest (Repl.) 117, *606*.

(4) *Heilbut, Symons & Co.* v. *Buckleton*, [1913] A.C. 30; 82 L.J.K.B. 245; 107 L.T. 769; 20 Mans. 54, H.L.; 9 Digest (Repl.) 259, *1643*.

(5) *Seddon* v. *North-Eastern Salt Co., Ltd.*, [1905] 1 Ch. 326; 74 L.J.Ch. 199; 91 L.T. 793; 53 W.R. 232; 21 T.L.R. 118; 49 Sol. Jo. 119; 9 Digest (Repl.) 366, *2342*.

(6) *Smith* v. *Marrable* (1843), 11 M. & W. 5; Car. & M. 749; 12 L.J.Ex. 223; 7 Jur. 70; 152 E.R. 693; 31 Digest (Repl.) 195, *3266*.

(7) *Hart* v. *Windsor* (1844), 12 M. & W. 68; 13 L.J.Ex. 129; 2 L.T.O.S. 440; 8 J.P. 233; 8 Jur. 150; 152 E.R. 1114; 31 Digest (Repl.) 133, *2716*.

Witness Action.

The following facts are taken from the judgment: The plaintiff, the tenant, claimed to have a lease of April 22, 1931, set aside on the ground of misrepresentation or mutual mistake; and, alternatively, damages for breach of warranty, or of covenant, or for trespass. The defendant, the landlord, counter-claimed for payment of rent.

In April, 1931, the tenant saw an advertisement of two flats to let at 1, Moreton Gardens, near the Boltons, Kensington. The house, about a hundred years old, was originally a private house and had been altered into three separate flats by the landlord.

The tenant and his wife saw the landlord and went over one of the flats, and, as it seemed suitable, on April 22, a few days after, he signed a lease, by which the landlord demised it to him, with the use, in common with the other occupiers, of the entrance hall and staircase, for ten years from June 24, 1931. There were a number of reservations, common in leases of flats, whereby gas, water, electric light and other pipes and drains running through or under the flat were reserved by the landlord, together with a right of entry to view and repair. The rent was £335 a year, payable quarterly. There were the usual covenants by the lessee to pay the rent, to keep the interior in good repair, and not to assign or sublet. The lessor covenanted to pay all rates, taxes, &c., and the lease also contained the following covenant:

> "The lessee paying the rent hereby reserved and performing and observing the several conditions and agreements herein contained and on his part to be performed and observed shall and may peaceably and quietly hold and enjoy the said flat during the term hereby granted without any lawful interruption from or by the lessor or any person or persons claiming under or in trust for him."

There was a dispute on the evidence whether the tenant had executed the lease by reason of a statement made by the landlord, and so was entitled to rely thereon as a warranty entitling him to damages or to rescind the lease. He said that, on April 20, 1931, on going to the premises, he met the landlord and the landlord's builder, and that the landlord, having previously said that the place was "all right," then said "everything is all right; all the alterations have been passed by the London County Council." The landlord in evidence said that he had no recollection of being present on that day. His Lordship found as a fact that the conversation took place, but that it was in the nature of a casual observation which might well have slipped from the landlord's recollection. His Lordship also found that the tenant had not said that he would not sign the lease unless he got an assurance that the building was perfectly sound.

The tenant went into possession. There were certain matters then not very satisfactory. In particular, certain cornices had cracked. The alterations to the house had been done under contract according to the specification of a gentleman who, although describing himself as an auctioneer, estate agent, surveyor, and valuer, had no qualification as a competent architect for such work. The tenant also found minor troubles. Meanwhile the landlord had become aware that the structural alterations were not entirely satisfactory, and he employed Farebrother, Ellis & Co. to examine the premises. The position shown in their letter was at least disquieting. By the end of July it was plain that there was something seriously wrong. Farebrother, Ellis & Co. reported that they could not give a clean bill for the "covered" works, or guarantee that they were absolutely safe and in order. It became apparent that three at least of the partitions were seriously overloaded and dangerous, and if substantial weights, such as a piano, were moved, danger might ensue. Later it was found that not only were the joists overloaded, but one had been cut through. The landlord was unaware of these facts, and supposed that the flats were perfectly sound and habitable. For a considerable time the true facts were kept from the tenant, who was led to suppose that only trifling matters needed putting right. Later, however, it became apparent that certain work was needed which could not be done in the presence of the tenant in the flat, and that, if it were not done, the other flats might be ruined by a collapse. The tenant would at any rate be considerably disturbed by the work. On Sept. 30 the landlord's solicitors wrote:

> "It is all very well to allow [the tenant] to say he will not agree to the workmen going into the flat, but [the tenant] might very quickly change his mind if he was to see your report."

Farebrother, Ellis & Co. considered that the work would take from three weeks to a month. The landlord knew how serious the matter was, and on Nov. 2 told the tenant that anything might happen, at any moment, which might involve him in thousands of pounds compensation to tenants. On Nov. 6 he wrote to the tenant, telling him the floors needed strengthening, and offering to be responsible for all his hotel expenses, storage of furniture, &c. The tenant was given to understand that the work would take six weeks. On Nov. 10 the tenant wrote to the solicitors for the landlord, calling for cancellation of the lease. On Nov. 14 he went out, his furniture following in three or four days. On these facts his Lordship held: (i) that it was reasonably necessary for the tenant to quit the premises; (ii) that he was called on by the landlord to do so; (iii) that the circumstances did not amount to an eviction. Having gone, the tenant was unwilling to return.

Spens, K.C., and *Evershed* for the tenant.
Manning, K.C., and *Russell Gilbert* for the landlord.

MAUGHAM, J., after stating the facts, decided, on the authority of *Angel* v. *Jay* (2), *First National Reinsurance Co.* v. *Greenfield* (3), *Heilbut, Symons & Co.* v. *Buckleton* (4), and *Seddon* v. *North-Eastern Salt Co., Ltd.* (5), that the landlord's oral representation did not amount to a warranty, and continued: I now turn to the consideration of the question whether, in regard to the letting of a flat for immediate occupation, there is an implied condition that the premises are fit for human habitation. The leading case on the subject of furnished lodgings is *Smith* v. *Marrable* (6). That is the well-known case where Lady Marrable took a house in Brighton for five or six weeks, and found after she entered into possession that it was so infested with bugs that it was impossible for her to remain in it. The case was before PARKE, B., LORD ABINGER, C.B., ALDERSON and GURNEY, BB. I should add that the agreement was in writing, so that it was not a case of a merely oral agreement. The learned judges held that a man who let a ready furnished house did so under the implied condition or obligation that the house was in a fit state to be inhabited, and that, if the demised premises were encumbered with a nuisance of so serious a nature that no person could reasonably be expected to live in them, the tenant was at liberty to throw the lease up. That decision has been doubted by some persons. It was followed by the Exchequer Chamber in some other cases which I need not mention. It was distinguished in *Hart* v. *Windsor* (7), where there was a lease of an unfurnished house and garden ground, and the court there held that the law implied no contract on the part of the lessor that the house was, at the time of the demise, or should be at the commencement of the term, in a reasonably fit state and condition for habitation. It may be noted that PARKE, B., there, referring to his own judgment in *Smith* v. *Marrable* (6), observed (12 M &. W. at p. 78) that that case certainly could not be supported on the ground on which he had rested his judgment. Since then, *Smith* v. *Marrable* (6) has, on one ground or another, constantly been followed, and I, at any rate, do not intend to cast any doubt on its being a correct decision. Accordingly, the matter stands thus, that, in regard to the letting of furnished premises, there is an implied condition that the premises shall be fit for human habitation at the date when the tenancy begins, and that, if they are not so fit, the lessee can throw up the tenancy. In regard to an unfurnished house, for the reasons given in *Hart* v. *Windsor* (7)—which, I think, will readily occur to anyone who knows that unfurnished houses are constantly let in a very bad state (that condition being one which is reflected in the rent)—it has been held that there is no such condition or warranty.

It was argued here on behalf of the tenant that the case of a flat is midway between the two, and that, having regard to certain obvious considerations in the case of a flat, the same rule should be followed as applies in the case of furnished lodgings. It is to be noted that, in the case of a flat, it very often happens, as it did in the present case, that the landlord does not undertake to repair the inside of the flat, and it will be observed that the practice is not for intending tenants of flats to send surveyors round to examine the building, because a surveyor could not make a proper examination when A other flats are in the possession of other tenants. Finally, it is to be noted that, if the flat is structurally in bad repair, the tenant, under an ordinary tenancy of a flat, has no power to rebuild or reconstruct the premises. To do that he would have to go into the flats which belonged to other tenants and attempt to do work on their premises, which he would have no power to do. I should not have felt any reluctance in holding, if it were open to me to do so, that the case of a flat was one of a special character, and B that there was an implied condition that the flat was fit for habitation or, at any rate, that the flat in question was not a dangerous structure. I am, however, bound, as it seems to me, by the decision of the Common Pleas Division in *Manchester Bonded Warehouse Co.* v. *Carr* (1), a decision of LORD COLERIDGE, C.J., GROVE and LINDLEY, JJ. The plaintiffs had demised certain floors in a warehouse to the defendant, Mr. Carr. The defendant covenanted, as the tenant did here, to repair and maintain the inside C of the premises. The plaintiffs covenanted to keep the walls, roof, and main timbers of the premises in good and substantial repair and condition. A sub-lessee of the defendant overloaded a floor of the warehouse with flour, in consequence of which the whole building fell. The plaintiffs rebuilt it and sued for rent during the time the building was unoccupied, and for damages. The defendant denied liability, and claimed damages from the plaintiffs. It was held, first, that, notwithstanding the fall, D the defendant was liable to pay the rent; secondly, that there was no implied warranty by the plaintiffs that the building was fit for the purpose for which it was to be used; and thirdly, certain other conclusions, with which I am not going to deal, were reached with regard to the question of warranty or condition. The judgment of the court, taking it shortly, was to this effect: the plaintiffs were not liable in damages by reason of any implied covenant or warranty by them that the building was fit for the purpose E for which it was to be used; no authority had decided that there was any such warranty, and what authority there was on the point was against its existence, and the court held that no such warranty could be implied. It is true that I do not know whether it was the ground floor, or the first or the second floor, that was sublet; but it seems to me it would be quite wrong for me to try to distinguish that case from the present one. It was a lease of part of a building, where all the considerations that I have mentioned as F applicable in the case of a flat were, to some extent, applicable, and the court, one of very eminent judges, came to the conclusion that it would be to extend the law to hold that any warranty could be implied in such a case.

Accordingly, it seems to me that, following that decision, I must hold that a landlord is entitled to let a flat in a building without being held to be giving such an implied warranty. The tenant is not, therefore, entitled to maintain an action for damages G for breach of warranty, nor is he entitled, by treating the warranty as a condition, to put an end to the lease.

[His Lordship then held that, in the circumstances, the landlord had broken the covenant for quiet enjoyment, and was liable for damages, including the tenant's expenses in vacating the flat. On the counter-claim for rent there would be judgment for the landlord.] H

Solicitors: *Finnis, Downey, Linnell & Chessher*; *Dudley M. Paul & Co.*

[*Reported* by A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re COSSENTINE. PHILP *v.* TRUSTEES OF THE WESLEYAN METHODIST LOCAL PREACHERS' MUTUAL AID ASSOCIATION

CHANCERY DIVISION (Maugham, J.), July 1, 1932]

[Reported [1933] Ch. 119; 102 L.J.Ch. 78; 148 L.T. 261; 76 Sol. Jo. 512]

Will—Bequest—Bequest "to be divided between the L. Society and the heirs of my brother and sisters"—Division between sisters and heir of brother per capita.

By his will the testator gave "the rest of my property of whatsoever kind . . . to my wife, and after her decease to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters." At that time there were two sisters living, each of whom had a child then living. The brother had died, leaving a widow and child then living. No sister pre-deceased the testator, but his own wife did so.

Held: The society, the daughter of the deceased brother, and each of the two surviving sisters were each entitled to one equal fourth share of the property because —

(i) "the heirs of my brother and sisters" meant "my sisters and the heirs of my brother," not "the heirs of my brother and the heirs of my sisters": *Re Dale, Mayer* v. *Wood* (1), [1931] 1 Ch. 357, applied.

(ii) an ordinary man directing a sum to be divided between the children of A and B would be intending a division per capita, and, therefore, according to the natural meaning of the words the gift was therefore to be divided equally between the specified charity, each sister who survived the testator, and the daughter of the deceased brother: *Re Harper, Plowman* v. *Harper* (2), [1914] 1 Ch. 70, followed; *Re Walbran, Milner* v. *Walbran* (3), [1906] 1 Ch. 64, not followed.

Notes. Followed: *Re Alcock, Bonser* v. *Alcock*, [1945] 1 All E.R. 613. Considered: *Re Birkett, Holland* v. *Duncan*, [1950] 1 All E.R. 316. Referred to: *Re Jeeves, Morris-Williams* v. *Haylett*, [1948] 2 All E.R. 961.

As to gifts to "the children of A and B," see 34 HALSBURY'S LAWS (2nd Edn.) 304, para. 354, as to the meaning of "between" see ibid. 356–357, para. 402, note (*i*) (5), and for cases on these subjects see 41 DIGEST 845–846, *6983–6994* and ibid. 991 et seq.

Cases referred to:

(1) *Re Dale, Mayer* v. *Wood*, [1931] 1 Ch. 357; 100 L.J.Ch. 237; 145 L.T. 632; Digest Supp.

(2) *Re Harper, Plowman* v. *Harper*, [1914] 1 Ch. 70; 83 L.J.Ch. 157; 109 L.T. 925; 58 Sol. Jo. 120; 44 Digest 845, *6985*.

(3) *Re Walbran, Milner* v. *Walbran*, [1906] 1 Ch. 64; 93 L.T. 745; 54 W.R. 167; 44 Digest 574, *3910*.

(4) *Doe d. Hayter* v. *Joinville* (1802), 3 East, 172; 102 E.R. 563; 44 Digest 612, *4394*.

(5) *Re Prosser, Prosser* v. *Griffiths* (1929), 167 L.T.Jo. 307; 67 L.Jo. 346; [1929] W.N. 85; Digest Supp.

(6) *Dowding* v. *Smith* (1841), 3 Beav. 541; 10 L.J.Ch. 235; 49 E.R. 213; 44 Digest 991, *8496*.

(7) *Roberts* v. *Edwards* (1863), 33 Beav. 259; 33 L.J.Ch. 369; 9 L.T. 360; 9 Jur.N.S. 1219; 12 W.R. 33; 55 E.R. 367; 44 Digest 656, *4950*.

(8) *Re Featherstone's Trusts* (1882), 22 Ch.D. 111; 52 L.J.Ch. 75; 47 L.T. 538; 31 W.R. 89; 44 Digest 513, *3329*.

Construction Summons as to a will.

By his will made in 1931, the testator, after giving certain legacies, continued:

"The rest of my property of whatsoever kind I give to my wife and after her decease to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters."

At that date there were two sisters living, each of whom had one child, and the widow A and child of a deceased brother. They all survived him. His wife pre-deceased him, and he died on July 30, 1931. After the court had found that the testator meant by the above described society the charity known as the Wesleyan Methodists Local Preachers' Mutual Aid Association the executors took out this summons asking whether the will designated the testator's sisters or the heirs of his sisters as taking under the residuary gift, and whether the expression "heirs" denoted persons to be ascertained B under the Inheritance Act, 1833, or the Administration of Estates Act, 1925, or denoted children or some other and what class of persons, or whether in the case of heirs of a living person it meant those who would have been such had that person died immediately before the testator or at some other and what time.

G. D. Johnston for the executors. C

J. A. Reid, for the charity, referred to *Re Dale, Mayer* v. *Wood* (1), *Doe* v. *Joinville* (4), *Re Harper, Plowman* v. *Harper* (2), *Re Prosser, Prosser* v. *Griffiths* (5), *Re Walbran, Milner* v. *Walbran* (3).

Jopling, for the sisters and their children, cited *Dowding* v. *Smith* (6), *Roberts* v. *Edwards* (7), *Re Walbran, Milner* v. *Walbran* (3).

F. H. L. Errington, for the brother's widow, cited *Re Featherstone's Trusts* (8), *Re Harper, Plowman* v. *Harper* (2), and *Re Walbran, Milner* v. *Walbran* (3). D

G. P. Slade for the child of the brother.

MAUGHAM, J. [after stating the facts, continued]: The will has the merit of great brevity, but its true construction is a matter of considerable difficulty. What is the meaning of a gift of personal estate which is

> "to be divided between the Local Preachers' Mutual Aid Society and the heirs of E my brother and sisters"?

On those words several ambiguities arise. Is the division to be between the charity on the one hand and the heirs of the brother and sisters on the other, or is it to be between all the beneficiaries per capita? Next, do the words "between . . . the heirs of my brother and sisters" mean between the heirs of the brother and of the sisters, F or between the sisters and the heirs of the brother? A further question may arise, what does the word "heirs" mean when used by a testator in regard to the personal estate of living sisters of the testator?

All the relevent authorities have been cited. The latest is *Re Dale, Mayer* v. *Wood* (1), in which there was a gift by will of proceeds of sale to be divided "equally between the children of my son A and my daughter B." In his judgment in that case, LUXMOORE, J., G carefully considered all the preceding cases on the point and stated the effect of them, so that I need not refer to the facts in the various cases or state the reasons for the judgments in them. I agree with the view expressed in that case by LUXMOORE, J., that

> ". . . in the absence of any context or surrounding circumstances, a gift to the children of A and B in equal shares, or to be equally divided between the children H of A and B, should be construed as a gift in equal shares to the individual B and the children of A."

That view seems to be borne out by a consideration of the reported cases to which LUXMOORE, J., refers. I think that, in the present case, dealing with the gift to "the heirs of my brother and sisters," which is, in effect, identical with a gift to "the heirs of my deceased brother and sisters," I ought to hold that it is to be construed as being a I gift to "my sisters and the heirs of my brother," and not as being a gift to "the heirs of my brother and the heirs of my sisters." One difficulty is, therefore, resolved, because any possible construction of the words "the heirs of my brother" must lead to the same person being entitled to that share, since the share, whatever it is, must go to the deceased brother's daughter.

The remaining question is, how must the division between the charity, the testator's sisters and the deceased brother's heir be made? On that point there has been some difference of opinion, apart from slight differences in the language of testators. I think that Joyce, J., in *Re Walbran, Milner* v. *Walbran* (3), did take the view that with regard to a gift "to be equally divided between the children of A and B," the primâ facie meaning implied a division into two parts rather than into a greater number. I agree that he had some ground, which he mentioned, for thinking that that was what the testatrix in that case meant. For my part, however, I doubt whether that is the true natural popular meaning of a gift of personal estate "to be divided between the children of A and B." An ordinary man directing a sum to be divided between the children of his sister and, say, his nephew Jack, would, in my opinion, be intending a division per capita. The history of the word "between" goes back, as does the history of many words in common use, to remote antiquity. Reference to the OXFORD DICTIONARY, vol. I, p. 834, shows that, if you go as far back as Anglo-Saxon times, the word "between" was etymologically a reference to "two." However, there is also in the OXFORD DICTIONARY, vol. I, p. 835, para. 5, 19, the statement that

> "in all senses, 'between' has been, from its earliest appearance, extended to more than two. In Old English and Middle English it was so extended in sense 1 [that is, the sense of simple position] in which 'among' is now considered better. It is still the only word available to express the relation of a thing to many surrounding things severally and individually, 'among' expressing a relation to them collectively and vaguely. . . ."

The illustrations given show that in the opinion of the editor it is not, in strictness, right to direct a sum to be divided "among A, B and C," but that the correct phrase is, and for many years has been, "between A, B and C." Agreeing as I do with that view, I am disposed to follow the decision of SARGANT, J., in *Re Harper, Plowman* v. *Harper* (2). In that case there was a gift of a fund

> "to be divided equally between the unmarried daughters of my brother-in-law Dr. H. and Dr. G. equally."

Dr. H. had five daughters, of whom three were unmarried, and Dr. G. one daughter only, who was four years old, and SARGANT, J., held that the gift was a gift to Dr. G. personally and not to his "unmarried daughter," and that the fund in question was divisible in equal fourth parts.

On the whole, I am of opinion that the gift in the present case

> ". . . to be divided between the Local Preachers' Mutual Aid Society and the heirs of my brother and sisters"

is, according to the natural meaning of the words—which I have construed as meaning a gift to be divided between—for in this case I decline to use the word "among"—the charity, the sisters, who were alive at the date of the testator's death, and the daughter of his deceased brother—a gift in equal fourth parts. It is true that it is not a family class, but, for the reasons given by SARGANT, J., in *Re Harper, Plowman* v. *Harper* (2), and bearing in mind that unless I am right as to the meaning of the word "between," there are no words of division applicable to the testator's sisters and the daughter of his brother, I hold that the testator did intend, and has expressed the intention, that the property should go, in the events which have happened, in equal fourth shares.

Declaration accordingly.

Solicitors: *Gregory, Rowcliffe & Co.* for *Caunter & Venning*, Liskeard; *Kingsley Wood, Williams & Co.*; *Bridges, Sawtell & Co.* for *H. E. Wilkes*, Stowmarket; *Oldman, Cornwall & Wood Roberts* for *Ollard & Ollard*, Wisbech.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

BRYCE *v.* BRYCE

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P.), December 15, 1932]

[Reported [1933] P. 83; 102 L.J.P. 1; 148 L.T. 351; 49 T.L.R. 177; 77 Sol. Jo. 49]

Domicil—Evidence—Declarations of intention—Admissibility.

On an issue of domicil, statements of a living person as to his intention of acquiring a domicil are not subject to the common law rule that they cannot be received unless they are against his interest since questions of domicil are not only of private interest but of public concern. Such statements must be duly weighed together with the rest of the evidence adduced, though they have been described as "the lowest species of evidence."

On a wife's petition for dissolution of marriage, the husband denied the charges, and claimed that he had acquired a domicil of choice in France. The marriage took place at a London register office in 1919. The husband's domicil of origin was England. He alleged that he had stipulated with his wife before marriage that they should always live in France. This was denied by the wife. The husband gave evidence on commission that from time to time he had made declarations to friends of his intention to live the rest of his life in France, and friends were called to prove such declarations. Objection was made on behalf of the wife that such evidence was inadmissible.

Held: the evidence would be admitted de bene esse, but on the facts, the husband had not established that he had relinquished his domicil of origin.

Notes. As to evidence of change of domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 19–23, paras. 35–43; and for cases on the subject see 11 DIGEST (Repl.) 335–338, *78–96*.

Cases referred to:

(1) *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. 307, H.L.; 11 Digest (Repl.) 329, *39*.

(2) *D'Etchegoyen* v. *D'Etchegoyen* (1888), 13 P.D. 132; 57 L.J.P. 104; 37 W.R. 64; 11 Digest (Repl.) 349, *180*.

(3) *Rawson* v. *Haigh* (1824), 2 Bing. 99; 9 Moore, C.P. 217; 2 L.J.O.S.C.P. 130; 130 E.R. 242; 22 Digest (Repl.) 51, *318*.

(4) *Hodgson* v. *De Beauchesne* (1858), 12 Moo. P.C.C. 285; 33 L.T.O.S. 36; 7 W.R. 397; 14 E.R. 920, P.C.; 11 Digest (Repl.) 332, *55*.

(5) *Ross* v. *Ellison* (or *Ross*), [1930] A.C. 1; 96 L.J.P.C. 163; 141 L.T. 666, H.L.; 27 Digest (Repl.) 316, *2643*.

(6) *Brodie* v. *Brodie* (1861), 2 Sw. & Tr. 259; 30 L.J.P.M. & A. 185; 4 L.T. 307; 9 W.R. 815; 164 E.R. 995; 11 Digest (Repl.) 472, *1026*.

(7) *Crookenden* v. *Fuller* (1859), Sea. & Sm. 3; 1 Sw. & Tr. 441; 29 L.J.P. & M. 1; 1 L.T. 70; 5 Jur. N.S. 1222; 8 W.R. 49; 164 E.R. 804; 11 Digest (Repl.) 327, *25*.

Trial of an issue as to domicil arising out of a petition for divorce. The facts are set out in the judgment of LORD MERRIVALE, P.

Bayford, K.C., and *T. Bucknill* for the wife petitioner.

Fergus Morton, K.C., and *F. L. C. Hodson*, for the husband respondent, referred to *Bell* v. *Kennedy* (1); *D'Etchegoyen* v. *D'Etchegoyen* (2); *Rawson* v. *Haigh* (3); *Hodgson* v. *De Beauchesne* (4); and *Ross* v. *Ellison* (or *Ross*) (5).

LORD MERRIVALE, P.—The question here is a question of domicil. The wife is a petitioner in the divorce jurisdiction. The husband has alleged that the domicil of the parties is French, and that for that reason the court has no jurisdiction to deal with their marital relations. If that plea is established in fact, this court has no jurisdiction; the parties must come before the appropriate French tribunal to determine what is to happen between them. There is no question here that the domicil of origin of the parties is English. The petitioner was the daughter of a man of position and fortune, who, in his later years, was living at Broomhill in Kent, a country house which had been the property of himself and his predecessors for a very long period of years, the petitioner says for upwards of eighty years. The respondent is the son of a man who was very well known in Devon, where he had an established position. The respondent was born in Devon and educated at Harrow. Then he showed the independent mind which was his characteristic. He was self-willed as well as independent, but he had a resolute mind. He went to South America, and when the South African war broke out he promptly came home, received a commission in the Army, and fought gallantly during the South African War. Not long afterwards he went to Johore rubber planting, but when the Great War came he returned and was given a commission in His Majesty's forces. He remained on active service during the War, and achieved distinction, becoming colonel in the Tank Corps.

He was married to the petitioner on Jan. 1, 1919, and obtained his discharge from the Army in May, 1919. In that year they rented a furnished flat in Paris, and then they acquired a lease of another flat which became their pied-à-terre. They were people of substantial means, having their foothold in Paris, pursuing what pleasures they wished to pursue, and living on very good terms down to the year 1928. Then a serious trouble arose, and in 1930 the petitioner definitely left the respondent. If these people are domiciled where they were married in 1919, their various rights are governed by English law, but if they have ceased to be domiciled in England and have become domiciled in France, their various rights are governed by French law. The respondent's case, in substance, is that, before they were married, it was definitely established between them that they should make their permanent home in France, and that that was a condition precedent to the marriage. Apart altogether from that stipulation, he said it was common knowledge among his friends that he had abandoned his English domicil and adopted a French domicil. He vouches various friends of his in confirmation of that statement.

There is a conflict of evidence between the respondent and the petitioner on the question of the stipulation which is asserted, and whether the parties lived in Paris during the subsequent years in pursuance of the determination of the respondent acquiesced in by the petitioner. The law being as it is, the determination of the respondent as to domicil acted on must settle the matter, if it is established. It seems sometimes in these days a hard measure to say that a man can determine for himself what the status of the parties as to marital rights shall be, but that is the law. He can determine the domicil, and the wife's domicil follows that of the husband. I have to consider whether the respondent's affirmation as to the circumstances of the marriage must be implicitly accepted. I have come to the conclusion that it cannot be, and his memory is at fault about that.

[His Lordship reviewed certain authorities of the English law of domicil, and continued:] No one can doubt that there was a sufficient residence to found domicil, if there was the intention. In considering the question of intention, I have had before me a body of evidence. There was a question whether the evidence of some friends of the respondent of declarations of intention on his part was receivable. That was a nice question, and it is not one easy of decision. I received the evidence de bene esse.

The common law rule, no doubt, is that the statements of a living person as to intentions of his cannot be received unless they are against his interest. To what extent that applies in cases of domicil is a little difficult to determine, because domicil is a matter not only of private interest but also of public concern; and so the dividing line cannot be laid down very definitely. *Brodie* v. *Brodie* (6) seems to support the view of admissibility of such evidence within limits rather than to reject it. A witness was called in that case by the petitioner to give evidence of declarations of domicil on his part, the question being whether the petitioner was domiciled here so as to found a jurisdiction in divorce. The witness gave an account of intentions in which he said:

> "I understood from him [that is, at a time when the petitioner was the vendor of a sheep station in South Australia] when I purchased the sheep station that he was selling off to return home and live in this country."

That was, perhaps, admissible on the ground that it explained with what intention the act which was being concluded between the parties was, in fact, concluded. The court, which was the full court of SIR CRESSWELL CRESSWELL and WHITEMAN and WILLIAMS, JJ., said: A

> "We say nothing as to what the effect of the evidence might be in a testamentary suit. We think that the petitioner was bona fide resident here and not casually as a traveller." B

There they left the matter. They received the evidence and domicil was held to be established.

An authority of that kind is, at any rate, some ground for giving proper consideration to the evidence of the respondent's friends who were witnesses here. I have heard from them that their view was that it was his intention to make his home permanently C in France. The petitioner, on the other hand, said that before the marriage the respondent never spoke of living in Paris, and that he had never expressed to her any intention of living permanently in France. She called some witnesses who gave evidence to the effect that the respondent's expressed reason for continuing to live in France and not coming to live in England was that the taxes in England were so high that they could not afford to live here. The petitioner's evidence on the subject is that there was never D any question of permanently residing out of England, but, on the other hand, there came a time when it was accepted between them that their ultimate home would be an English home at Broomhill, which the petitioner looked on as her inheritance.

As to the evidence of the witnesses with respect to intention, I received it de bene esse. I think that in some respect or other a considerable part of it was undoubtedly evidence and some part of it was not, but I have taken it into consideration, and I have E considered in the light of the authorities what weight should be attached to evidence of declarations or intentions. In *Hodgson* v. *De Beauchesne* (4) this was said by an eminent judge (DR. LUSHINGTON) (12 Moo.P.C.C. at p. 325):

> "Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence, especially when it is encountered by conflicting declarations." F

SIR CRESSWELL CRESSWELL also had to consider that matter quite early in his tenure as Judge Ordinary, and in *Crookenden* v. *Fuller* (7) he said this (1 Sw. & Tr. at p. 450):

> "Conversations and declarations, unless accompanying acts, have, I think, been properly described as the lowest species of evidence. They must not, however, be disregarded, but duly weighed together with the rest of the evidence adduced." G

They have to be duly weighed, and it comes to this, that the friends of the respondent are summoned here now to say that they understood from him he had made his home in France. The friends of the petitioner are summoned and say: "We understood that these people lived in France because of the high taxation in England."

Has the respondent established that he had set up in France the permanent residence of himself and his wife with the intent which is necessary to establish domicil? Unless H he has affirmatively satisfied me in that matter he cannot succeed. He has not, and, on that narrow footing, I must give judgment for the petitioner on the issue, with costs. Perhaps I should express the view that where the parties should live was a matter on which they agreed from time to time between themselves. They were not on the footing of a husband in absolute authority. The petitioner had her say, and she would inevitably be consulted as to where they were to live, and her view as to where they I would live had weight with him.

Judgment for the wife petitioner.

Solicitors: *Druces & Attlee*; *Lewis & Lewis.*

[*Reported by* WILLIAM LATEY, ESQ., *Barrister-at-Law.*]

FRESHWATER *v.* WESTERN AUSTRALIA ASSURANCE CO., LTD.

[COURT OF APPEAL (Lord Hanworth, M.R., and ROMER, L.J.), November 22, 1932]

[Reported [1933] 1 K.B. 515; 102 L.J.K.B. 75; 148 L.T. 275; 49 T.L.R. 131; 76 Sol. Jo. 888]

Insurance—Motor insurance—Action against insurers to satisfy judgment against bankrupt insured—Arbitration clause in policy—Alleged mis-statements in proposal form—Denial of liability by insurers—Right of insurers to a stay of proceedings—Third Parties (Rights against Insurers) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 25), *s.* 1*—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 36 (4), (5)*—Arbitration Act,* 1889 (52 *&* 53 *Vict., c.* 49), *s.* 4.

A third party claiming against the insurers of a bankrupt motorist under the Third Parties (Rights against Insurers) Act, 1930, s. 1, is bound by the terms and conditions of the bankrupt's policy, including any condition making arbitration a condition precedent to a right of action against the insurers. Such a condition in no way takes away the advantages given to the third party by s. 36 (4) and (5) of the Road Traffic Act, 1930, and so an action by a third party against the insurers will be stayed unless sufficient reason why the matter should not be referred to arbitration is proved.

Condition 6 of a motor insurance policy against third-party risks provided that "if any difference or dispute of any kind whatsoever shall arise between the insured or any claimant and the [insurance] company in respect of this policy or in respect of any claim or of any matter or thing or any liability arising or alleged to have arisen hereunder or otherwise connected herewith directly or indirectly the same shall be referred to the final determination and award of a single arbitrator. . . . It shall not be competent to prosecute any action against the company in a court of law for sums due or alleged to be due under this policy except for the amount of the award, and the obtaining of the said award shall be a condition precedent to the liability of the company to make any payment under this policy. A proviso to the policy made the truth of the insured's answers in the proposal form "conditions precedent to any liability of the company to make any payment under this policy." A third party injured in a motor accident due to the negligence of the insured recovered judgment for £300 and costs in an action against the insured. Before the judgment had been satisfied the insured went bankrupt. The third party then applied to the insurers to satisfy the judgment, but the insurers replied, by letter dated Sept. 22, 1932, setting out the proviso and stating that the answers given by the insured in his proposal form "or some of them are untrue, and in the circumstances we . . . therefore, cannot accept liability under the policy." On Sept. 28, 1932, the third party issued a writ against the insurers for the amount of his judgment against the bankrupt insured, pursuant to the provision of s. 1 of the Third Parties (Rights against Insurers) Act, 1930, that, in the events which had happened, the insured's "rights against the insurer under the contract in respect of the liability [to the third party] shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred." On an application by the insurers to stay the action under s. 4 of the Arbitration Act, 1889, which provided that "when any party to a submission commences legal proceedings in a court, that party against whom the proceedings are brought may apply to the court to stay the proceedings on the ground that in the submission there is a clause providing for arbitration, and thereupon the court . . ., if satisfied that there is no sufficient reason why the matter should not be referred . . . may make an order staying the proceedings."

Held: the action should be stayed because

(i) a third party, if he wished to rely on the policy pursuant to s. 1, was bound by the terms and conditions thereof, including the arbitration clause;

(ii) condition 6 merely postponed, and did not oust, the jurisdiction of the court, and was therefore valid: *Scott* v. *Avery* (1) (1856), 5 H.L.C. 811, applied;

(iii) the letter of Sept. 22, 1932, did not constitute a repudiation of the policy by the insurers, but only a repudiation of liability thereunder, and so the insurers were still entitled to rely on the arbitration clause;

Woodall v. *Pearl Assurance Co.* (2), [1919] 1 K.B. 593, and *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (3) (1932), 43 Ll.R. 487, applied; *Jureidini* v. *National British and Irish Millers' Insurance Co.* (4), [1915] A.C. 499, distinguished.

(iv) the arbitration clause in no way deprived the third party of the advantages and privileges given to him by s. 36 (4) and (5) of the Road Traffic Act, 1930, and in the circumstances "no sufficient reason why the matter should not be referred" had been shown to the court.

Notes. Section 4 of the Arbitration Act, 1889, is now s. 4 (1) of the Arbitration Act, 1950.

Applied: *Denneby* v. *Bellamy*, [1938] 2 All E.R. 262.

As to how far conditions in an insurance policy are binding on third parties suing under the Act, see 22 Halsbury's Laws (3rd Edn.) 341, para. 699; as to when and to what extent an arbitration clause bars an action or an insurance policy, see ibid. 257, para. 505, and ibid., vol. 2, 19–21, paras. 47, 49, and for cases on the subject see 2 Digest (Repl.) 449, *180*, *181*; as to repudiation of such clauses, see 2 Halsbury's Laws (3rd Edn.) 20, para. 48, and for cases on the subject see 2 Digest (Repl.) 443, 444, *160–162*. As to the statutory requirements of the Road Traffic Acts in respect of policies of motor insurance against third-party risks, see 22 Halsbury's Laws (3rd Edn.) 363–369, paras. 748–757. As to the jurisdiction to stay proceedings by a party to an arbitration agreement, see 2 ibid. 21–28, paras. 50–62, and for cases on the subject see 2 Digest (Repl.) 477 et seq., 346 et seq. For the Third Parties (Rights against Insurers) Act, 1930, see 2 Halsbury's Statutes (2nd Edn.) 458, and for the Road Traffic Act, 1930, see ibid., vol. 24, 569, and for the Arbitration Act, 1950, s. 4 (1), see ibid., vol. 29, 93.

Cases referred to:

(1) *Scott* v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest (Repl.) 465, *290*.

(2) *Woodall* v. *Pearl Assurance Co.*, [1919] 1 K.B. 593; 88 L.J.K.B. 706; 120 L.T. 556; 83 J.P. 125; 63 Sol. Jo. 352; 24 Com. Cas. 237, C.A.; 29 Digest 403, *3187*.

(3) *Golding* v. *London and Edinburgh Insurance Co.* (1932), 43 Ll.L.R. 487.

(4) *Jureidini* v. *National British and Irish Millers' Insurance Co., Ltd.*, [1915] A.C. 499; 84 L.J.K.B. 640; 112 L.T. 531; 31 T.L.R. 132; 59 Sol. Jo. 205, H.L.; 2 Digest (Repl.) 444, *161*.

Appeal by insurers from an order made by Swift, J., in chambers on Oct. 27, 1932, refusing to stay an action brought against them under the Third Parties (Rights against Insurers) Act, 1930, s. 1.

The facts are shortly stated in the headnote, and are fully set out in the judgment of the Master of the Rolls.

Van den Berg, K.C., and *G. J. Paull* for the insurance company, the defendants.

Croom-Johnson, K.C., and *Martin O'Connor* for the plaintiff, the third-party claimant.

LORD HANWORTH, M.R.—This appeal raises an interesting point, and a point which, as the cases show, has presented some difficulty to the courts in the past.

Henry Freshwater brings his action by a writ issued on Sept. 28, 1932, against the Western Australian Insurance Co., Ltd.; he alleges that on July 24, he, whilst travelling on the pillion seat of a motor cycle of Reginald Thomas Cundy, was injured in consequence of a collision between Cundy's motor cycle and the motor cycle of one Leslie Harper. The collision, he alleged, was due to the negligence of both Cundy and Harper by reason of their not having proper control of their respective motor cycles, and in an action which was brought and tried before TALBOT, J., and a common jury, on July 18 and 19 of this year, the plaintiff—that is Freshwater—obtained a verdict for £300 damages against both Harper and Cundy with costs.

On July 24, 1931, Harper was insured by the defendant company against third-party risks. The policy was dated Nov. 1, 1930. Harper was insured against third-party risks whilst riding his motor cycle. The insurance company defended the action which was brought by the plaintiff against Cundy and Harper, and in spite of that defence, the plaintiff succeeded against both of them. Although Harper was insured by the insurance company—and, indeed, that was the reason why they took the trouble to defend the action—yet the insurance company refused to pay the sum for which there was an insurance policy held by Harper.

On Sept. 13, 1932, Leslie Harper was adjudicated bankrupt and has no assets, and so the plaintiff claims that the defendants are now liable to pay to him the sum of £300, with his taxed costs in the action which resulted in the said judgment, by virtue of s. 1 of the Third Parties (Rights against Insurers) Act, 1930.

On this action being started in that form, the insurance company have taken out a summons asking that all further proceedings in this action shall be stayed, on the ground that the insurance policy which was held by Harper contained a clause providing for arbitration, and that an award obtained under it should be a condition precedent to any action against them.

The application is made under what used to be s. 4 of the Arbitration Act, 1889, which, shortly put, says:

> "When any party to a submission commences legal proceedings in a court, that party against whom the proceedings are brought may apply to the court to stay the proceedings on the ground that in the submission there is a clause providing for arbitration, and thereupon the court or judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, may make an order staying the proceedings."

What the insurance company say here is this: there is no sufficient reason why the clause for arbitration in the policy held by Harper should not be implemented; it is a clause which appears in a great number of insurance policies; it is part of a contract we made with Harper, and no sufficient reason has been established why the case should not be referred to arbitration.

RIGBY SWIFT, J., did not take that view, and holding that the case was one of public importance and that there appeared to be legal difficulties to be solved, exercised his discretion in favour of allowing the action to proceed. From that the defendants, the insurance company, appeal to this court.

It will be observed that under s. 4 it is not a simple matter of discretion to be exercised by the learned judge. If it were a simple exercise of discretion this court would be very reluctant to interfere with the exercise by the learned judge of his discretion; but, in order to exercise his discretion, the learned judge must, first of all, be satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission; in other words, the terms of s. 4 mean this: that the court must hold the parties to that contract, provided they submit to arbitration, unless some sufficient reason, adequate in the circumstances, justifies its setting aside that term of the contract, and exercising then a discretion in favour of allowing the action to proceed.

The plaintiff takes up a definite and strong position. He says, first of all, that he does not really care what the terms of the policy were as between Harper and the defendant insurance company; that by virtue of recent legislation every person is bound to insure against third-party risks, and that the third party (so says the plaintiff) has a right, if and when the party who has caused the injury, the insured party, goes bankrupt, to have the compensation payable in respect of the accident paid to him, the third party. He says that it was for this reason, first of all, that the Third Parties (Rights against Insurers) Act, 1930, was passed. That Act was passed to obviate the difficulty that where a person who was insured went bankrupt the sum which he was to receive under the policy passed into his general assets, his general estate, and could not be paid out to the person who had been injured, although no doubt he was the person who had suffered from the accident, and it was owing to the accident that any sum at all was paid under the policy. A

So this Act—the Third Parties (Rights against Insurers) Act, 1930—provides that

> "where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then (a) in the event of the insured becoming bankrupt . . . if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred." B

C

The terms of that section are plain enough that where there is under a contract of insurance a person who is insured, then his rights of insurance against the insurer shall pass on to the person to whom the liability was so incurred; that leaves open the question whether, under the terms of the policy, the insured person still remained insured, and whether he had any, and what, rights against the insurer; so that does not carry the plaintiff any distance if in this case the insurers desire to raise the point that, by virtue of a mis-statement in the answers to questions which were made the basis of the contract of insurance between the insured and the insurers, mistakes have been made such as to invalidate the policy of insurance. D

However, the plaintiff does not stop there. He says: Even if that Act does not apply I am entitled to say that I have nothing to do with the detailed terms of the policy for insurance. Harper was insured, and was insured by the insurance company, and I am entitled, as I have already said, to implement that policy of insurance by virtue of s. 36 (4) of the Road Traffic Act, 1930, which provides: E

> "Notwithstanding anything in any enactment, a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons." F

It is argued on behalf of the plaintiff that the meaning of those words "the policy purports to cover" is: here is a policy for a certain sum payable to a third party, and inasmuch as we have an insurer and an insured and a sum insured which the policy purports to cover, and those words are specified, therefore, the plaintiff, by a short cut, can say against the insurers: Pay me what you have insured under the policy. I cannot, however, read those words "purports to cover" as meaning simply: look at the name of the insurers and the insured and the amount insured; disregard all the conditions that are contained in the policy, and the effect of the policy is an out-and-out right to payment, if there is an accident, of the sum insured. G

Section 36 (5) is this:

> "A policy shall be of no effect for the purposes of this Part of this Act unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Part of this Act referred to as a 'certificate of insurance') in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed. . . ." H

We have looked at a certificate of insurance, which merely signifies that there is an insurance for a certain amount of some person to travel in a motor car; but we have not had our attention drawn to the prescribed form or the particulars which may have been prescribed, and unless that section is carried into effect by prescribing some particulars which may or may not be rendered valid by the certificate, I cannot read sub-s. (5) as making a different policy for the insurance than that which is contained in the actual terms of the policy. I

Whether I read, therefore, sub-s. (4) or sub-s. (5), I think that the policy of insurance itself has got to be looked at to see what the policy purports to cover, and when one looks at this policy and sees what it purports to cover, one sees that it does contain conditions which do, or may, prevent a right to recover on the part of the insured person. In other words, in spite of the terms of sub-ss. (4) and (5) of s. 36 of the Road Traffic Act, 1930, one still has to look at the terms of the policy. A third party such as the plaintiff cannot eliminate all the terms and conditions of the policy, but, if he wishes to rely upon the policy, he is bound by the terms and conditions therein written; in other words, he is bound by the clause which provides for arbitration.

I turn, therefore, to consider what are the terms of the policy. The arbitration clause, condition 6, is a very wide one indeed; it is in these terms:

> "If any difference or dispute of any kind whatsoever shall arise between the insured or any claimant and the company [that word "claimant" obviously including someone outside the insured; it may be a third party; it may be an executor or an administrator, and the like] in respect of this policy or in respect of any claim or of any matter or thing or any liability arising or alleged to have arisen hereunder or otherwise connected herewith directly or indirectly the same shall be referred to the final determination and award of a single arbitrator to be agreed upon by both parties. . . ."

There cannot be—at least I hesitate to find or to suggest that there are—wider terms of arbitration. Whatever dispute, whatever difference, arises between the insured or a claimant and the company, all such difference and disputes are referred to an arbitrator; and, correspondingly, there is a negative clause:

> "It shall not be competent to prosecute any action against the company in a court of law for sums due or alleged to be due under this policy except for the amount of the award, and the obtaining of the said award shall be a condition precedent to the liability of the company to make any payment under this policy."

It is to be noted that the words there are "except for the amount of the award"; that is the only event in which there would be a successful issue to the arbitration in favour of the insured or any claimant. If a liability under the policy is established, and if a loss is established, then the award would be that a certain sum would be recovered from the company who are held to be liable in that amount. If the award was in favour of the company there would not be anything to recover, and so this clause is that no action except for the amount of the award shall be prosecuted.

It seems to me that that clause is a very wide one indeed, and far wider than the clause in *Scott* v. *Avery* (1), but the principle of *Scott* v. *Avery* (1) applies to it, namely, that the jurisdiction of the court is not ousted; the clause is not bad; the condition is lawful; and all that has happened is that no action can be brought until the award has been made. It postpones but does not annihilate the right of access to the court.

Then comes the proviso:

> "Provided always that the due observance and fulfilment of the terms provisions conditions and endorsements of this policy in so far as they relate to anything to be done or complied with by the insured and the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy."

That proviso means this: that, although the policy stands, yet, when a loss arises or some other occasion requires investigation, it is open to the company to see whether there is any liability to make any payment under the policy, because the right to extract such a payment may have been lost by reason of the inaccuracy of some statements made. It might not be necessary to put an end to the policy wholly, as would be the case where the company have been inveigled by fraud into making a contract of insurance; but this is a stipulation, a contractual stipulation, which gives the right to the company to investigate the question whether or not the conditions which are precedent to the liability have been fulfilled.

Construing that condition 6 and the proviso in the way that I have done, our course is plain to decide that it is a case which falls within the decision of the Court of Appeal in *Woodall* v. *Pearl Assurance Co.* (2), and the observations which are made in that case by BANKES, L.J., and also within the authority of *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (3), also a case which was decided in this court. In both of those cases *Jureidini* v. *National British and Irish Millers' Insurance Co.* (4) is distinguished. A The *Jureidini Case* (4) was different because in that case what was being considered was not a claim under the policy; there it was held to have been a complete repudiation of the policy and all its terms.

Counsel for the plaintiff called our attention to the letter of Sept. 22, 1932, and said that that letter was one which is to the same effect as the one which has been treated in the *Jureidini Case* (4) as one of absolute repudiation. I cannot so read that letter. B It sets out very carefully the terms of the proviso; it sets out the questions and answers to which exception has been taken, and then it says:

> "These answers or some of them are untrue, and in the circumstances we have to inform you that our clients, therefore, cannot accept liability under the policy;"

because, the proviso standing good as a contractual engagement, they have then become C entitled to rely on the failure to comply with the conditions imposed with regard to the statements and answers made in the proposal. In other words, it appears to me that this court is bound, not by the *Jureidini Case* (4), which is easily distinguished and must be distinguished by the facts in this case and the terms of the policy, but is bound by *Woodall* v. *Pearl Assurance Co., Ltd.* (2), and also by *Golding* v. *London and Edinburgh Insurance Co.* (3).

D In these circumstances we have here a case in which the claimant, the plaintiff, is bound by the clause of arbitration. It is a case in which we are bound by the decisions in *Woodall* v. *Pearl Assurance Co., Ltd.* (2), and *Golding* v. *London and Edinburgh Insurance Co.* (3). In those cases the arbitration clause was held effective.

In those circumstances, has there been sufficient cause shown to us for refusing to give effect to this term of the contract which is the basis of the liability, that arbitration E shall precede any legal proceedings? It seems to me that no such sufficient case has been made out, and therefore that point does not really come into play, and the action must be stayed.

There is one other observation which I desire to make. Leading and junior counsel for the plaintiff have both insisted on the importance of this claim as a claim in which not only the parties but the public may be interested in the result. It may be so, but F in sending the case to arbitration one does not preclude the possibility of a decision being given by the court; if questions are raised as matters of law in the arbitration it is possible to take the consultative opinion of the court by what was s. 19 of the Arbitration Act or a Case could be stated. Either of those courses provides a means for coming back to the court, where an authoritative decision could be obtained, and that in a manner which is by no means inconvenient in such a case as this, or the fact can be G shortly stated in the case which is submitted to the court, and a convenient method of raising the point of law is thus provided.

For those reasons the appeal must be allowed, with costs here and below, and an order to stay made.

ROMER, L.J.—I agree. The first point taken by counsel for the plaintiff is that the arbitration clause in this policy is not binding upon his clients. We cannot, of course, H stay this matter and refer the matter to arbitration if that contention is a good one, and therefore it is necessary to decide the question.

In what I am about to say I am not referring in any way, and I do not intend to refer in any way, to the condition on which the insurance company are insisting in this case, that, having regard to the misleading answers, or alleged misleading answers, given by the assured in making the proposal for the policy, their liability under the I policy is determined. It may well be that, having regard to the certificate given by the insurance company, it no longer lies in their mouth to say that the policy in respect of which the certificate was given is not a policy which, to use the words of s. 36 (1) (b) of the Road Traffic Act, 1930,

> "insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road."

A It may well be, too, that in any case the insurance company are precluded by the words of sub-s. (4) of s. 36 from raising any such point. That is a question which will ultimately have to be decided in this case, and I agree it is a question of great public importance. However, very different considerations apply to the question as to whether the arbitration clause is binding upon the third party. Counsel for the plaintiff says it does not bind him, for two reasons, as I understand his argument. He says, in B the first place, that to hold it is binding upon him would be to run contrary to the provisions of sub-s. (4) of s. 36 of the Road Traffic Act, 1930; but when one looks at the policy it is plain that the liability which the policy purports to impose upon the insurance company is a liability to pay such amount as shall in the first instance be determined by arbitration, and that it is a condition precedent to that company's liability to make any payment that an award shall have been made. To hold that the plaintiff in this C matter is bound by the arbitration clause in the policy is not in the least to deprive him of the advantages and privileges given to him by sub-s. (4). It is possible to hold that he is bound by that clause, and yet to give effect in full to every word of sub-s. (4).

Then it was said by counsel for the plaintiff that the clause in question is not binding on his client having regard to the provisions contained in sub-s. (5) of s. 36. That sub-section provides that the certificate shall contain "such particulars of any conditions D subject to which the policy is issued"—I am leaving out immaterial words—"as may be prescribed." My attention has not been drawn to any order or rule which does prescribe what particulars of conditions are to be included in the certificate, and I have no reason for supposing, as I have not seen it, that the certificate in the present case does not contain all references to such particulars as have been prescribed; but, assuming that the certificate is a deficient certificate in that respect, I cannot find any ground in E the Act for saying that in consequence of that omission the condition relating to arbitration is not binding upon the third party.

Then, the condition of arbitration, the clause relating to arbitration, being binding upon the plaintiff, the next question which arises is as to whether, having regard to the decision in *Jureidini* v. *National British and Irish Millers' Insurance Co.* (4), we ought to stay these proceedings. In that case, as I understand it, the defendants were repu-F diating altogether the contract on which the plaintiff was suing. As a matter of fact, the plaintiff had not repudiated, so the contract was still in force, and the plaintiff was suing on the contract which in fact contained the arbitration clause; but, nevertheless, inasmuch as the defendants were purporting to repudiate the contract, although ineffectually, they were held by the House of Lords to be disentitled to rely on that clause in the contract which provided for arbitration. But the true meaning and extent of G that decision has been considered on more than one occasion by the court, and, as I understand the decisions which have been cited, culminating with *Golding* v. *London and Edinburgh Insurance Co., Ltd.* (3), the *Jureidini Case* (4) does not apply where, as here, the defendant is not saying: "I will have nothing to do with the contract at all," but is merely saying, "According to the true construction of the contract I am under no liability to you whatsoever." So much for the *Jureidini Case* (4).

H Then it was said that the court had a discretion in the matter. It is, no doubt, a matter to be taken into serious consideration by the court that there is that very important question to which I have referred in an earlier part of this judgment; but nevertheless, I think that this action ought to be stayed, and for this reason. If the action goes on and the defendants can satisfy the court that arbitration was a condition precedent to the action being brought against the insurance company, the condition I precedent to their being liable to the plaintiff, the judge, so far as I can see, would have no course open to him but to dismiss the action with costs. If, on the other hand, we now stay these proceedings, the matter will go to arbitration; it will no longer be open to the insurance company to avail themselves of the defence that there has been no performance of the condition precedent relating to the making of an award, and this difficult and important question of law may, and I have no doubt will, as was pointed out by the Master of the Rolls, be raised for the decision of the court on a Case Stated.

For these reasons I agree that this appeal should be allowed, with the consequences that have been stated.

LORD HANWORTH, M.R.—

> "It is ordered that all further proceedings in this action be stayed pursuant to s. 4 of the Arbitration Act, 1889, and that the plaintiff do pay to the defendants their costs of and occasioned by this action (including the costs of this application) to be taxed."

That is right, is it, Mr. Croom-Johnson?

Croom-Johnson.—I have nothing to say on that, my Lord, once your Lordships have made up your minds that this is a proper case in which this plaintiff ought to pay the costs of the action straight away. These matters which are raised are matters of some importance, and it was thought that, in the circumstances, the right thing to do was to test them by the issue of a writ. The order that is sometimes made accordingly is to make the costs of the action costs in the arbitration. I am entirely in your Lordships' hands about it, but I did feel, in the circumstances of this case, that I ought to make that submission.

LORD HANWORTH, M.R.—What do you say to that, Mr. Van den Berg? I think it is a fair suggestion having regard to the difficulty. You get the costs of the appeal, but the costs of the action so far and of the application under s. 4 should be made costs either in the discretion of the arbitrator or in the costs of the arbitration.

Van den Berg.—I should submit not; because the arbitration really starts afresh. Your Lordships know all the circumstances connected with this application, and it would mean probably a longer re-hearing before the arbitrator to go into all these questions of costs. The usual order is the one to which I draw your Lordships' attention.

Croom-Johnson.—If they are costs in the arbitration they will stand or fall by what happens in the arbitration. That is the convenient course, I venture to suggest, in order to avoid another taxation.

Van den Berg.—I submit there is no reason here to depart from the usual order which is set out on p. 2346 of the ANNUAL PRACTICE (1932), which says:

> "The above section makes no provision as to the costs [that is s. 4] but s. 20 provides that any order made under this Act may be made on such terms as to costs as may be just. The order to stay usually gives the defendant the costs of the action and of the application to stay."

I submit there is no good reason here for making an order which is not the usual one. We lost before the learned judge, and we were ordered to pay the costs.

ROMER, L.J.—This is a very special case.

LORD HANWORTH, M.R.—We think the right order to make is: No costs to either side of the action or application to stay, but the defendants, the appellants, are entitled to the costs of the appeal.

Appeal allowed.

Solicitors: *Shaen, Roscoe, Massey & Co.*; *J. Nixon Watts & Co.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

Re MORTON. MORTON *v.* MORTON

[CHANCERY DIVISION (Eve, J.), January 12, 19, 1932]

[Reported [1932] 1 Ch. 505; 101 L.J.Ch. 269; 146 L.T. 527]

Family Arrangement—Arrangement made without knowledge of person entitled to share —Concurrence not obtained later.

A family arrangement for the distribution of the estate of an intestate made without the knowledge or in the absence of a person entitled to share is regarded, in the absence of any express or implied contrary provision, as having been entered into on the assumption that the absentee will in due time join in the arrangement. If the absentees' concurrence is not obtained, the arrangement is accordingly not binding on any of the parties to it.

Peto v. *Peto* (1) (1849), 16 Sim. 590, and *Bolitho* v. *Hillyar* (2) (1865), 34 Beav. 180, followed.

Notes. As to the necessity for all parties to adopt a family arrangement, see 17 HALSBURY'S LAWS (3rd Edn.) 221, para. 366; and for cases on the subject see 24 DIGEST (Repl.) 121, *38–40*.

Cases referred to:

(1) *Peto* v. *Peto* (1849), 16 Sim. 590; 13 L.T.O.S. 134; 13 Jur. 646; 60 E.R. 1003; 24 Digest (Repl.) 1121, *38*.

(2) *Bolitho* v. *Hillyar* (1865), 34 Beav. 180; 11 Jur.N.S. 556; 13 W.R. 600; 55 E.R. 603; 24 Digest (Repl.) 1121, *39*.

Adjourned Summons as to whether a deed of family arrangement was binding on the parties thereto.

A testator by his last will made in 1914 gave all his real and personal estate to his wife and appointed her sole executrix. She died in June, 1928. He died in September, 1928, having made no subsequent will. The property accordingly passed, as on an intestacy, to his five brothers, the whereabouts of one of whom were unknown, he not having been heard of for over twelve years. The testator had desired to make some provision for a niece who resided with him, but had not done so. Accordingly a deed of family arrangement was made whereby the property was divided into sixths, one of such sixths being given to the niece. The brother whose whereabouts were unknown subsequently appeared and refused to concur. This summons was therefore issued to ascertain if the deed was binding on the parties thereto.

The following facts are taken from the judgment:

By a will dated Feb. 7, 1914, William Morton devised and bequeathed all his real and personal estate to his wife absolutely and appointed her his sole executrix. He died on Sept. 26, 1928, having survived his wife for a period of three months or thereabouts and without having made any testamentary disposition other than this will. He therefore died intestate, and the persons entitled to his estate under the Administration of Estates Act, 1925, were his five brothers, the two plaintiffs to whom letters of administration were granted, the first two defendants, and Tom Morton, whose whereabouts were unknown and who had not been heard of for upwards of twelve years at the date of the death.

In the period elapsing between the death of his wife and his own death the intestate had expressed his intention of making some provision for his niece the defendant Maud Handley (then Maud Morton) who had lived with the intestate and his wife from early infancy.

In these circumstances a deed of family arrangement was entered into on Sept. 29, 1928, between the four brothers, parties to the action, of the first part, and the defendant Maud Handley of the second part, whereby after reciting the facts stated above and that the parties thereto of the first part had agreed to respect the wishes of the intestate by making provision for the said Maud Handley as thereinafter mentioned and contained,

it was witnessed that in consideration of the premises the estate of the intestate **A**
should be administered as though he had died having made and duly executed a valid
will whereby he had devised and bequeathed his real and personal estate to the four
brothers, parties to the action, Tom Morton, if living at the date of the intestate's
decease, or the children, if any, of the said Tom Morton, if he should be dead, and the
said Maud Handley in equal shares, the children of the said Tom Morton, if any, taking
the share which Tom Morton would have taken had he been living at the date of the **B**
intestate's death.

Since the date of the deed the whereabouts of Tom Morton, who was still living, had
been discovered, and he refused to concur in or give effect to the proposed arrangement
insisting on his right to receive one-fifth of the estate. The administrators therefore
issued this summons for the determination of the question whether the deed was binding
on the parties thereto. **C**

P. M. Walters for the plaintiffs, brothers of the intestate and his administrators.

R. W. Goff for the first two defendants, brothers of the intestate.—The deed is not binding.

W. M. Hunt for the defendant Maud Handley, the niece.

Cur. adv. vult. **D**

Jan. 19. The following judgment was read.

EVE, J. [stated the facts and continued:]—A family arrangement of this nature
come to by the persons who have signed the deed without the knowledge or in the
absence of one member of the family intended to be affected thereby, is regarded, in
the absence of any proviso to the contrary, express or implied, as having been entered **E**
into on the assumption that the absentee will in due time join in the transaction. His
concurrence is, therefore, an implied condition of the validity of the arrangement, and
if it is not obtained, the arrangement is not binding on any of the parties to it.

Authority for this proposition is to be found in *Peto* v. *Peto* (1) and *Bolitho* v.
Hillyar (2). In the former of these cases, where the facts were not dissimilar from those
of this case, seven out of eight children of Ann Grissell entitled to a fund equally in the **F**
event of their surviving their mother executed a deed whereby they severally covenanted
with each other reciprocally that in case any of them should die in the mother's lifetime
leaving a child or children, such child or children should be entitled to the share or
shares of the parent or parents in such and the same manner as if such parent or parents
had survived the mother. The eighth child was named as a party to the deed, but at
the date of the deed he was abroad in India and never executed it. He and six of the **G**
seven survived the mother, the remaining child died in the mother's lifetime leaving
children who brought the action, claiming to be entitled under the deed to their parents'
share. For the plaintiffs it was argued that the parties who executed the deed were
bound by the arrangement as regards their respective shares of the fund, but the action
was dismissed on the ground that the deed was made on the assumption that all the
persons named as parties would execute it, and as one of them had not executed it, it **H**
was not binding upon the others, though they had executed it.

In the present case it is true Tom Morton is not named as a party in the deed, but he is so referred to therein as to make it plain that the deed was made upon the supposition that if living he would ultimately concur in the intended arrangement.

The deed contains no express proviso, and I cannot find anything in it which raises
an implication that the general rule applicable to a transaction in the nature of a family **I**
arrangement is not to apply to this case, and in my opinion the case falls within the
principles laid down in the cases I have referred to. I must answer the first question
in the negative; the costs may be retained and paid out of the shares of residue to
which the parties to the summons are entitled.

Declaration accordingly.

Solicitors: *Milner & Bickford*, for *Stapler, Kesteven & Co.*, Sheffield.

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

Re SANDBACH. ROYDS *v.* DOUGLAS

[CHANCERY DIVISION (Farwell, J.), December 6, 8, 1932]

[Reported [1933] Ch. 505; 102 L.J.Ch. 173; 149 L.T. 44]

Settlement—Income—Cumulative preference shares—Dividends unpaid for seventeen-and-a-quarter years—Scheme for redemption of accrued dividends—Unpaid dividends accruing partly in testator's life and partly afterwards—Moneys received in accordance with redemption scheme.

At the date of his death in 1915 a testator was possessed of 500 5½ per cent. cumulative preference shares in a brewery company. By the will of the testator his widow was entitled to the income of his residuary personal estate. In July, 1920, the company being seventeen-and-a-quarter years in arrears with respect to dividends of the preference shares, some of which had accrued during the testator's life, put forward a scheme, which was sanctioned by the court, for the redemption of the arrears. Under the scheme the testator's trustees received a certificate for £2,371.

On the question whether the moneys secured by the certificate should be treated as the income of the residuary personal estate or as the capital thereof, or whether it should be apportioned between capital and income, the capital representing the arrears of dividends accrued before the testator's death,

Held: the whole of the moneys secured by the certificate should be treated as income of the residuary personal estate.

Re Wakley (1), [1920] 2 Ch. 205, and *Re Marjoribanks* (2), [1923] 2 Ch. 307, applied.

Notes. As to the right of a tenant for life to dividends declared during his tenancy, see 29 HALSBURY'S LAWS (2nd Edn.) 647, para. 929; but as to the income tax position see 20 ibid. (3rd Edn.) 414, para. 772 and 425, para. 774.

Cases referred to:

(1) *Re Wakley, Wakley* v. *Vachell*, [1920] 2 Ch. 205; 89 L.J.Ch. 321; 123 L.T. 150; 36 T.L.R. 325; 64 Sol. Jo. 357, C.A.; 9 Digest (Repl.) 641, *4262*.

(2) *Re Marjoribanks, Marjoribanks* v. *Dansey*, [1923] 2 Ch. 307; 92 L.J.Ch. 609; 129 L.T. 669; 67 Sol. Jo. 659; 40 Digest 663, *2011*.

(3) *Lemon* v. *Austin Friars Investment Trust, Ltd.*, [1926] Ch. 1; 95 L.J.Ch. 97; 133 L.T. 790; 41 T.L.R. 629; 69 Sol. Jo. 762, C.A.; 10 Digest (Repl.) 763, *4950*.

(4) *Re Armitage, Armitage* v. *Garnett*, [1893] 3 Ch. 337; 63 L.J.Ch. 110; 69 L.T. 619; 9 T.L.R. 630; 7 R. 290, C.A.; 40 Digest 668, *2059*.

Adjourned Summons

The defendant, Mrs. Helen Margaret Douglas, under the will of her husband, Major William Sandbach, who died in 1915, was entitled to the income of his residuary personal estate. In exercise of their powers the trustees of the will of the testator retained 500 5½ per cent. cumulative preference shares in Reffell's Bexley Brewery Co., of which shares the testator was the holder at the date of his death. On July 27, 1920, the company were seventeen-and-a-quarter years in arrears, and on that date the court sanctioned a funding scheme which they had put forward, the object of which was the redemption of the arrears of dividends. Under such scheme the trustees received a certificate for £2,371 funded dividend in respect of the arrears of dividend due on the preference shares held by them. This sum the trustees apportioned as follows, namely, £603 in respect of income which was to be paid to the testator's widow, and £1,768 in respect of capital which the trustees retained. In June, 1923, the testator's widow, the defendant Mrs. Douglas, sold her right to the £603 of funded dividend and received £298 as the price thereof. In April, 1932, the trustees tendered their holding of £1,768 of funded dividend at 60 per cent. The company accepted the tender, and on April 8, 1932, paid £1,060 15s. to the trustees.

The trustees took out this summons for the determination, inter alia, of the following question, namely,

> "Whether the moneys secured by or payable in respect of a certificate for £2,371 issued in 1920 by Reffell's Bexley Brewery, Ltd., in respect of seventeen-and-a-quarter years' arrears of dividend on 500 5½ per cent. cumulative preference shares ought to be treated as income of the residuary personal estate, or as capital thereof, or whether the same should be apportioned between capital and income in proportion to the arrears in respect of years before the testator's death and the arrears in respect of years after such death or in some other and what proportions."

F. H. L. Errington for the trustees of the will.

J. B. Lindon for the defendant Mrs. Douglas, the tenant for life, referred to *Re Wakley, Wakley* v. *Vachell* (1); *Re Marjoribanks, Marjoribanks* v. *Dansey* (2); and *Lemon* v. *Austin Friars Investment Trust, Ltd.* (3).

Franey for defendants interested in capital and income.

J. B. Richardson, for the defendants interested in capital, referred to *Re Armitage, Armitage* v. *Garrett* (4).

FARWELL, J.—This summons raises a question that is not without difficulty as to the rights of a tenant for life and the remaindermen in what are called "funded dividends" in a company. [His Lordship stated the facts and continued:] In 1920 the company put forward a scheme which was described as "a funding dividends" scheme. Paragraph 1 of the scheme provided: [His Lordship read the paragraph and continued:] The effect of that was that the shareholders in the company by virtue of the scheme, ceased to have any rights, conditional or otherwise, to receive in the future anything in respect of dividends unpaid in the past. In pursuance of that scheme, the necessary alterations were made in the articles of association, and funded dividends certificates were received by the trustees for a sum amounting to £2,371. Of that amount the trustees set aside £603 as belonging to the tenant for life and the balance, £1,768 as belonging to capital. In June, 1923, the widow sold her funded dividends certificates for £298 odd, and in the year 1932 the trustees tendered all the certificates they held for redemption at 60 per cent. The company accepted the tender and paid the trustees the sum of £1,060 15s. on April 8, 1932. The question now is whether the moneys so received £298 by the widow and £1,060 15s. by the trustees, or any parts thereof—are capital or income.

The whole position as between capital and income in regard to moneys paid by a company in respect of past dividends was considered and finally decided, so far as this court is concerned, by the Court of Appeal in *Re Wakley* (1). In that case the testator specifically bequeathed certain cumulative preference shares to his son R. and settled his residuary estate on trust for all his children. At his death in 1905 the dividends on the shares were in arrear, and it was not till 1907 that there were any profits available for dividends. In that year an interim dividend was declared, sufficient in amount to satisfy all the arrears upon the shares, and it was held by the Court of Appeal, reversing PETERSEN, J., that the dividend declared in 1907 must be treated as being in respect of that year only; that the Apportionment Act, 1870, did not apply, and, consequently, that the whole of the dividend belonged to R. LORD STERNDALE, M.R., said ([1920] 2 Ch. at p. 216):

> "It is necessary, therefore, to see what is the effect of the provisions as to cumulative dividends. The two views maintained before us may, I think, be stated thus: The respondents' view is that the shareholders acquire a right in each year to a 6 per cent. or 12 per cent. dividend, but that it can be paid only when profits are earned and a dividend declared, and that when the dividend is declared it is declared and paid in respect of each year in which no dividend has been paid. The appellants, however, contend that no right to dividend is acquired at all until profits are made and a dividend declared, and that each dividend is declared in respect of the current year, the shareholder by virtue of the provision that dividends shall be cumulative then, and not till then, acquiring a right to have for that year not 6 per

> cent. or 12 per cent., but that sum with an addition of the amount of the dividends which they did not receive in the previous years. I think the latter is the correct view. The shareholders, in my opinion, acquire no right to any dividend until there are, in the language of cl. 5 of the memorandum, 'profits or other moneys of the company available for dividend which it shall from time to time be determined to distribute.' It was argued that they had an inchoate right which became absolute on the happening of the events mentioned. I am not sure that I understand clearly the nature of an inchoate right, but if there be a right which must be qualified by an adjective, I think it is more correctly described as a conditional right, for, in my opinion, it does not arise until the two conditions of the existence of profits and the determination to distribute come into existence. When these conditions are fulfilled the shareholders acquire the right to add to the dividend for the year the same amount for each year in which no dividend has been paid. If this be correct, the dividend which is paid is not in respect of each year, but in respect of the year in which profits are declared for division, the amount being by virtue of the cumulative clause determined by the whole amount of dividends unpaid."

Re Wakley (1) was followed by RUSSELL, J., in *Re Marjoribanks* (2), which perhaps goes a little further. There the directors passed a resolution

> "to transfer £80,000 from reserve to profit and loss account, and to declare and pay a dividend of £1 17s. 6d. on the preference shares, being the equivalent of three-and three-quarters years' dividend on account of arrears."

In accordance with the resolution, £3,150 was paid to the executors of the testatrix, and it was held that the shareholder then entitled to the shares was entitled to the money, that the money was income, and that accordingly the whole passed to the tenant for life.

The position in this case is that if, instead of putting the scheme into effect, the company had been in a position, and had had available funds, to declare a dividend, including the amount unpaid for seventeen years, it is plain beyond argument, on the authorities above cited, that that sum would have belonged to the widow, and that there would have been no apportionment, although much of it would have represented dividends unpaid in former years. However, the company was not in a position to pay in cash and, accordingly, being anxious to get rid of the conditional rights of the shareholders to payment of the amounts unpaid in past years, if and when funds were available, evolved this scheme, which was approved by the court and is therefore binding on everybody concerned.

The first thing the scheme does is to put an end to any rights of the shareholders to receive arrears of dividends when funds become available. That right has gone for ever. In its place the shareholders get something in the nature of a debenture. I am not prepared to say that it is a debenture for all purposes; it is a charge, but a charge only on profits available for distribution. It is in the nature of a debenture, inasmuch as it belongs to the shareholder, who can sell it or it can be redeemed by the company. On the face of the certificate it says:

> "This is to certify that   of   is/are the registered holder(s) of   pounds of the above funded preference dividend of the company pursuant to a scheme of arrangement between the company and the holders of the preference shares thereof, under s. 120 of the Companies (Consolidation) Act, 1908, confirmed by the High Court of Justice, Chancery Division, on the 27th day of July, 1920. The said scheme of arrangement is endorsed upon this certificate,"

and the conditions printed on the back follow the terms of the scheme of arrangement. That being so, what are the rights of the parties to these moneys? If the company had paid in cash, the tenant for life would have been entitled to the whole of the money. If, instead of cash, the company had offered to discharge their obligations in some other form, for example, by bonus shares or debentures in another company, I cannot see, on the principle of *Wakley's Case* (1), why the tenant for life would not have been entitled to those shares or debentures. The company did not do that, but it gave something in the nature of a debenture, payable out of future profits, and that debenture was given in consideration of the shareholder giving up whatever conditional right he had in respect of past dividends. It is said against the tenant for life that this is not a payment out of profits for the year 1920, but a charge on profits in future years, and that on the authority of *Re Wakley* (1) these moneys cannot belong to the tenant for life. That, in my judgment, is not the true view. On principle I can see no difference between these funded dividend bonds, which are given by the company in discharge of their obligation to pay the arrears of dividends at some future date, and the giving of shares in another company to the shareholder in similar discharge. These bonds have been sold or redeemed and the moneys so realised appear to me, on the authority of the cases above cited, to belong to the person who would have been entitled to the dividends if the obligation of the company had been discharged in cash, that is, the tenant for life.

In my judgment, on the true construction of the scheme, the whole of these moneys were properly payable to the widow as tenant for life on July 27, 1920, and I so declare.

Solicitors: *Royds, Rawstorne & Co.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re JONES. MEACOCK *v.* JONES

[CHANCERY DIVISION (Farwell, J.), January 22, 26, 1932]

[Reported [1932] 1 Ch. 642; 101 L.J.Ch. 307; 147 L.T. 137]

Will—Infant—Contingent legacy by parent—Interest—Contingency referable to attainment of age later than full age—Intention that infant be maintained out of interest.

A contingent legacy given to an infant child of the testator will carry interest, although the contingency is one which may happen after the infant's attainment of twenty-one years, if, and only if, the testator has shown by his will an intention that the infant should be maintained out of the interest on the legacy.

A testator by his will bequeathed £1,850 to each of his two daughters and to each of his two sons "if and when each of them attains the age of twenty-five years." He also by cl. 6 of his will expressed his desire that his trustees should provide a home for the use of his wife and four children, or any of them, while such children were under that age, but made no special provision for the maintenance of the home. He further left on trust two sums of £1,000 each to be expended by his trustees on the education and maintenance of his two sons at school, and further sums of £2,500 and a share of residue to be paid to each child if and when it attained the age of twenty-five years.

Held: (i) the provisions of cl. 6 showed that the testator intended his children to be maintained till they were twenty-five out of the income of the contingent legacies except in those cases where express provision for maintenance was made: principle stated by JAMES, L.J., in *Re George* (1) (1887), 5 Ch.D. 837, applied; *Re Abrahams* (2), [1911] 1 Ch. 108, explained and distinguished.

(ii) no such express provision was made for the daughters, and their legacies, therefore, carried interest (which was fixed at 5 per cent.).

(iii) such express provision was made for the sons by the provision of the two sums of £1,000, and their legacies, therefore, did not carry interest.

Notes. As to maintenance of infants out of the income of legacies, see 16 HALSBURY'S LAWS (3rd Edn.) 325, para. 630; and for cases on the subject see 23 Digest (Repl.) 459–470, *5295–5416.*

Cases referred to:

(1) *Re George* (1877), 5 Ch.D. 837; 47 L.J.Ch. 118; 37 L.T. 204; 26 W.R. 65, C.A.; 23 Digest (Repl.) 466, *5390.*

(2) *Re Abrahams, Abrahams* v. *Bendon,* [1911] 1 Ch. 108; 80 L.J.Ch. 83; 103 L.T. 532; 55 Sol. Jo. 46; 23 Digest (Repl.) 463, *5343.*

(3) *Re Churchill, Hiscock* v. *Lodder,* [1909] 2 Ch. 431; 79 L.J.Ch. 10; 101 L.T. 380; 53 Sol. Jo. 697; 23 Digest (Repl.) 465, *5376.*

(4) *Re West, Westhead* v. *Aspland,* [1913] 2 Ch. 345; 82 L.J.Ch. 488; 109 L.T. 39; 23 Digest (Repl.) 467, *5393.*

(5) *Re Bowlby, Bowlby* v. *Bowlby,* [1904] 2 Ch. 685; 73 L.J.Ch. 810; 91 L.T. 573; 53 W.R. 270; 48 Sol. Jo. 698, C.A.; 23 Digest (Repl.) 461, *5331.*

(6) *Re Moody, Woodroffe* v. *Moody,* [1895] 1 Ch. 101; 64 L.J.Ch. 174; 72 L.T. 190; 43 W.R. 462; 13 R. 13; 23 Digest (Repl.) 464, *5360.*

(7) *Green* v. *Belchier* (1737), 1 Atk. 505; West temp. Hard 217; 26 E.R. 319, L.C.; 40 Digest 619, *1563.*

(8) *Beckford* v. *Tobin* (1749), 1 Ves. Sen. 308; 27 E.R. 1049, L.C.; 23 Digest (Repl.) 464, *5365.*

(9) *Crickett* v. *Dolby* (1795), 3 Ves. 10; 30 E.R. 866; 23 Digest (Repl.) 420, *4906.*

Adjourned Summons on question as to whether contingent gifts to a testator's children should bear interest.

The testator made his will dated May 16, 1927, and died on June 3, 1927, leaving his wife and four children, two sons and two daughters, children of a former marriage, him surviving.

By cl. 6 of the will the testator expressed his desire that his trustees should provide a place of residence or home in Cardiff for the use of his wife and four children, or any of them, while such children were under the age of twenty-five years respectively and his wife remained unmarried, but he made no special provision for the maintenance of the home. Clause 7 provided as follows:

> "Having purchased in the name of my son Fred by way of gift to him (which gift I hereby confirm) War Savings Certificates of the value of £500 at the time of purchase, which certificates upon maturity will yield or bring in the sum of £650, and in order to place my other children on an equal basis with my son Fred in respect thereof, I bequeath to each of my three children Dachie Iris, Constance Margaret, and Albert, the sum of £650, which amount shall be appropriated for them when the said War Savings Certificates mature so as to bring in the sum of £650 as aforesaid."

By cl. 9 it was provided:

> "It is my wish that each of my children should have the sum of £2,500 (in addition to any other moneys hereby given to them), and, having already provided by cl. 7 of this my will for £650 to each of them, I accordingly bequeath to each of my children the sum of £1,850, if and when each of them attains the age of twenty-five years and upon the same trusts and conditions as are hereinafter contained concerning their respective shares of and in my residuary estate."

By cl. 10 the testator gave devised and bequeathed the whole of the residue of his property to his trustees upon trust to sell, call in and convert the same. By cl. 11 he directed that his debts, legacies, and testamentary expenses should be paid out of the proceeds of such sale and conversion, and that his trustees should stand possessed of the residue upon the following trusts:

> "(a) Upon trust to retain thereout two sums of £1,000 to be expended by my trustees upon the education and maintenance of my two sons Fred and Albert respectively at school, and such part thereof as shall not have been expended by my trustees as aforesaid, together with any accumulated income thereon, shall be paid over to my two sons respectively on their attaining the respective ages of twenty-five years, provided however that if either of my sons shall not attain the age of twenty-five years then any moneys not expended as aforesaid, together with

> any accumulated interest thereon, shall fall into and form part of my residuary estate. . . . (b) Upon trust to pay to each of my four children, if and when each of them attains the age of twenty-five years, the sum of £2,500 (in addition to the moneys bequeathed to each of them by cl. 9 of this my will or otherwise). (c) Upon trust to divide the remainder of my residuary estate into five equal parts, and to pay one of such parts to my wife Anna if she shall remain my widow . . . and to pay the remaining four parts to my said four children in equal shares, share and share alike, if and when each of them attains the age of twenty-five years."

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This summons was taken out by the trustees of the will for the decision of the court (inter alia) whether the gifts to the testator's children contingently upon their respectively attaining the age of twenty-five years should bear interest until the time of payment should arrive, and if so at what rate.

C

G. R. Upjohn for the plaintiffs, the trustees.

R. W. Turnbull, for the widow of the testator, cited *Re Abrahams, Abrahams* v. *Bendon* (2), *Re Churchill, Hiscock* v. *Lodder* (3), and *Re West, Westhead* v. *Aspland* (4).

Morton, K.C., and *R. F. Roxburgh* for the infant children.—At all events the legacies of £1,800 given by cl. 9 of the will carry interest under s. 31 (3) of the Trustee Act, 1925. They referred to *Re Abrahams* (2), *Re Bowlby, Bowlby* v. *Bowlby* (5), *Re George* (1), *Re Moody, Woodroffe* v. *Moody* (6), and *Re Churchill, Hiscock* v. *Lodder* (3).

D

R. W. Turnbull replied.

FARWELL, J.—The question which I now have to determine upon this will gives rise to an interesting and, I think, difficult problem, namely, whether the legacies, or any of them, given to the four children, which are in every case contingent upon the child attaining the age of twenty-five years, carry interest before that date, that is, before the children attain the age of twenty-five years. The general rule of construction in regard to contingent legacies is that such legacies do not carry interest until the time for payment, but there are undoubtedly exceptions to that general rule. One of the exceptions is where the legatee is an infant child of a testator, or an infant to whom the testator has put himself in loco parentis. In such cases a contingent legacy may carry interest if there is no other provision made by the will for the maintenance of the legatee. But it is said, on the authority of a decision of EVE, J. [*Re Abrahams, Abrahams* v. *Bendon* (2), [1911] 1 Ch. 108] that there is an exception to that exception namely, that the exception only applies where the contingency is the attainment by the child of full age or marriage under that age, and that, if the legacy given by the parent to a child is contingent upon that child attaining some age later than twenty-one years, then in no circumstances will the court hold that the legacy carries interest. There is also another exception to the general rule in the case of legatees who are strangers to the testator, that is, persons who are neither children nor persons to whom the testator was in loco parentis, which is, that if the court can find a general intention to provide for the maintenance of the legatee, then interest runs from the death, notwithstanding that the legacy is contingent. But such intention cannot be presumed where the testator has made a provision for the maintenance of a legatee out of some other fund. So far as I am aware, in all the reported cases of contingent legacies to strangers in which the court has held that the legacies carry interest because of the intention expressed by the testator in his will to maintain the legatees, the contingency was the attainment of twenty-one years or marriage under that age. There appears to be no reported case in which the court has been able to infer an intention to maintain and, therefore, to give interest on the contingent legacy to a stranger, when the contingency was an event happening after the infancy of the legatee.

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In these circumstances, what is the true view? Is this a case which comes within the general rule, or is it within the first exception which I have mentioned? Is it a case where I have to look at the will itself to find the intention of the testator and give effect to it, or must I say that the decisions prevent me, whatever my view may be as to the intention of the testator, from holding that these contingent legacies carry interest, because they are payable at twenty-five and not at twenty-one. The exception to the general rule has been stated with great clearness in *Re Bowlby* (5). It is not

A necessary for me to refer to that case beyond making reference to the passage in the judgment which deals with the general law. VAUGHAN-WILLIAMS, L.J., says:

> "I propose now to deal with the question of the general law under which the will of a father giving a legacy to a child, either not payable till a future event, or contingent upon the happening of a future event, is so construed as to make a provision B for the child's maintenance by making the child's legacy carry interest. There can, to my mind, be no doubt but that the language used in the cases in which this canon of construction was first established is language apt for the gift to the child legatee of interest on the legacy payable in futuro or contingently during the interval between the parent's death and the arrival of the time or the happening of the event on which the legacy is made payable. Thus in *Green* v. *Belchier* (7) LORD C HARDWICKE says (1 Atk. at p. 507):
>
> > 'In such a case interest by way of maintenance would certainly be allowable in the meantime; it being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money; D if the legatee was a stranger to the testator it would be otherwise.'
>
> The words in *Beckford* v. *Tobin* (8) and *Crickett* v. *Dolby* (9) are all of a similar character. The child's legacy is said to bear interest or carry interest. It will be found that this sort of phraseology is used equally in modern cases. Take, for example, *Re George* (1), in which JAMES, L.J., said (5 Ch.D. at p. 843):
>
> > E 'But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing in loco parentis to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose.'"

F Now it will be noticed there that the learned lord justice, in stating in that precise language the rule of construction, does not limit it in terms to cases where the contingency is the attaining of twenty-one years by the legatee, and I can find nothing in that statement of the law by the learned lord justice which prevents the court from coming to the conclusion that in a proper case interest may be payable on a contingent G legacy given to an infant by a parent, notwithstanding that the contingency is not the attainment of full age. It is said, however, that EVE, J., in *Re Abrahams* (2) has decided that very question. It is true that in that particular case the learned judge came to the conclusion that, since the legacies were contingent on the sons attaining the age of twenty-five, the legatees were not entitled to interest on their legacies. The ratio decidendi of his decision was that in the case of a parent giving to an infant a contingent H legacy payable on the attainment of full age or marriage under that age, and making no other provision for that child's maintenance, the court is able to infer an intention that the child should have the interest on the legacy, because presumably the parent intends to fulfil his legal obligation to maintain the child whilst an infant; but he felt that there was a very grave difficulty in drawing any such inference where the legacy, although given to an infant, was not contingent upon the attainment of twenty-one, I but upon some other and later event. In the passage in his judgment to which I refer he says ([1911] 1 Ch. at p. 115):

> "I agree that the matter is left somewhat in doubt as to whether maintenance is allowed and treated as interest upon the legacy, or whether interest is allowed and maintenance given thereout. But this much I think is clear from the historical examination of the cases through which Mr. Levett has taken us, that the exception had its origin in the desire of the court to give effect to what the court presumed must have been the intention of the testator, that is to say, to provide for the maintenance of the infant, an intention which might well be presumed in cases where the

> suspensory period was limited to the years when the infant would, in the ordinary course, require to be maintained, but which could not be presumed as readily, if indeed at all, where the legacy was made contingent upon events having no reference to the infancy of the legatee, and in this connection it certainly is remarkable that in all the cases to which my attention has been directed the contingencies have been the attainment by the child of full age or marriage under that age. There is no case in which I can see that the exception has been held to apply when the contingency is anything but the attainment of full age or marriage under that age. In that state of things, and bearing in mind that I am dealing with an exception engrafted on a general rule, ought I to be the first judge to hold that the exception extends so as to include contingencies of every description and having no relation to the attainment of full age? I do not think I ought to be. I think I ought to treat the exception as limited to those cases in which the contingency is the attaining of full age or previous marriage, and to hold that, where the testator has made the legacy payable upon a contingency which has no reference to the attainment of full age, the case ought to be treated as governed by the general rule, and not as coming within the exception."

Now, as I understand it, EVE, J., was taking the view that it would be extremely difficult for the court to presume an intention by the testator that the contingent legacy should carry interest in favour of an infant child of the testator where the contingency was the happening of some event later than the attaining of twenty-one years or a marriage under that age, and that, at all events in the case before him, he was not prepared to hold that there was any such intention. It is to be noticed that in the case with which EVE, J., was dealing there was not, as far as I can see, anything that would assist him in drawing the inference that the testator intended that the legacy should carry interest, except the mere fact that it was a contingent legacy given to an infant child of the testator. I do not think that the will contained anything else which would have enabled the court to come to the conclusion that there was an intention that the children should be maintained out of the interest on the legacies.

The principle of the cases which have been cited, as I understand it, is this: the general rule that a contingent legacy does not carry interest does not apply in a case where the contingent legacy is given by a parent to a child who is an infant, because the court infers that the testator intended that the child should be maintained, and, if no other due provision is made for maintenance, the court will presume that the testator intended the child to be maintained out of the only fund available—namely, the interest on the contingent legacy; but in all the reported cases the inference has only been drawn where the contingency was the attainment of full age or marriage under that age. That being so, am I precluded, however clearly I may think that the testator has shown by his will his intention that the infant should be maintained out of the interest on the contingent legacies, from giving effect to that intention, or, putting it in another way, is it impossible for me to hold that there can be any such intention expressed in the will, because the legacies are contingent upon the infant's attaining the age of twenty-five years? I have carefully considered this question, especially having regard to what EVE, J., has said in the case already referred to, and I have come to the conclusion that I am not so precluded.

There is certainly nothing in the general statement of the law by VAUGHAN WILLIAMS, L.J., quoted above, or in any of the other cases to which I have been referred, which in terms decides this question. The only case which it can be suggested might prevent me coming to such a conclusion is the case before EVE, J. But in EVE, J.'s judgment I do not think that there is anything which precludes me from coming to that conclusion, because, as I read his judgment, what he is saying is: Where the suspensory period is the attaining of twenty-one years there is no difficulty in the court inferring the intention that the child should be maintained out of the interest on the contingent legacy, but where the contingency is the attaining of a later age, then there is great difficulty in the court drawing such an inference; but I do not think that he intended to decide finally that in no case could such an inference be properly drawn.

A In my judgment, the true view is this: where a contingent legacy is given to an infant, a child of the testator, and no other proper provision made for maintenance, and the legacy is contingent on the attaining of twenty-one or marriage, the infant is entitled to interest, because the court presumes that the testator intended to maintain his child, and, as he has made no other provision for it except the interest on the contingent legacy, the court infers that he must have intended interest to be payable accordingly.
B But that presumption, or that inference, which the court will draw with regard to the testator's intention in such a case, is rebutted if the court finds that there is other due provision made for the maintenance of the legatee, because in such a case there is no room for the court to infer an intention that the infant shall be maintained out of the interest on the contingent legacy. Now, if that be the true reason why the court is able to give an infant, who is a child of the testator, interest on a contingent legacy, it
C seems to me that the same reasoning must enable the court in a proper case to say that a contingent legacy given to an infant, who is a child of the testator, may carry interest, although the contingency is one which may happen after the attainment of twenty-one years. Of course, in a case where the contingency was some event happening long after the child attained twenty-one years, the court would be very slow, and would in most cases probably find it impossible, to draw any such inference at all, and in any case, in
D my judgment, it must always be difficult for the court to draw such an inference where the legacy is contingent upon the happening of some event later than the attainment of full age. But, in my judgment, the court is not precluded in a proper case from drawing such an inference. Now, ought I to draw any such inference in this case? In my judgment, I ought, but only to a limited extent.

In the first place it is to be noted that there is no due provision made for the daughters
E except on attaining twenty-five years. In this case it is obvious, in my judgment, that the testator looked upon the period during which a child would require maintenance as continuing up to the age of twenty-five years. I think that by his will he has shown a clear intention that his daughters at any rate will require maintaining until they have attained twenty-five years. A very strong indication of this is shown in cl. 6, which provides that if the trustees think right they shall provide a home for the children until
F they attain twenty-five years, no provision being made for the upkeep of such a home unless it can be provided out of the interest on these legacies. There is, in my judgment, in this will a clear indication of two things: (i) that there is to be an income available for this home, if the trustees think fit to provide it; and (ii) that the children may need the home until they are twenty-five years of age. Then one finds the obvious desire in this will to provide more or less equally, so far as possible, for the various
G legatees. Looking at the will as a whole, I have come to the conclusion that there is a clear intention that the infants shall be maintained out of the income of the contingent legacies, except in those cases where express provision for maintenance is made. In cl. 11 (a) there is such an express provision made for the sons. It is true that it is in terms limited to the education and maintenance of the two sons respectively at school, but there is a clear provision made that there is to be £1,000 apiece for the two sons,
H which is to be applied for their education and maintenance, and I do not think that the trustees are precluded from providing out of that sum for them during the holidays, because so long as they are at school they must be maintained both at school and in the holidays. Therefore, it seems to me that, so far as the two sons are concerned, there is no room to find an intention by the testator that the legacies were to carry interest, because he has expressly provided otherwise, and moreover so to hold would
I be contrary to the clearly expressed intention of the testator to equalise matters, which would be largely defeated if the two sons were to have £1,000 apiece, and also to have maintenance out of the legacies. It seems to me, therefore, that, so far as the two sons are concerned, I cannot come to the conclusion that they are entitled to interest on their contingent legacies.

So far as the two daughters are concerned, there is no other provision in the will for their maintenance. There is the clearest expression of intention by the testator that they are to be maintained, and, that being so, I am entitled in my judgment, notwithstanding that the legacies are not payable until twenty-five, to hold that those two legacies carry interest, and that they carry interest at the rate of five per cent., which will be payable to each daughter until she attains the age of twenty-five years.

Declaration accordingly.

Solicitors: *Bell, Brodrick, & Gray*, for *Cousins, Botsford & Co.*, Cardiff; *Wrentmore & Son*, for *Phœnix, Levinson & Co.*, Cardiff.

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

PORTVALE STEAMSHIP CO. *v.* ROYAL EXCHANGE ASSURANCE CORPORATION

[King's Bench Division (MacKinnon, J.), May 6, 1932]

[Reported 147 L.T. 217; 48 T.L.R. 441; 76 Sol. Jo. 415;
18 Asp.M.L.C. 309]

Insurance—Marine insurance—Institute Time Clauses—Continuity of voyage—Particular average—Adding successive losses.

By a policy dated July 30, 1930, insurers insured the steamship *Portvale* for twelve calendar months from midnight, July 30, 1930, to midnight, July 30, 1931, subject to "Institute Time Clauses as attached." Clause 13 of the Institute Time Clauses provided "Warranted free from particular average under 3 per cent." Clause 16 provided: "The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, namely, at any time at which the vessel (i) begins to load cargo, or (ii) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage if made) or has carried and discharged two cargoes, whichever may first happen, and, further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port." The *Portvale* was chartered to load in the River Plate for Antwerp, and between Jan. 10, 1931, and the discharge of her cargo at Antwerp on April 9, 1931, she sustained damage on three occasions. She then lay up at Antwerp till Aug. 27, 1931, owing to absence of freight. During the period of lying up she sustained damage on two occasions. On a claim by the shipowners against the insurers, the insurers contended that the cost of repairs arising from these two casualties could not be added to the expenses incurred on the three earlier casualties for the purpose of ascertaining whether the 3 per cent. particular average was exceeded.

Held: the voyage which had commenced on Jan. 10, must, pursuant to cl. 16, "be deemed to continue" during the period of lying up, and the shipowners were, therefore, entitled to add all these losses together for the purpose of ascertaining whether the particular average had been exceeded.

Notes. As to adding successive losses together, see 22 Halsbury's Laws (3rd Edn.) 132, para. 250.

Action tried in the Commercial list without a jury.

Under a policy of marine insurance dated July 30, 1930, the defendant corporation (the insurers) insured the plaintiffs' steamship *Portvale*

> "for and during the space of twelve calendar months commencing midnight, July 30, 1930, and ending midnight, July 30, 1931, as employment may offer subject to 'Institute Time Clauses' as attached."

A Clause 13 provided "warranted free from particular average under 3 per cent.," and
cl. 16 defined when a voyage was deemed to begin and end.

The *Portvale* sailed in ballast from Pernambuco on Jan. 10, 1931, chartered to load in
the River Plate for Antwerp. On Jan. 17, 1931, she encountered heavy weather which
caused damage to the hull and machinery, and she put into Montevideo for repairs on
Jan. 21. She later proceeded on the voyage, and on Feb. 7, when entering the port of
B Santa Fé to load, she struck the quay wall, sustaining damage to her bows. After
loading a complete cargo the vessel proceeded to St. Vincent for bunkers, and while
bunkering there on March 18, 1931, the steamship *Sagres* collided with her, damaging
her bulwarks.

The vessel then proceeded to Antwerp, arriving there on April 2, 1931, and the dis-
charge of the cargo was completed on April 9. The vessel was then shifted to a lay-up
C berth pending arrangements for further employment. While so lying up, the steamship
Kabinda, on June 24, 1931, collided with her. She was dry-docked, and the collision
damage was repaired, together with the damage previously suffered. In leaving the
dry-dock, on July 9, 1931, the vessel struck the quay walls on two occasions and sustained
further damage. That damage was repaired in due course, and on Aug. 27, 1931, she
sailed in ballast for Hamburg, where she subsequently loaded cargo for the Kara Sea.

D The plaintiff shipowners contended that under the provisions of cl. 16, the voyage
which began at Pernambuco was still continuing while the ship lay-up, and the casualties
suffered at Antwerp were covered. The insurers contended that the voyage was not so
continuing, and that the cost of repairs, &c., arising from the casualties of June 24 and
July 9, 1931, could not be added to the expenses incurred in respect of the earlier
casualties, regardless whether the 3 per cent. particular average had been exceeded or
E not.

Carpmael for the plaintiffs, the insured.
Sir Robert Aske for the defendants, the insurers.

MACKINNON, J.—In this case the steamship *Portvale* was insured by the defendant
corporation under a policy dated July 30, 1930, the policy being expressed to be "for
F and during the space of twelve calendar months commencing midnight July 30, 1930,
and ending midnight July 30, 1931, as employment may offer," subject "to Institute
Time Clauses as attached." In the Institute Time Clauses it was provided, in s. 13,
"warranted free from particular average under 3 per cent.," with a qualification that
is of no moment in this case. It was then provided, in cl. 16:

> G "The warranty and conditions as to average under 3 per cent. to be applicable
> to each voyage as if separately insured."

The clause then goes on to give a definition of what is meant by a voyage. As it is upon the wording of that part of the cl. 16 that this dispute turns, I need not read it until I come to consider the point in dispute.

It is perhaps not immaterial to observe that cl. 23 provides for what is commonly
H known as laid-up returns, the material one of which would be the return of 13s. 6d. per
cent. if abroad when laid up in port.

The material facts which happened were these. On Jan. 10 the vessel sailed in ballast
from Pernambuco under a charterparty to load cargo for carriage to Antwerp. On
Jan. 17, while she was in ballast, she sustained some damage at sea. That was repaired
in January at Montevideo, but on Feb. 7 she sustained at Santa Fé some further damage
I by colliding with a quay wall. On Feb. 22 she sailed from the Plate with her cargo, but
put into St. Vincent for bunkers, and on March 18 she sustained some further damage
from collision there. She then arrived at Antwerp, and on April 9 had discharged her
cargo at Antwerp. Owing to the unhappy condition of the freight market her owners
then had no immediate employment for her and she was laid up at Antwerp from
April 9 until Aug. 27. During that period, on June 24, she sustained some further
damage through a ship running into her, and on July 9 she sustained some further
damage by bumping into a sea wall. On Aug. 27 her stay at Antwerp came to an end,
and she sailed for Hamburg under charter to load a cargo for the Kara Sea.

The collective cost of the damage which she sustained on these three occasions—Jan. 17, Feb. 7, and March 18, came to more than 3 per cent. under the policy, and was admitted to be a claim. The cost of repairing the two sets of damage at Antwerp, on June 24 and July 9, did not amount to 3 per cent., and the insured can only claim for these if they can assert that these two claims arose during the same "voyage" as that upon which the three earlier claims arose. In other words, they must establish that all five claims arose during the same "voyage."

The insurers say that that claim cannot be made, inasmuch as these five sets of damage were not all sustained during one voyage, but only the first three of them were sustained during the course of the voyage, and the two later ones were during a different voyage, or at any rate, not during the same voyage.

That involves the question what is the effect of the definition of a voyage set out in the words of cl. 16. Those words are these:

> "A voyage shall be deemed to commence at one of the following periods to be selected by the assured when making up the claim, namely, at any time at which the vessel (i) begins to load cargo, or (ii) sails in ballast to a loading port."

There is no dispute in this case when the voyage which we have to consider began. It is obvious, and it is admitted, that the voyage began when the ship sailed in ballast from Pernambuco. That is clearly within the provision that the voyage

> "shall be deemed to commence at one of the following periods to be selected by the assured when making up his claim."

One of those is when the vessel "sails in ballast to a loading port." So the voyage began at Pernambuco. But the clause, having defined when the voyage should be deemed to have commenced, goes on to provide how long such voyage shall be deemed to continue in these words:

> "Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including intermediate ballast passage if made), or has carried and discharged two cargoes, whichever may first happen; and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port."

Clearly the insured are correct in saying that, under that provision, this voyage had not finished by July 9, when the fifth of the series of damages, the second of those when laid up at Antwerp, occurred, because the voyage having commenced at Pernambuco, it is to be deemed to continue until the vessel has carried and discharged two cargoes, and further, until she begins to load the subsequent cargo or sails in ballast for the loading port. On the actual words of the clause the insured is right in saying that the voyage which has been deemed to commence at Pernambuco under this condition must be deemed to be still continuing.

However, it is alleged by counsel, on behalf of the insurers, that it is to be implied that the period when the vessel is actually lying up waiting for further employment to offer is to be excluded from the period covered by the voyage: he relies on the fact that what one is dealing with, and what one is considering, is a voyage, and that the period when the ship is laid up is entirely alien to any notion of the ship being engaged upon a voyage. I should quite agree with that contention on the part of counsel for the insurers if the question one had to consider was what was the natural construction to be applied to the word "voyage," and what is covered by or implied by it. In this case, however, we are dealing with a clause or provision which uses the word "deemed," "such voyage shall be deemed to continue" as from a certain date. Whenever you get the words "deemed to be" it means that, though obviously the thing is not true, you have to pretend that it is true. Whenever you are dealing with a phrase which provides that something or other shall "be deemed to be" so and so, you have to avoid and leave out of account any real consideration of the true facts, and you have only to ascertain whether the facts stated in the provision have arisen. If they have arisen, then you have to pretend and to deem that they are something else, though, apart from such direction, you would not think of doing so. Furthermore, I feel great difficulty in knowing, if I give effect to this contention, what limit I am to put on the period, and how much is to be excluded from that which would clearly be covered under the clear words of the clause. I put the possible case that in the circumstances here it might have happened that this ship, after discharging at Antwerp, had been chartered to load cargo in the Baltic, at first open water, and that as a result of waiting until the ice was broken she had to wait three weeks or a month, or even longer perhaps, at Antwerp, instead of hanging about out at sea until the ice allowed her to enter her new loading port. Counsel for the insurers was inclined to say that the period of waiting at Antwerp then would not be part of the voyage. From that the next stage would be, if she had not actually a new charter, that her owners would have to wait for a certain period before they could find a new charter, which might be a fortnight. As to that, counsel for the insurers was inclined to say that it was only a little time, and he could not say that that was not included in the voyage.

The real truth is that the insurers, not unnaturally, feel that it is hard that so long a period as this, which amounts to five months, should be included in this voyage which started at Pernambuco. But, in my view, on the clear wording of the clause, though it results in this case in what appears to be a somewhat strange and possibly hard result, I do not see my way to say that, under the artificial definition of a voyage provided by this clause, at the time when these last two pieces of damage were sustained this ship had ceased to be on the voyage which commenced at Pernambuco.

The result is that the insured are entitled to recover the claim they make in this case.

As it happens, by an accident we have discovered (because I had brought to me the old edition of Arnould) that this clause has remained unaltered since 1908, and it is perhaps rather a happy illustration of the comparative regularity of the employment of British ships that circumstances have not previously arisen to make this point obviously one of difficulty.

I am not going to suggest that the underwriters of the institute should make still longer what is already a very lengthy "Institute Time Clause," but I imagine that, if this sort of point had been previously considered, there would have probably been some sort of addition or qualification to cl. 16 providing that any period in respect of which the insured recovered a lying-up premium under cl. 23 was not to be deemed to be part of a voyage within the meaning of cl. 16. I am not inviting them to introduce that condition, but I do not think that I can imply such a condition as it has not been expressed.

I understand there is no dispute about the amount. The result is there must be judgment for the plaintiff insured for £17 4s. 10d., with costs on the High Court scale.

Judgment for the insured.

Solicitors: *Middleton, Lewis, & Clarke*, for *Downing & Handcock*, Cardiff; *Ince & Co.*

[*Reported by* R. A. Yule, Esq., *Barrister-at-Law.*]

HILLERNS AND FOWLER *v.* MURRAY (INSPECTOR OF TAXES)

[COURT OF APPEAL (Lord Hanworth, M.R., Greer and Romer, L.JJ.), January 20, 21, 1932]

[Reported 146 L.T. 474; 48 T.L.R. 213; 17 Tax Cas. 77]

Income Tax—Profits—Computation of profits—Trade receipt—Partnership—Determination of partnership—Performance of contracts during winding-up—Profits accruing after determination of partnership—Liability to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D.*

On March 31, 1926, a partnership, which had carried on business as corn and seed merchants, was determined. On that date the partnership held trading stock for the purpose of fulfilling contracts made before (for fulfilment after) that date. By virtue of the powers conferred by the Partnership Act, 1890, s. 38, those contracts were performed by the partners. Further stock was received after March 31, 1926, under contractual obligations previously entered into, and it was similarly used for the fulfilment of contracts made before that date. In dealing with the stock and completing the contracts, the services of employees of the partnership were employed by the partners. In the year April, 1926, to April, 1927, a profit was realised in respect of which the partnership was assessed to income tax under Sched. D in the sum of £5,820. The Special Commissioners held that the profits were trading receipts and confirmed the assessment.

Held: there was ample evidence to justify the finding of the commissioners that the partnership was trading during the year 1926–27, and, therefore, the profits were correctly assessed as trading receipts.

Cohan's Executors v. *I.R.Comrs.* (1) (1924), 131 L.T. 377, distinguished.

Notes. The Income Tax Act, 1918, Sched. D, was replaced by the Income Tax Act, 1952, s. 122.

Considered: *Baker* v. *Cook*, [1937] 3 All E.R. 509; *Gladstone Development Co.* v. *Strick* (1948), 30 Tax Cas. 131.

As to what is trading, see 20 HALSBURY'S LAWS (3rd Edn.) 115, 116, para. 210; and for cases on the subject see 28 DIGEST 22, *108–119*.

Cases referred to:

(1) *Cohan's Executors* v. *I.R.Comrs.* (1924), 131 L.T. 377; 12 Tax Cas. 602, C.A.; Digest Supp.

(2) *O'Kane & Co.* v. *I.R.Comrs.* (1922), 126 L.T. 707; 66 Sol. Jo. 281; 12 Tax Cas. 303, H.L.; Digest Supp.

Appeal

This was an appeal by the Crown from an order of ROWLATT, J., dated June 8, 1931, and reported 146 L.T. 474 made on a Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on Feb. 5, 1930, Messrs. Hillerns and Fowler (hereinafter called the taxpayers) appealed against an assessment in the sum of £5,820 made on them under Sched. D of the Income Tax Acts for the year ended April 5, 1927, in respect of the taxpayers' alleged profits as grain merchants.

Prior to 1920 taxpayers' firm consisted of Mr. Hillerns and Mr. Fowler in partnership. On Feb. 20, 1920, a new partnership consisting of Mr. Hillerns, Mr. Fowler, Mr. Thorpe, and Mr. Spear was formed. On March 16, 1923, a new agreement was made between the four parties, Mr. Hillerns retiring, but becoming a limited partner. The new partnership was for a term of three years expiring on March 31, 1926. The partnership constituted by the agreement dated March 16, 1923, was determined on March 31, 1926, not only by effluxion of time, but because Mr. Hillerns gave written notice to terminate the partnership on that date. A circular letter dated March 31, 1926, was issued to

A customers of the taxpayers stating that the partnership between the four persons had been dissolved by lapse of time and that trading was being discontinued from the date of the circular. It was also stated that the offices of the taxpayers would remain open only for the purpose of receiving and paying accounts as they became due, and for the carrying out of existing contracts.

On the same date, namely, March 31, 1926, Mr. Spear and Mr. Thorpe, two of the B partners of the taxpayers, circularised customers saying that they proposed commencing business in partnership on their own account at 5, Bishop-lane, Hull, which had been the address of the taxpayers. The dissolution of partnership of the taxpayers was advertised in the "London Gazette" on April 8, 1926. The fulfilment of existing contracts was carried out by Messrs. Fowler, Thorpe, and Spear, and some of the members of the staff, but they did not make any sales or purchases in the course of the C liquidation or realisation of the affairs of the taxpayers.

On March 31, 1926, the taxpayers held certain trading stock for the purpose of fulfilling contracts with their customers made previously to, but due for fulfilment after, March 31, 1926. Further stock was received by the taxpayers after March 31, 1926, under contractual obligations previously entered into, and it was similarly used to fulfil the already existing contracts with their customers. In all cases stock had been contracted for by D the taxpayers as buyers and sellers before March 31, 1926. After March 31, 1926, the only trading stock for which payment was received or made was the undelivered stock on hand and held by the taxpayers at March 31, 1926, and the stock received by them after March 31, 1926, all of which stocks had been contracted for by the firm as buyers and sellers respectively before March 31, 1926. The normal turnover in a trading year of the taxpayers was about £3,000,000, while the amount realised in the six months to E Sept. 30, 1926, was about £300,000. The practice in the past had been to assess to income tax the balance of profits of contracts when they were completed and not when they were made.

The notice of assessment was delivered by post on or about Jan. 12, 1929, at the offices vacated by the firm on March 31, 1926, being the taxpayers' last known place of address, and came into the possession of Mr. Spear and Mr. Thorpe, who carried on business under F a new and separate firm and style at that address.

On behalf of the taxpayers it was contended:

(a) That the taxpayers as a firm were defunct at March 31, 1926.

(b) That the assessment was not legal or legally served and could not be served on a firm known to H.M. inspector of taxes to be defunct.

(c) That the taxpayers' trading ceased at March 31, 1926, and thereafter the time was G occupied by some of the late partners in realising stock, the purchase and the sale of which had been contracted for prior to that date.

(d) That the assessment and notice and service thereof were bad.

(e) That there was no firm in existence to be assessed.

(f) That the result of such purchase and sale was not a balance of profits and gains assessable under Sched. D of the Income Tax Acts, but was a mere excess of receipts H over disbursements, the process being a liquidation of assets with no element of trading.

On behalf of the Crown it was contended (inter alia):

(i) That the taxpayers continued to trade after March 31, 1926, and that the profits of such trade were assessable under Sched. D.

(ii) That the assessment appealed against was therefore correctly made against the I firm and should be confirmed.

The commissioners held that the moneys received by the taxpayers after the notice of dissolution in respect of sales on contracts entered into before the notice of dissolution were trading receipts and were rightly assessed in the name of the firm. They thereupon confirmed the assessment in the sum of £5,820, no dispute arising as to the figures.

The taxpayers immediately on the determination of the appeal declared to the commissioners their dissatisfaction therewith as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

Rowlatt, J., held that there was no evidence of trading after the dissolution, and allowed the appeal. A

The Solicitor-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.
Raymond Needham, K.C., and *Scrimgeour* for the taxpayers.

LORD HANWORTH, M.R.—In this case between March, 1923, and March 31, 1926, the business of Messrs. Hillerns and Fowler, corn and seed merchants, was being carried on by a partnership consisting of Mr. Hillerns, Mr. Fowler, Mr. Thorpe, and Mr. Spear, but Mr. Hillerns, during that time was what is called a limited partner, as opposed to a full effective partner, which was the character of the other three persons. That partnership, which was for a limited term, came to an end and expired on March 31, 1926. In consequence of that expiration of the partnership the firm wrote a letter of that date saying: B C

> "We beg to advise you that the partnership has been dissolved by lapse of time and trading discontinued as from this date. The offices as above will remain open for the purpose of receiving and paying accounts as they become due and the carrying out of existing contracts."

D

It is quite true that the operation of the partnership deed had come to a conclusion on March 31, but, under the code dealing with the law relating to partnership, the Partnership Act, 1890, it is provided by s. 38:

> "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise." E

So that the agency existing between the partners by virtue of s. 38 continued after March 31, 1926, for the purpose of winding-up the outstanding contracts. At the date when the partnerships came to an end there were big contracts (for it was a large business) still outstanding. F

That business is measured by the fact that they had at that time grain in their warehouse sold prior to March 31, the value of which was £12,579, and there were payments made for grain bought before March 31, 1926, arising after that date of no less than some £250,000.

It takes time to wind-up such a business, and to fulfil the contracts, and in the course of 1927 these operations were carried out, with the result, as shown on the figures before us, that there was a realised profit in that time of £6,190. An assessment has been made upon the firm for profits made in 1927 in the sum of £5,820. The firm appeal from that assessment on the ground that during that year ending April 5, 1927, what they were doing was not trading; they were not traders. The matter went before the commissioners, who have stated a Case. Then it came, by way of appeal, to Rowlatt, J. Rowlatt, J., was not satisfied that the commissioners had made clear what their finding of fact was, and he therefore sent the Case back to the commissioners in order that they might explicitly state whether or not the taxpayers were trading during the year from April, 1926, to April, 1927. On the matter then coming a second time before the commissioners they answered the question, and said: "We find that the appellants were trading during the year from April, 1926, to April, 1927." They had confirmed, and they reaffirmed, the assessment. The Case went back again to Rowlatt, J., and he came to the conclusion that, although the question to be determined was one of fact for the commissioners, yet, as a matter of law, there was no evidence on which they could reasonably come to that conclusion, with the result that he held that their decision must be set aside on that ground. From that decision of Rowlatt, J., the appeal is brought to this court. The question, therefore, for this court to determine is the question of law whether there was any evidence before the commissioners on which they could come to the conclusion of fact which they had reached. I need hardly remind those who are G H I

A engaged in cases of this sort that it is within the competence of the commissioners to find the facts. The High Court and the Court of Appeal have only to deal with the questions of law which arise from and emerge out of the questions of fact found by the commissioners.

In the present case we have not any complexity arising from any devolution of the business from one hand into another by the operation of law. It is not a case in which B a trader dies and leaves his executor to deal with his business either by carrying it on, or by winding it up, or by selling it. We have here the clear and simple case of partners who determined no longer to remain partners with that interconnection between themselves, but give notice that the contracts which have been made during the existence of the partnership, the paying and receiving of accounts, and the like, of that business, will be carried on for the partnership as it existed before March 31, 1926.

C It is quite true that the partnership, Hillerns and Fowler, have written to say, and made a declaration, that from and after March 31 their intention is not to carry on the business. But a declaration of an intention by the persons charged will not do to secure immunity from income tax. The question is, what is the character to be attributed to the acts done by the partners in relation to the Income Tax Act? The quality and the characteristics to be attached to the acts are all questions of fact, because they are D questions of degree. They are questions for the commissioners to determine. The short point is before us: Were there any materials on which the commissioners could reach the conclusion to which they have come?

There were large quantities of grain to be delivered; there would be large payments to be recovered in respect of the delivery of that grain; there would be freight to be paid, or, it may be, to be received, in respect of the carriage of it. It may be that there were E contracts for freight; it may be that those had all been arranged before March 31, 1926, but there are certain items which unquestionably would fall to be dealt with after March 31, 1926. The discharging, the lighterage and the storage of the grain, the carriage of the grain, arbitration fees which would arise on questions whether or not delivery had been made in accordance with the terms of the contract; and there would be gratuities to the late employees, bank charges, and interest, and sundry realisation expenses. F When one puts those together they are not negligible items. They are something like £1,800 or £1,900, obviously having to be dealt with, settled, and arranged for in the course of the year down to April 5, 1927. The employees were made use of. Although the term "gratuity" is used it is quite plain that those gratuities were paid in return for services rendered. Some months were occupied in completing this business, and, during those months, the partners still had to employ their own labour and the labour of their G staff. The result was that there remained a profit of rather over £6,000 for distribution amongst the partners. Is it possible for us to say that there was no evidence which the commissioners could take into account as indicating the carrying on of a trade? After careful consideration of these facts, and of the view presented to us by counsel for the taxpayers, I find it quite impossible to take that view. In my view there was evidence quite sufficient to justify the finding of the commissioners. That finding ought not to H be disturbed. The appeal will be allowed with costs both here and below and the assessment confirmed.

GREER, L.J.—I have come to the same conclusion. For some period until March 31, 1926, four gentlemen carried on business together in partnership as seed merchants. One of them was a limited partner at the time, and, on going out of the partnership, as I appears from the accounts, he was not entitled to any profits which might arise out of the realisation of the assets of the business. But it was necessary, in order to ascertain the position of the three other partners, that the business should be wound-up under the terms of s. 38 of the Partnership Act, 1890, which provides that:

> "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise."

It is quite possible that the affairs of a partnership may be so situated that it is A possible to wind-up the affairs of the partnership and complete the transactions begun but unfinished at the time of the dissolution without any operation, or doing any acts, that can be treated as trading in the course of the winding-up. But, on the other hand, it is possible that the situations of the partners, and the facts relating to their business position, may be such that it is quite impossible to carry out the terms of s. 38 without performing acts which are acts of trading. The question in every case is whether B what is done for the purpose of carrying out the provisions of s. 38 has been done by means of transactions that are properly described as trading, or whether it has all been done by transactions to which the term "trading" has no real application or meaning. There are people who, by some stroke of good fortune, are enabled to escape tax on income that they have, in fact, made, by reason of the technical application of the provisions of the taxing Acts. For example, if it should happen to a member of the C Bar that he should be appointed a judge of the High Court, his emoluments uncollected at the time would not be liable to income tax because he could collect them without continuing to exercise his profession as a member of the Bar. But it is difficult for people who are in business to collect the debts which belong to them without carrying on the trade they had been carrying on before the dissolution of partnership. There may be facts tending to show that they did not carry on any trade. There may be D facts tending to show that they did carry on the trade. The decision as to the quality and effect of the facts established in each particular case that is binding on the court is the decision of the commissioners. In this case the commissioners had before them two accounts showing what the operations were which it had been necessary for the partners to carry out in order to wind-up their affairs. Among the operations that were necessary were these: They had to arrange for the delivery of the goods they had bought forward E to ships from the countries to which they had to be carried. They had to pay the freight. It may be, as counsel for the taxpayers says, that the amount of that freight had previously been fixed. It may well be that that was so, but they had to incur the freight by seeing that the goods were put on board the ships. They had, in addition, to arrange for the discharging, for the lighterage, and for the storage of the goods received pending the time when the buyers were ready to receive them from them in performance of the F contracts entered into before the dissolution. They had in some instances to forward the goods by rail, and, to do that, they would have had to make business arrangements with the railway companies, with the result that they incurred an expense of £547 11s. 9d. In addition to that, questions arose, such as arise very frequently in carrying on businesses of this sort between traders and the persons with whom they trade, and there had to be arbitrations. I gather from the smallness of the fees that they were simply arbitrations G with regard to qualities, but they had to be arranged; the arbitrators had to be appointed, or, at any rate, if appointed by the contracts, the facts had to be put before the arbitrators for decision, and their fees had to be paid by the party against whom they were awarded. In some cases they were awarded against these partners, and they paid £55 16s. 10d.

The proceedings, which seem to me proceedings by way of trade for the purpose of H winding-up the business of this company, resulted in a profit of £6,589 16s. 1d., and of this £1,733 5s. 7d. went to Mr. Thorpe, who was still carrying on the same class of business at the same address as he had been carrying on when he was a partner with the other three gentlemen; £2,104 13s. 10d. went to Mr. Spear, who also was still carrying on the same kind of business at the same address that he had previously been carrying on. It may be that the technicalities of the law relating to income tax entitle these I gentlemen to say that although in fact those profits formed part of their income, they are not liable to pay tax on them. That, strictly speaking, is not relevant to what we have to decide, because we have to decide whether all the partners were liable in respect of the income derived by them from the trading which was necessary to wind-up this partnership. I have come to the conclusion that they were all so liable, and I am not sorry to come to that conclusion, because it accords with one's sense of justice to the rest of the taxpayers of this country. Be that as it may, we have to consider, and quite properly consider, the argument which has been put before us by counsel for taxpayers, with his usual lucidity and felicity, based on the decision in *Cohan's Executors* v. *I.R.Comrs.* (1). We are, of course, bound by the decision in *Cohan's Case* (1), but, in my judgment, there is nothing in the decision which binds us to hold that in the present case the commissioners were wrong in law in finding that the facts before them amounted to a trading for the purposes of winding-up. In *Cohan's Case* (1) all that was done was reasonably necessary for the purpose of realising a contract which was in existence for the time being at the decease of the trader. The position was exactly the same in the result as if, instead of taking delivery of the ship and delivering it to the company that had been formed, the executors had sold their rights under their shipbuilding contract. They might possibly have received a little less, but that was one of the ways in which they might have realised the estate of their testator. Instead of doing that merely for the purpose of realising the estate of the testator, they adopted the view that the more beneficial way of realising the estate would be to allow the shipbuilding contract to be completed, and then to deal with the completed ship in the way that they, in fact, dealt with it. In that case all that the court decided was that under those circumstances the commissioners were wrong in law in coming to the conclusion that there had been a trading by the executors, and, though it is quite possible to found a plausible argument on that case, in my judgment, it has no real application to the facts of this case. The reason why, I think, the learned judge went wrong in his decision in this case was that he misapplied the decision in *Cohan's Case* (1) to facts to which it had no real application.

For these reasons I agree that this appeal should be allowed with the usual consequences.

ROMER, L.J.—I agree. The only question that we have to determine in this case is whether there was any evidence on which the commissioners could reasonably have found that during the six months ending September, 1926, the partners had been trading. In my opinion, not only was there evidence on which they could reasonably make that finding, but I myself should have come to the same conclusion. If on March 31, 1926, the partners, instead of dissolving partnership, had agreed that they would continue business, but, having regard to the state of their existing commitments, the state of the market, or some such reason, that they would not enter into any further bargains for the next six months, it would have been impossible to say that during those six months they were not trading; yet, in such a case, they could have done neither more nor less, as far as I can see, than they did, in fact, in this case during the six months after the dissolution.

It was said by counsel for the taxpayers that this court held in *Cohan's Executors* v. *I.R.Comrs.* (1) that where in such a case the partners do no more than is necessary for winding up the partnership affairs, they cannot be said to be carrying on a business. *Cohan's Case* (1), in fact, did not lay down any such proposition, nor, with all respect to counsel, could the court possibly have done so. When a partnership is dissolved the partners in whose control the assets happen to be owe a duty to the partnership to realise those assets to the best advantage, and, in order to realise the assets to the best advantage, it is sometimes necessary to continue to carry on the business. Where, for instance, the goodwill of the business is of value, and cannot be immediately sold, it is necessary to carry on the business to preserve the value of that goodwill pending a sale. Where there is stock-in-trade which can only be sold at a sacrifice by what is called a forced sale—some immediate sale by auction—it may be necessary, in order to dispose of that stock-in-trade to the best advantage, to carry on the business so that the stock-in-trade can be sold in the usual course of trade. That seems to me to have been the case in Ireland which came before the House of Lords in *O'Kane & Co.* v. *I.R.Comrs.* (2). Or it may be, and in my opinion this is what happened in the present case, the partnership may be possessed of outstanding contracts of a beneficial character. In that case, instead of shutting up the whole business and letting the people who suffered damage by breach of contract be paid their damage on winding-up, it is considered more beneficial to the partnership to continue the business for the purpose of completing the contracts. In those circumstances, it would be impossible to say that the partners were not carrying on a business. In many cases, in the winding-up of a partnership, it is necessary for the proper getting in of the assets to carry on the business for a short time, or to carry on the business to a limited extent. In *Cohan's Case* (1) the court came to the conclusion that there was no evidence that the executors were carrying on the business. If in *Cohan's Case* (1) instead of being the purchaser of the ship the testator had been the builder of the ship, and, after his death, the executors had fulfilled the contract of building the ship, it is more than likely that the decision would have been the other way. In the circumstances, *Cohan's Case* (1) which is a decision purely on its own facts, can have no possible bearing on the one that we have to decide.

I agree that the appeal should be allowed, with the consequences that follow.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Pritchard & Son*, for *Andrew M. Jackson & Co.*, Hull.

[*Reported by* Geoffrey P. Langworthy, Esq.,
Barrister-at-Law.]

OLIVER AND ANOTHER *v.* BIRMINGHAM AND MIDLAND MOTOR OMNIBUS CO., LTD.

[King's Bench Division (Swift and MacNaghten, JJ.), June 9, 10, 1932]

[Reported [1933] 1 K.B. 35; 102 L.J.K.B. 65; 147 L.T. 317; 48 T.L.R. 540]

Negligence—Doctrine of identification—Injury to infant—Negligence of both defendants' servant and adult in charge of infant.

The infant plaintiff, who was aged four, was injured by being struck by the defendants' motor omnibus while he was crossing a road in charge of his grandfather, the accident being caused partly by the negligence of the defendants' driver and partly by that of the grandfather.

Held: the infant plaintiff was not so identified with the grandfather that, by reason of the grandfather's negligence, he was disentitled from recovering from the defendants in respect of his injuries.

Notes. The common law rule that contributory negligence was a complete defence to an action for negligence was abolished by the Law Reform (Contributory Negligence) Act, 1945, which provides for apportionment of the loss according to the share in the responsibility for the damage.

As to the effect on a claim of negligence by a third party, see 23 Halsbury's Laws (2nd Edn.) 687 et seq., and for cases see 36 Digest (Repl.) 123–125. For Law Reform (Contributory Negligence) Act, 1945, see 17 Halsbury's Statutes (2nd Edn.) 12.

Cases referred to:

(1) *Mills* v. *Armstrong, The Bernina* (1888), 13 App. Cas. 1; 57 L.J.P. 65; 58 L.T. 423; 52 J.P. 212; 36 W.R. 870; 4 T.L.R. 360; 6 Asp.M.L.C. 257, H.L.; 36 Digest (Repl.) 194, *1023*.

(2) *Waite* v. *North-Eastern Rail. Co.* (1858), E.B. & E. 719; 27 L.J.Q.B. 417; 4 Jur.N.S. 1300; 120 E.R. 679; on appeal (1859), E.B. & E. 728; 28 L.J.Q.B. 258; 32 L.T.O.S. 334; 5 Jur.N.S. 936; 7 W.R. 311; 120 E.R. 682, Ex. Ch.; 36 Digest (Repl.) 125, *628*.

(3) *Thorogood* v. *Bryan, Cattlin* v. *Hills* (1849), 8 C.B. 115; 18 L.J.C.P. 336; 13 L.T.O.S. 284; 137 E.R. 452; 36 Digest (Repl.) 193, *1020*.

Since the decision of the House of Lords in *Mills* v. *Armstrong, The Bernina* (1) (1888), 13 App. Cas. 1, the doctrine of identification has not been part of the law of England.

Waite v. *North-Eastern Rail. Co.* (2) (1858), E.B. & E. 728 not followed.

Appeal by defendants from Birmingham County Court.

The plaintiff, an infant, through his father as next friend, sued the defendant company for damages for personal injuries sustained by him through the negligent driving of a motor omnibus belonging to the defendants. On July 5, 1931, at about 10.30 p.m., the infant plaintiff, who was four years old, was walking hand-in-hand with his grandfather. The grandfather began to cross the road without taking proper precautions to see that nothing was coming that would endanger himself or the child, and suddenly became aware of the approach of the motor omnibus. Letting go the plaintiff's hand, he jumped back to safety, but the infant plaintiff was struck and received injuries to his left hand. At the trial the learned county court judge left two questions to the jury: (i) Was the defendant's driver guilty of negligence? (ii) Was the infant plaintiff's grandfather guilty of contributory negligence? The jury answered both questions in the affirmative and assessed the damages at £200. The defendants appealed on the ground that the doctrine of identification laid down in *Waite* v. *North-Eastern Rail. Co.* (2), relating to an accident to an infant, was applicable to the present case.

T. N. Winning and *Eric Falk* for the defendants.

Hedley, K.C., and *David White* for the plaintiffs.

SWIFT, J.—On July 5, 1931, at about half-past ten in the evening, William Joseph Oliver, an infant of tender years, was walking with his grandfather in Waterfall-lane, Blackheath, in the county of Staffordshire. It is assumed that the infant was of such an age as to be himself incapable of negligence. There came a time when the grandfather determined that he and the infant could cross the road. He proceeded to do so without taking adequate precautions, a sufficient look-out, to assure himself that there was nothing coming which might endanger himself or the child. Unfortunately, a motor vehicle belonging to the Birmingham and Midland Motor Omnibus Co., Ltd., was coming along Waterfall-lane, and the driver of that bus failed to sound his horn or to give any other warning of his approach. The consequence was, first, because of the negligence of the grandfather in not looking to see whether the road was clear, and, secondly, because of the negligence of the driver in the omnibus in not sounding a warning of his approach, that the grandfather suddenly found an omnibus close upon him, and he let go of the child's hand which he was holding and himself jumped out of danger back again to the pavement. The child seems for the moment to have gone on and then to have returned, and, in endeavouring to get back to his grandfather, in some way or other came in contact with the motor vehicle, with the result that his left hand was severely injured and he has practically lost the use of that hand.

The child, by his next friend, brought an action in the county court of Warwickshire, holden at Birmingham, and that action came to be tried before HIS HONOUR JUDGE RUEGG, a judge of very great experience and of very great learning in matters of this nature—actions for personal injuries. There was no note taken of the evidence, nor is there any shorthand note of the summing-up. There is a very brief summary of the summing-up which has been supplied to us by agreement between the parties, and from that note we find that His Honour told the jury that

> "even if you do find grandfather guilty of contributory negligence I don't think that does deprive child of right to recover damages: *The Bernina* (1). Before you can disentitle plaintiff it must be his own negligence, however closely associated they are. Was the defendants' servant guilty of negligence? Speed—warning—warning given too late. Child guilty of no negligence. Negligence of grandfather does not disentitle child to recover. If there was negligence on the part of the driver then plaintiff is entitled to recover. Lost practically the use of his left hand. Questions left to jury: (i) Was the driver guilty of negligence? (ii) Was the grandfather guilty of contributory negligence?"

From that very scanty note I think it is quite plain that the learned judge left it to the jury to say whether this accident was caused by the combined negligence of the two or not. The whole case for the plaintiff was fought upon the basis that the defendants' negligence was the cause of the accident. On the other hand, the defendants' case was, as is shown by the pleading: "We were not negligent at all. The whole of the negligence which caused this accident was the negligence of the grandfather," and the jury's mind must all along have been directed to the question: Was it the fault of them both, or was it the fault of one or other of them only? And they have, I think, come clearly to the conclusion, by the answers to those questions, that it was the combined effect of the negligence of both that brought about the accident in which the plaintiff sustained his injuries. It is to be noted that in the notice of appeal no question is raised as to the questions which were left to the jury or as to a proper direction to them by the learned judge on matters of law. The only points raised by the notice of appeal are that the learned judge misdirected the jury by directing them that the contributory negligence of the infant plaintiff's grandfather was no bar to the plaintiff's claim, and, further, that upon the finding of the jury that the infant's grandfather was guilty of contributory negligence, the learned judge was wrong in law in giving judgment for the plaintiff.

Counsel for the defendants told us that the real point was whether the doctrine of identification, which was laid down in *Waite* v. *North-Eastern Rail. Co.* (2), was applicable to the facts of the particular case with which we are now dealing, and he submitted to the learned judge at the trial, both before the verdict and after the verdict, that on the authority of that case the infant plaintiff was so identified with the grandfather, who was in charge of him, that he was disentitled to recover from a person whose negligence had contributed to the accident if, in addition to that negligence, there was negligence on the part of the grandfather also contributing to the accident. When that submission was made to him at the close of the plaintiff's case, or at some other stage before summing-up, the learned judge referred to *The Bernina* (1), and expressed the view that since the decision in *The Bernina* (1), *Waite* v. *North-Eastern Rail. Co.* (2) could no longer be considered as good law, and that the doctrine of identification was no longer part of the law of England.

In my view, the learned judge was right in the opinion which he expressed upon that matter. Whether *Waite's Case* (2) is to be regarded as authority for saying that the plaintiff in that case was unable to recover because of the terms of the contract between the parties or whether the basis of the decision is to be taken as being the fact that the plaintiff was a small child who could not take care of himself, seems to me to matter little now for practical purposes, because, whichever view you take of it, I think that since *The Bernina* (1) the case ought to be regarded as overruled. In that case it was not expressly overruled, I agree, but LORD BRAMWELL said with regard to it:

> "I will only say that [if the judgment which it was proposed should be given in *The Bernina* (1) was right] for the reasons I gave, *Waite* v. *North-Eastern Rail. Co.* (2) was wrongly decided. The abstract question must be decided on principle. I do not pretend to have a confident opinion on it, but I think the judgment right, and should be affirmed. I think so on the ground that in such cases the defendant is a wrongdoer without whose wrongdoing the plaintiff would not have been damaged; that he cannot be heard to say that there is some other wrongdoer who contributed to the damage; that as far as the sufferer is concerned it matters not whether that other wrongdoer was so in a joint or separate act."

In *Thorogood* v. *Bryan* (3), *Waite's Case* (2) was regarded as the law of this country. The court there held that a passenger in an omnibus, who had been injured partly by the negligence of the driver of his own bus and partly by the negligence of the driver of the defendant's bus, was not entitled to recover from the defendant because the driver of the bus in which he had been travelling had been guilty of contributory negligence, and he was identified with the driver of the bus in which he was travelling so as to make that person his servant or agent. That case was expressly overruled in *The Bernina* (1), A and the question is whether, that case being overruled, *Waite's Case* (2) is still law so as to have this effect, that while a passenger is not deprived of his rights against a third party because of the negligence of somebody to whom he has committed the care of himself, an infant of so tender years that it cannot look after itself is deprived of those rights when in the position of the present plaintiff, because the doctrine of identification still continues. In my view, there is no ground for drawing any such distinction. An B infant a day old has got rights; nobody has any right negligently to injure it, and I cannot see any difference between an infant a day old and a man of fifty. If a man of fifty is entitled to recover against a wrongdoer, notwithstanding the fact that someone else has contributed to his injury, why should not this infant who has been maimed, recover against the defendants?

In my view the learned county court judge was right in thinking that the old doctrine C laid down in *Thorogood* v. *Bryan* (3) and in *Waite* v. *North-Eastern Rail. Co.* (2) is no longer the law of this country, and he was right in entering judgment for the amount which the jury found in the plaintiff's favour. This appeal must be dismissed.

MACNAGHTEN, J.—I am of the same opinion. The defendants in their notice of appeal ask that judgment should be entered for them on the ground that on the findings D of the jury such a judgment is the only judgment which ought to be entered according to law. No question arises in this case with regard to the trial or the summing up of the learned judge. The defendants accept the findings of the jury without question, but contend that on those findings they were entitled to judgment. The case, therefore, comes before this court on a simple question of law, as it might have come in former times by way of demurrer to a declaration.

E The question is simply this: Would a plea, in an action brought by an infant to recover damages for negligence, that the infant plaintiff was of such tender years as to be incapable of taking care of itself and was in fact at the time of the accident in the charge of an adult person, and that the accident was due to the combined negligence of the defendants and that adult person, be a good answer in law to the claim? The jury have found that the defendants were guilty of negligence and that the grandfather, who at F the time of the accident was in charge of the infant plaintiff, was guilty of contributory negligence. That means that both the defendants and the grandfather failed in the duty of care which they owed, each of them, to this infant. If only one of them had been negligent the accident would not have occurred. It was because both were negligent that the accident occurred whereby the child was injured, and, that being so, the plea that the infant cannot recover because he is an infant and was under the charge G of a person who at the time of the accident also failed in his duty to the child, is said to be good on the authority of *Waite* v. *North-Eastern Rail. Co.* (2). I think it is fair to say that the judgment of LORD CAMPBELL seems to support the view that at that time the court would have held that an infant a few days old, in its mother's arms, was so closely identified with its mother that it could not maintain an action for injuries received by reason of the combined negligence of its mother and a third person. But I agree H with my learned brother that that view of the law has been superseded in consequence of the decision in *The Bernina* (1). After all, children of tender years are not the only persons who are incapable of taking care of themselves. There comes a time in life when a second childhood supervenes and the aged may be quite as incapable of taking care of themselves in a public highway as the very young, and even between the extremes of youth and age there are the halt, the maimed and the blind. All those persons, by I reason of their infirmity, have to go out into the public highway under the care of somebody else. Are they also to be debarred from recovering compensation if they are injured by an accident brought about by the combined negligence of the person in whose care they are and a third person? If the accident is due solely to the negligence of the person in whose care they are, there seems to be no doubt that they could recover compensation from that person. If the accident were due solely to the negligence of a third person there is no doubt that they could recover compensation in that case. It would, indeed, seem very odd that if the injury were due to the combined negligence of both that then such a person should be without remedy.

I, therefore, think that the judgment of the learned county court judge in this case was right and ought to be affirmed. A

Solicitors: *Hatchett, Jones & Co.*, for *W. Waldron & Son*, Brierley Hill, Staffs.; *Berry, Tompkins & Co.*

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

B

R. *v.* DAVIES. Ex parte PENN C

[KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Humphreys, JJ.), July 26, 1932]

[Reported 148 L.T. 19; 96 J.P. 416; 48 T.L.R. 666; 30 L.G.R. 419]

Local Authority—Councillor—Disqualification for membership—"Paid office"—Roadman employed by district council—Reimbursement of wages by county council—Local Government Act, 1894 (56 *&* 57 *Vict., c.* 73), *s.* 46 (1) (*d*). D

A roadman, who had for many years been employed by a county council on a section of main road within an urban district area, was in 1928 elected a member of the urban district council. When the Local Government Act, 1929, came into force on April 1, 1930, the urban district council claimed to exercise the powers of maintenance and repair of "county roads" in its area, including the above section of main road. The roadman continued to be employed as before, and received his wages in the first instance from the urban district council, which were reimbursed by the county council up to the amount included in the district surveyor's estimate. He continued to act as an urban district councillor, and was re-elected in 1931. E

Held: as the roadman was under the control of and bound to obey the orders of the urban district council, he must be regarded as being employed by that council and not by the county council, and he was, therefore, disqualified, under s. 46 (1) of the Local Government Act, 1894, for holding the office of urban district councillor. F

Notes. Section 46 (1) of the Local Government Act, 1894, has been replaced by s. 59 (1) (a) of the Local Government Act, 1933.

As to the disqualification of persons for acting as councillors, see 21 HALSBURY'S LAWS (2nd Edn.) 54–56, and for cases see 33 DIGEST 9 et seq. For Local Government Act, 1933, see 18 HALSBURY'S STATUTES (2nd Edn.) 353. G

Cases referred to:

(1) *R.* v. *Negus* (1873), L.R. 2 C.C.R. 34; 42 L.J.M.C. 62; 28 L.T. 646; 37 J.P. 469; 21 W.R. 687; 12 Cox, C.C. 492, C.C.R.; 15 Digest (Repl.) 1095, *10851*.

(2) *Crump* v. *Lewis*, [1908] 1 K.B. 858; 77 L.J.K.B. 478; 98 L.T. 864; 72 J.P. 149; 24 T.L.R. 321; 52 Sol. Jo. 282; 6 L.G.R. 588, D.C.; 33 Digest 10, *13*. H

Rule nisi for information in the nature of a quo warranto.

In 1928 one Davies was elected a councillor of the Abertillery Urban District Council. Davies had for many years been employed as a roadman on a section of main road in the Abertillery urban district, his wages, hours, and conditions of work having been originally fixed by the Monmouthshire County Council. On April 1, 1930, the Local Government Act, 1929, came into force, and the county council became the highway authority in respect of all "county roads" which included (a) main roads, (b) all roads in rural districts, (c) classified roads in urban districts; but the Abertillery Urban District Council, as the council of an urban district of more than 20,000 inhabitants, under s. 32 of the Act, claimed and became entitled to exercise the powers of maintenance and repair of "county" roads within its district, including that section of road on which Davies was employed. It became the duty of the surveyor of the urban district council to submit to the county council annually a detailed estimate of proposed expenditure I

A on county roads, and, on approval by the county council, the county council became liable to repay to the urban district council the amount of the estimate or such less sum as might in fact be spent. The estimate submitted by the Abertillery council included Davies's wages at the rates and subject to the conditions of employment prescribed by the county council. The estimate was sent to the county council by the district surveyor without approval by the urban district council. Davies continued to act as an B urban district councillor, and was re-elected in 1931. A rule nisi, calling on Davies to show cause why an information in the nature of a quo warranto should not be exhibited against him to show by what authority he claimed to exercise the office of councillor, was granted at the instance of certain ratepayers and electors in the urban district. The rule was granted on the grounds (i) that Davies held a paid office, namely, that of a roadman under the urban district council; (ii) that he was concerned in a bargain or C contract entered into with the urban district council and participated in the profits thereof, namely, a bargain or contract as roadman under the council.

By s. 46 (1) of the Local Government Act, 1894:

> "A person shall be disqualified for being elected or being a member or chairman of a council . . . of a district other than a borough or of a board of guardians if he . . . (d) holds any paid office under the . . . district council . . .; or (e) is concerned D in any bargain or contract entered into with the council . . . or participates in the profit of any such bargain or contract or of any work done under the authority of the council. . . ."

A. M. Trustram Eve, showed cause.

R. M. Montgomery, K.C., and *W. C. Howe*, in support of the rule.

E **LORD HEWART, C.J.**—In my opinion, this rule must be made absolute. It is a rule nisi calling on Theophilus John Davies to show cause why an information in the nature of a quo warranto should not be exhibited against him to show by what authority he claims to exercise the office of a member of the urban district council of Abertillery in the county of Monmouth. Two grounds are stated in the rule. The first is that he holds a paid office, being that of a roadman to the urban district council; the second is F that he is concerned in a bargain or contract entered into with the urban district council and participates in the profits of such bargain or contract, namely, a bargain or contract as roadman under the urban district council.

It is an unfortunate case, and, speaking for myself, I have no doubt that Mr. Davies thought that he was perfectly entitled to do that which he has done, but the facts are not open to dispute. He has been, as the clerk to the urban district council shows, G a member of the Abertillery Urban District Council since April, 1928, and he has occupied various positions of importance upon that council. He was chairman of the education committee in 1930–31, chairman of the finance committee in 1931–32, vice-chairman of the council in 1931–32, and chairman of the council in 1932. This rule was applied for on April 8, 1932, when, apparently, his election to be chairman of the council was imminent. Mr. Davies himself, in the course of his affidavit, says:

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> "Upon the passing of the Local Government Act, 1929, the urban district council of Abertillery, having a population exceeding 20,000, exercised their right under s. 32 of that Act to claim to exercise the function of maintenance and repair of main (therein re-named county) roads within their district, and such claim was allowed by the Minister of Health. From April 1, 1930, the urban district council became I entitled to exercise the function of maintenance and repair of the county roads within their district including the section of the road numbered A. 4044 upon which I was working."

The affidavit goes on to say that a letter dated March 31, 1930, from the clerk of the Monmouthshire County Council, addressed to the clerk of the Abertillery Urban District Council, stated, among other things:

> "I have to transmit to you herewith for your information a copy of the minutes of my council with regard to the hours and working conditions of men engaged on roads by your district council. I also enclose a copy of the Joint Wages Board Schedule."

A It says: "Men engaged on roads by your district council," and what is said concerning Mr. Davies is that, within the meaning of the Local Government Act, 1894, he is disqualified for being elected or being a member or chairman of a council if he holds any paid office—it is common ground that that includes any paid employment—under the district council. I pass over other points. It seems to me to be quite clear that he is employed under this urban district council.

B It has been strenuously argued by his counsel that the true position of Mr. Davies was that, while the hand which passed him his wages as roadman was the hand of the urban district council, his employer really was the Monmouthshire County Council. That argument, urged as it has been with great force, seems to me to pay too little attention to the sharp contrast which is pointed out between two sets of sections in the Local Government Act, 1929. Under ss. 32 and 33 there are provisions whereby certain urban district councils may claim to exercise the functions of maintenance and repair C of any county road within their district. Under ss. 35 and 36, by way of contrast, there are provisions whereby the council of any county may delegate functions to district councils. The road with which this case is concerned falls into the first category. It was a road with regard to which, at the time when this Act became law, the appointed day being April 1, 1930, the council of this large urban district claimed, and claimed with success, to exercise the functions of maintenance and repair, and it seems to me that it D matters not for the present purpose that the statute provides, as it does by the proviso to s. 33 (2):

> "Provided that in no case shall a county council be liable to make a payment towards such costs until they are satisfied by a report of their surveyor or such other person as they may appoint for the purpose that the works of maintenance, repair, or improvement, are being or have been properly executed." E

The facts have now been made quite clear. It is the urban district council which employs the roadman; it is the urban district council which may put an end to his employment; it is the urban district council which may appoint his successor. It is true up to a certain point, but only up to a certain point, that the urban district council may call upon the county council to reimburse them for the expenses which are being or have been F incurred. I think, therefore, that it is apparent that Mr. Davies is disqualified by reason of his holding this position of roadman under the council of which he has now been made the chairman.

Something has been said, and naturally said, upon the question of delay, but the terms of the Act are stringent, as one would expect. Section 46 (1) of the Local Government Act, 1894, provides: "A person shall be disqualified for being elected or being a G member or chairman of a council," and so on, if he holds any paid office under the parish council, or district council, or board of guardians, as the case may be, and by sub-s. (8) of that section it is provided:

> "If any person acts when disqualified, or votes when prohibited under this section, he shall for each offence be liable on summary conviction to a fine not exceeding twenty pounds." H

As I began by saying, I am satisfied that Mr. Davies has made a mistake in good faith, but I am equally satisfied that holding the position that he does he is disqualified by the clear terms of this Act. I think, therefore, that this rule must be made absolute.

AVORY, J.—I am of the same opinion. I entirely agree that in the circumstances Mr. Davies may quite honestly have believed that he was not disqualified from serving I as a member of the district council. In fact, he appears to have been misled throughout by the attitude taken by the clerk to the district council, and the clerk of the county council, because it appears that in April, 1930, the clerk of the county council wrote to the clerk of the urban district council to the effect that Mr. T. J. Davies was ineligible to serve upon the West Monmouthshire Guardians Committee, and the ground upon which he was considered ineligible to serve upon that committee of the county council was that he was a roadman employed by the county council. Further, it appears that at the time when he was standing as a candidate for re-election to the district council

A in March 1931, the returning officer, who was the late clerk of the urban district council, decided, in answer to an objection, that Mr. Davies was eligible as a candidate on the ground that his wages were paid and his hours and conditions of service controlled by the county council, and not by the district council. Further, that being the decision of the late clerk of the district council when he was acting as returning officer, we have an affidavit from the present clerk to the district council, Mr. David Richard Davies, who B says:

> "I have always taken the view that neither the urban district council or its officials have any right either to employ or dismiss roadmen working under the same conditions as Theophilus John Davies, without the sanction of the county council";

so that Mr. Davies may well, as my Lord has already said, have thoroughly believed C that he was eligible for election, and entitled to serve as a member of this district council. Those facts which I have just narrated appear to me to be also an answer to the question of delay, by reason of which it has been suggested that the court ought in its discretion to refuse to make this rule absolute. It may well be that those who are now setting the law in motion have hesitated to raise this question in consequence of these adverse opinions which have been expressed both by the clerk to the county council and by D the succeeding clerks to the district council. That of itself appears to be a sufficient reason why we ought not to refuse to make this rule absolute, on the ground that some delay has taken place in moving for it.

Upon the main question I am satisfied that Mr. Davies does hold a paid office under the district council within the meaning of s. 46 of the Local Government Act, 1894, "office" being defined as including employment. It has been strenuously urged upon E us that the office is paid by the county council, and not by the district council, and that, therefore, he cannot be said to be holding a paid office under the district council. In my opinion, his office or employment is paid for, in the first instance, by the district council, and there is no doubt that it is an office under the district council, and not an office under the county council. The effect of sub-s. (2) of s. 33 of the Local Government Act, 1929, which requires that an estimate of the cost of maintenance and repair of the F road in question shall be submitted to the county council, merely is, in my opinion, that the district council, in the first instance, have to pay the costs of that maintenance and repair, including the wages, and that they are then entitled to be reimbursed by the county council, and the proviso to that sub-s. (2) of s. 33 carries out that view. It is in these words:

> G "Provided that in no case shall a county council be liable to make a payment towards such costs until they are satisfied by a report of their surveyor or such other person as they may appoint for the purpose that the works of maintenance, repair, or improvement are being or have been properly executed."

In the result, the issue really comes down to the simple question whether this gentleman, while he is employed as a roadman upon this particular road which has been H taken over by the district council under the provisions of s. 32, is the servant of the district council or the servant of the county council. I am satisfied that upon the facts as they are stated here he comes within the well-known definition laid down years ago by Blackburn, J., as he then was, in *R.* v. *Negus* (1) (L.R. 2 C.C.R. at p. 37):

> "The test is . . . whether the person charged is under the control and bound to obey the orders of his master."

I I cannot doubt that in this case, so far as his work upon the road is concerned, he is under the control of, and is bound to obey the orders of, the district council and not of the county council. That fact shows that, however innocent he may have been of offending against this Act of Parliament, the case is clearly one which comes within the mischief aimed at by the Act of Parliament, in this sense, that his position brings his interest and his duty into conflict. He, as a member of this council, or as chairman of the council, has to decide upon the amount which is to be expended upon the roads, and upon the work which the different roadmen are to do upon the roads, he himself being one of the roadmen. It is impossible, therefore, not to see that in this case his position produces that conflict between his interest and his duty, and I agree that the rule ought to be made absolute.

HUMPHREYS, J.—I am of the same opinion. I entirely agree that the facts in this case show conclusively that Mr. Davies acted in perfect good faith throughout and was misled by the information which was given to him. Secondly, I desire to observe that, for my own part, I prefer not to express any opinion whether Mr. Davies is or is not eligible for election to the county council, having regard to the position which he holds. I am not at all clear that it follows that because he is holding a paid office under the district council he is necessarily eligible as a member of the county council, having regard to the relationship of a financial character which exists between those two bodies. I also agree that this case comes directly within what was described as the mischief of the Act, in the judgment of LORD ALVERSTONE, C.J., in *Crump* v. *Lewis* (2) which has been referred to in the argument, where the Lord Chief Justice said ([1908] 1 K.B. at p. 863):

> "The intention of s. 46 (d) of the Local Government Act, 1894, was to prevent the mischief of paid officers acting and voting as members of the body which pays them."

It is beyond dispute in this case that the body which directly pays Mr. Davies is the urban district council, of which he is chairman, and the person under whose control, as appears from the affidavits, he is, is the surveyor to the urban district council, so that in his capacity as roadman he is working under and in accordance with the directions of the district surveyor. In his capacity as chairman of the council it is, or it may be, part of his business to deal with the emoluments and duties of that same person. With regard to the question of delay which, I confess, troubled me considerably for a time, I think that Mr. Montgomery's answer is the right one, that where it is shown that a person is daily acting, and proposes to continue to act, in a public position, in which the court holds that he is not entitled to act by reason of the terms of a statute, the court ought not, when the facts are before it, to refuse to deal with the matter merely because there has been, as I think that there has been, substantial delay on the part of the persons who brought the matter before the court. I do not think myself that the question of delay really applies to a case of this sort at all. For those reasons I agree with the judgments which have been pronounced that this rule ought to be made absolute.

Rule absolute.

Solicitors: *Church, Adams, Tatham & Co.*, for *Dolman & Sons*, Abertillery; *Willis & Willis*, for *Gilling & Goodfellow*, Cardiff.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

STILWELL *v.* NEW WINDSOR CORPORATION

[Chancery Division (Clauson, J.), May 11, 12, 13, 1932]

[Reported [1932] 2 Ch. 155; 101 L.J.Ch. 342; 147 L.T. 306; 76 Sol. Jo. 433; 30 L.G.R. 477]

Highway—Trees on highway—Power of local authority to remove—Public Health Act, 1875 (38 *&* 39 *Vict., c.* 55), *s.* 149.

The defendants, who were the highway authority, served a notice on the plaintiff to remove certain trees on footpaths alongside roads which bounded her property on the ground that they were a dangerous obstruction to the public. The plaintiff, who claimed the ownership of the trees, refused to comply with the notice, whereupon the defendants removed some of the trees. The plaintiff sought an injunction to restrain the defendants from removing the remaining trees.

Held: the plaintiff's claim failed, because (i) the roads being ancient highways, the defendants had not only the right but the duty to remove those trees which constituted a dangerous obstruction, and (ii) in any event, the trees were part of the "street" within the meaning of the Public Health Act, 1875, s. 149, and vested in the defendants as highway authority when the roads became part of the borough of the defendants, and, therefore, the plaintiff had no right in them.

Coverdale v. *Charlton* (1) (1878), 4 Q.B.D. 104, explained.

Notes. As to the ownership and rights in trees growing on a highway, see 19 Halsbury's Laws (3rd Edn.) 68, para. 101, and for cases see 26 Digest 328, *604–606*; as to the effects of the statutory vesting of roads in local authorities, see 19 Halsbury's Laws (3rd Edn.) 71, para. 105, and for cases on the subject see 26 Digest 329–331, *616–631.*

For the Public Health Act, 1875, s. 149, see 19 Halsbury's Statutes (2nd Edn.) 69.

Cases referred to:

(1) *Coverdale* v. *Charlton* (1878), 4 Q.B.D. 104; 48 L.J.Q.B. 128; 40 L.T. 88; 43 J.P. 268; 27 W.R. 257, C.A.; 26 Digest 329, *616.*

(2) *Fisher* v. *Prowse, Cooper* v. *Walker* (1862), 2 B. & S. 770; 31 L.J.Q.B. 212; 6 L.T. 711; 26 J.P. 613; 8 Jur.N.S. 1208; 121 E.R. 1258; 26 Digest 265, *66.*

(3) *Rolls* v. *St. George The Martyr, Southwark, Vestry* (1880), 14 Ch.D. 785; 49 L.J.Ch. 691; 43 L.T. 140; 44 J.P. 680; 28 W.R. 867, C.A.; 26 Digest 330, *627.*

(4) *Tunbridge Wells Corpn.* v. *Baird,* [1896] A.C. 434; 65 L.J.Q.B. 451; 74 L.T. 385; 60 J.P. 788; 12 T.L.R. 372, H.L.; 26 Digest 330, *618.*

(5) *Turner* v. *Ringwood Highway Board* (1870), L.R. 9 Eq. 418; 21 L.T. 745; 18 W.R. 424; 26 Digest 315, *476.*

Action for an injunction restraining the defendants from removing trees.

The plaintiff, Mrs. Stillwell, owned a dwelling-house and gardens in the Parish of Clewer. The plaintiff's house was situated in Mill Lane which ran north out of the Windsor to Maidenhead road. Between the carriageway and the plaintiff's property there was a footpath, and separating the footpath and the carriageway was a line of trees. There were some further trees separating the footpath from the carriageway in St. Andrew's Road which also bounded the plaintiff's boundary. The defendants, who were the highway authority, served a notice on the plaintiff under the Highway Act, 1835, s. 64, requiring her to remove the trees in Mill Lane and St. Andrew's Road on the ground that they were a dangerous obstruction to the public using those roads. The plaintiff refused to comply with the notice on the ground that it was irregular. The defendants cut down three of the trees in St. Andrew's Road, whereupon the plaintiff brought this action for an injunction to restrain the defendants from removing the remaining trees and for other relief, claiming the ownership of the trees and that her predecessor in title 110 years ago, at a time before the roads were dedicated to the public, had planted the trees on land belonging to him which now belonged to her. At the hearing of the action, Clauson, J., found, on the evidence, that some of the trees concerned, being so decayed, were an immediate source of danger to the public and that the remainder A although they were not an immediate danger to the public, might well become so at short notice.

G. P. Upjohn for the plaintiff.—It is clear that these trees belonged to the plaintiff's predecessor in title 110 years ago, for the defendants have failed to prove that the roads were dedicated to the public before that time. Therefore, when the roads were dedicated B they were dedicated subject to the plaintiff's predecessor's rights in the trees, and provided they are not a danger to the public it can only use the roads subject to those rights. They do not constitute a danger, and consequently the highway authority has no right to remove them merely because they may constitute an obstruction (*Fisher* v. *Prowse* (2)). The Public Health Act, 1879, s. 149, does not apply to trees on roads which were dedicated after they were planted, and *Coverdale* v. *Charlton* (1) is an C authority for saying that that section does not make the trees growing on the highway the property of the highway authority even when they were planted after dedication. [He also referred to *Rolls* v. *St. George's Vestry* (3), *Tunbridge Wells Corpn.* v. *Baird* (4) and *Turner* v. *Ringwood Highway Board* (5).]

Charles Harman for the defendants.—These roads are ancient highways, therefore it must be presumed that the trees were planted after dedication. The provisions of D s. 149 of the Public Health Act, 1879, quite clearly vest the roads in the highway authority, therefore it naturally follows that everything growing on the roads is the property of the highway authority. In *Coverdale* v. *Charlton* (1) it was laid down that the herbage growing on the highway is the property of the highway authority. If herbage is the property of the highway authority, on principle every form of vegetable growth, including trees, is their property. The observations of BRAMWELL, L.J., in E *Coverdale* v. *Charlton* (1), expressing doubt as to the highway authority's property in trees on the highway were merely obiter dicta and it was not necessary for the purposes of that case to decide that point. Apart from the ownership of the trees, they are not only an obstruction, but a danger to the public using the road, and it is the defendants' duty as highway authority to remove them.

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CLAUSON, J. [stated the facts, and his view of the result of the evidence as to the danger to the public threatened by the trees and the obstruction caused by them to the traffic on the two roads, and continued:] It is admitted by the plaintiff, and agreed by the defendants, that St. Andrew's Road, at all events to a point rather beyond that at which the easternmost of the three trees stood which have been removed, and also Mill Lane, are highways repairable by the inhabitants at large. So far as any evidence G before me is concerned, I have no reason to doubt that they have existed as public highways for very many years, for a period to which no evidence has been forthcoming which enables me to put a limit.

The plaintiff claims that she has a right to complain of the highway authority having cut down the three trees which have been cut down, and that she has a right to prevent the highway authority from removing the nine trees which I have mentioned in Mill H Lane and the two still remaining trees in St. Andrew's Road.

In my view, the defendants, as the highway authority, subject to and apart from the question of the plaintiff's rights, a question with which I will deal later, were justified, in the exercise of the duty which lay on them to keep these highways in a proper condition for public traffic, in removing the three trees which they themselves did remove in St. Andrew's Road; and they would now be justified in removing the eighth and ninth I trees in Mill Lane, near the corner formed by the junction between Mill Lane and St. Andrew's Road, as being an interference with safe transit round that corner; and they would be justified in removing the second and third trees in Mill Lane counting from the south end thereof on the ground of their instability, those trees being dangerous from that point of view. With regard to the remaining trees, circumstances may very soon arise, it may be within a period of months or it may not be for two or three years, which may make those trees which it would be the duty of the defendants to remove in the exercise of their duty as highway authority or in the interest of the public.

A The plaintiff, however, claims the right to prevent the removal of the trees, and I must consider the grounds on which she bases that right and decide whether her claims are valid. The first way in which the case is put is this. It is said that, from the evidence before me, I ought to hold that, whereas it would appear that the highway in Mill Lane extended from the wall of the plaintiff's house on the east to the wall of the opposite house on the west, that is not the true position, but that Mill Lane consists of a carriage-
B way—I disregard for the moment the footway on the west, with which I am not concerned—reaching up to the lime trees and a footway lying between the trees and the plaintiff's property, that between the carriageway and the footway there is either a narrow strip of ground along which the trees are planted or there are pieces of ground on which the trees are planted which have never been part of the highway, that is to say, have never been dedicated as part of the highway, and that, accordingly, those nine trees
C —so it has been contended—occupy portions of ground which do not form parts of the highway at all, and in which the public and the highway authority have no interest, except such interest as may arise from their right to object to something of the nature of a nuisance on or adjoining the highway. This is an attractive hypothesis in the interest of those who wish to preserve rights in the trees; but on the evidence I come to the conclusion that I can hold nothing of the kind.

D In my judgment, on the evidence, I have no course open to me except to assume that Mill Lane is an ancient highway, and that the presence of those trees in Mill Lane is accounted for by the fact that the road authority, with the consent of the owner of the soil, whoever he was at the time, placed those trees in the roadway as a convenience and amenity for the roadway for the purpose of shade or of forming a living fence marking off the footway from the carriage-way. Or possibly the owner of the soil, with the
E permission of the road authority, planted those trees as an amenity or for his own purposes in the highway, either by leave or with the acquiescence of the highway authority. Those trees are admittedly not more than 110 years old, and I have no reason whatever to suppose that the highway was not in existence a very long time before the trees were planted. Accordingly, it is impossible to hold that those trees are not trees planted in the highway. The same sort of suggestion was made as regards the
F trees in St. Andrew's Road with, as it seems to me, very much less plausibility, and I cannot conceive that I could hold that St. Andrew's Road consists partly of the carriage-way and partly of the footway, between which there are pieces of ground occupied by the trees to which I have referred which do not form parts of the highway. Accordingly, I reach the conclusion that all the trees are trees which are planted in areas over which, as ancient highways, the public have rights of passage.

G Now what results from that? In the first place, this results, in my view, that those trees interfere with the right which the public have, in the case of an ancient highway, of using the whole of the highway, whether it be what is called via trita, or, in modern language, if I may translate, the made-up carriage-way, or not. The public are entitled to use the whole of the area of the highway, and, accordingly, those trees are an obstruction of the right of the public to use the whole of that area. If the highway authorities
H are satisfied that the obstruction is a serious one, in my view they not only have the right, but, indeed, as would seem to be suggested by some of the authorities, they are under the duty of removing the obstruction. In any case, such part of the obstruction as is a danger the highway authorities, in my view, have without doubt not merely the right, but the duty to remove. On that ground, in my view, the defendants are entitled not only to remove those trees which I have mentioned, which, in my view, are a
I nuisance to the highway, but they are entitled to remove the other trees which for the moment are not so unsound as to be dangerous; they are entitled to remove them simply as obstructions.

There is another point with which I must now deal. Counsel for the defendants has urged this point, that the plaintiff has no interest in the matter whatever. My views which I have been stating as regards the rights and duties of the highway authority are expressed on the assumption that the plaintiff is the owner of the soil of that half of the highway which is adjacent to her property, and, accordingly, is the owner of the trees which grow in that half of the highway. But counsel on behalf of the defendants contends that, having regard to s. 149 of the Public Health Act, 1875, the plaintiff has no interest in these trees at all; that these trees are vested in the defendants themselves; that they are their trees for the purpose, at all events, of exercising whatever rights and duties they may have as the highway authority, and that the plaintiff has no title to interfere with them at all. That suggestion is based on this: The parish of Clewer in which the locus is situated, became in the year 1920 part of the borough of New Windsor, and from the moment at which it became part of that borough, s. 149 of the Public Health Act, 1875, applied to it. That section is headed "Regulation of Streets and Buildings," and it enacts as follows:

> "All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district [these streets are admittedly repairable by the inhabitants at large] and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority. The urban authority shall from time to time cause all such streets to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit, and may place and keep in repair fences and posts for the safety of foot passengers. Any person who without the consent of the urban authority wilfully displaces or takes up or who injures the pavement, stones, materials, fences, or posts of, or the trees in, any such street, shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding five shillings, for every square foot of pavement, stones, or other materials so displaced, taken up, or injured; he shall also be liable in the case of any injury to trees to pay to the local authority such amount of compensation as the court may award."

The argument is that these trees, in the circumstances which I have stated and as I find them to be, are part of the "street"; they are things provided for the purposes of the street, the trees are planted and stand as trees in a street, an amenity of the street, possibly as marking off the footway from the carriageway, a convenience and a protection to the public; and the argument is that under that section they vest in and are under the control of the urban authority. It is pointed out that, if the trees are injured, compensation for the injury is to be paid to the local authority; that would suggest that the property in the trees would be in the local authority. It is pointed out further that a penalty is put on persons who, without the consent of the local authority, wilfully displace the trees; that would seem to imply that displacing the trees with the consent or by arrangement with the urban authority would not be an offence, which again fits in with the suggestion that the effect of this section is to place the control and, in some sense or other, the property in the trees in the local authority. In my view, that is the effect of the section as regards such trees as those with which I am here dealing. In my view, for all the purpose of exercising the rights of the highway authority, these trees are to be treated as the highway authority's trees, and, if they think it convenient to remove them, it is proper that they should remove them. I am not called on in this action to decide to whom the timber would belong when the trees were removed.

In coming to this conclusion I have to face this, that in *Coverdale* v. *Charlton* (1) (4 Q.B.D. at p. 116), Bramwell, L.J., in a judgment which has often been referred to, expressed some doubt whether the effect of this section was to vest the property in the trees in the highway authority. It was not necessary for the purposes of that case to decide this point, but that case did determine this, as I read it, that there was a right of property, of some kind at all events, vested in the highway authority, in the herbage growing in the soil of the highway; and I have some difficulty in seeing why there should not be a similar right of property, however far it extends, in the other vegetable growth in the soil of the highway which is constituted by the trees in the case with which I have to deal.

Being of that opinion in regard to the application of that section, it was, in the circumstances, unnecessary for me to deal with the other questions with which I have already dealt, because, if the view that I take of this section is correct, the plaintiff is a stranger to the matter in hand. This is not an action which is brought on the footing that the defendants are doing or threatening to do something which would be an improper exercise of their powers as a highway authority, or are exercising or threatening to exercise their powers unreasonably. On the view I take with regard to s. 149, I hold that the plaintiff is a stranger to the whole matter, and has no cause of action. The action will be dismissed.

Solicitors: *Mills & Morley*; *Sharpe, Pritchard & Co.*

[*Reported by* J. H. G. Buller, Esq., *Barrister-at-Law.*]

OSBORNE *v.* RICHARDS

[King's Bench Division (Lord Hewart, C.J., Talbot and Humphreys, JJ.), July 13, 1932]

[Reported [1933] 1 K.B. 283; 102 L.J.K.B. 44; 147 L.T. 419; 96 J.P. 377; 48 T.L.R. 622; 30 L.G.R. 385; 29 Cox, C.C. 524]

Road Traffic—Stage carriage—Contract carriage—Conveyance of members of public to football matches—Bona fide contract hiring vehicle to football club—Payment of separate fares—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 61 (1).

A motor-coach proprietor, without a licence from the Traffic Commissioners, conveyed members of the public, who paid separate fares, from a point in T. to the T. City football club's ground on the occasion of the club's football matches. After being warned by the police that he ought to apply for a road service licence, he let his vehicles on hire to the club, supplying the drivers, and all the fares collected were thenceforward paid to the secretary of the club.

Held: the arrangement between the proprietor of the coaches and the club did not render the vehicles "contract carriages," and the proprietor had committed an offence under s. 72 (10) of the Road Traffic Act, 1930.

Notes. Section 61 of the Road Traffic Act, 1930, has been replaced by ss. 39 & 40 of the Road Traffic Act, 1956.

Referred to: *Newell* v. *Cross*, [1936] 2 All E.R. 203.

As to public service vehicles, see 31 Halsbury's Laws (2nd Edn.) 728 et seq., and for cases see Digest Supps., tit. Street Traffic, case No. 76a et seq. For Road Traffic Act, 1956, see 36 Halsbury's Statutes (2nd Edn.) 795.

Case Stated by Truro justices.

An information was preferred by the appellant, Osborne, a superintendent of the Truro police, on behalf of the Traffic Commissioners for the Western Traffic Area, against the respondent Richards, a motor-coach proprietor. The information alleged that on Jan. 16, 1932, Richards unlawfully permitted a public service vehicle to be used as a stage carriage between Victoria Square, Truro, and the Truro City Football Club's ground without a road service licence, contrary to s. 72 of the Road Traffic Act, 1930.

The majority of the justices found the following facts proved or admitted:—On Wednesday, Jan. 13, 1932, one Rowland, a police sergeant, advised the respondent that he ought to apply to the Western Traffic Commissioners for a road service licence to enable him to convey passengers between Victoria Square and the football ground on the occasion of matches. The respondent replied: "I don't think it is necessary, and in any case there is a way to defeat them. I can get somebody to hire the coaches." On Saturday, Jan. 16, the sergeant saw in Victoria Square three coaches belonging to the respondent. One was reserved for the Truro City team (being hired from the respondent under a half-yearly contract). The other two were loading up with passengers. The respondent was there, and the sergeant asked him if he intended carrying passengers to the football field, and he replied: "Yes." The sergeant then asked if he had a road service licence, to which the respondent replied: "Look, old man, you will lose this case if you bring it to court. The coaches are hired by Truro City Football Club, and they will collect the fares. I shan't have anything to do with it. The Traffic Commissioners make these laws, but there is always a way of getting round them. I can hire my coaches to anyone and neither the Traffic Commissioners nor anyone else can say anything." The sergeant made a full note of that reply at the time, but the respondent in cross-examination denied it. The sergeant saw the two coaches in question leave Victoria Square with about sixteen persons in each and driven by employees of the respondent. Anyone who came along could have boarded the coaches in the square and ridden therein, as the respondent admitted. No notice was affixed to either to show that they had been hired by the Truro City Football Club. On Wednesday, Jan. 13, the respondent told Mr. Harold Thomas, the secretary of the football club, of the difficulty he was in, and that the only way out of the difficulty was for the club committee to hire the coaches. Next day the respondent received a letter from Mr. Thomas, on behalf of the committee, saying:

> "In addition to our usual coach for conveying the team will you please reserve two coaches to convey our supporters to the football field?"

The respondent's books showed that the club was debited by him with 10s. in respect of each coach. All the fares collected by the respondent's driver and Trewin (who was a member of the football club committee and occasionally employed by the respondent), including the fare paid by the respondent himself, £1 3s. 3d. in all (ninety-three at 3d.), were handed to Mr. Thomas.

The majority of the justices, who were not unanimous, found that the two coaches in question were "contract carriages" hired under a bona fide contract by the secretary of the Truro City Football Club for the purpose of conveying persons from Victoria Square to the football ground on the occasion of a match. They also found that, whether he did so or not, the respondent was acting on the advice of his solicitor and had no intention of breaking the law. Having regard to that and to the conflicting contentions of the solicitors who appeared for the parties, and to the fact that the respondent had made application to the Traffic Commissioners for a road service licence on a subsequent similar occasion, they were of opinion that the best way to deal with the case was to dismiss it, and express their strong disapproval of the way in which the respondent had acted and also of his attitude towards the Traffic Commissioners. They, accordingly, dismissed the information.

By the Road Traffic Act, 1930:

> Section 61: (1) Public service vehicles shall, for the purposes of this Part of this Act and the regulations made thereunder, be divided into the following classes: (a) Stage carriages: that is to say, motor vehicles carrying passengers for hire or reward at separate fares (any or all of which are less than one shilling for a single journey or such greater sum as may be prescribed), stage by stage, and stopping to pick up or set down passengers along the line of route, and any other motor vehicles carrying passengers for hire or reward at separate fares and not being express carriages as hereinafter defined. (b) Express carriages; that is to say, motor vehicles carrying passengers for hire or reward at separate fares (none of which is less than one shilling for a single journey or such greater sum as may be prescribed) and for a journey or journeys from one or more points specified in advance to one or more common destinations so specified, and not stopping to take up or set down passengers other than those paying the appropriate fares for the journey or journeys in question. (c) Contract carriages; that is to say, motor vehicles carrying passengers for hire or reward under a contract expressed or implied for the use of the vehicle as a whole at or for a fixed or agreed rate or sum: Provided that a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions, it is used to carry passengers at separate fares.

A (2) It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares whether the payments are solely in respect of the journey or not: provided that a vehicle used on a special occasion for the conveyance of a private party shall not B be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

Wilfrid Lewis for the appellant.
H. M. Pratt (*J. L. Pratt* with him) for the respondent.

C

LORD HEWART, C.J.—I am clearly of opinion that this appeal ought to be allowed. No useful purpose is served by minutely criticising the words of an Act of Parliament passed in the year 1930, and it would be idle to criticise the form in which this case is drafted, but I am satisfied that the appellant's contention is right, and that, even had we assumed that the two coaches referred to had been bona fide hired by the football club D for an agreed sum they were not used as contract carriages within the meaning of s. 61 (1) (c) of the Act, but were used as, and must be deemed to have been, stage carriages within the meaning of sub-s. (1) (a) of that section. It seems to me that the matter really is too clear for argument. I think the appeal should be allowed.

TALBOT, J.—I am of the same opinion. The question is whether the respondent has E allowed a public service vehicle to be used as a stage carriage within the meaning of the Road Traffic Act, 1930, without the licence required by the Act for that purpose. I think the argument here can be very succinctly stated, as it appears to have been before the justices, namely, that this carriage, being a public service vehicle within the definition of s. 121 (1) of the Act, falls within the first class described in s. 61 as being a motor vehicle, other than that described earlier in that subsection, carrying passengers for F hire or reward at separate fares and not being an express carriage. It is admitted that it was not an express carriage, and it is clearly found in the case that it did carry passengers for hire or reward on the occasion in question at separate fares. The second subsection, read according to its exact terms (although it is quite true that it appears to have been to a great extent directed at a possible escape from the Act where a payment was made in respect of something besides carriage as well as for carriage) shows that G wherever there are separate payments even in respect of a carriage which is the subject of a contract, and which is, therefore, a contract carriage within the description in sub-s. (1) the carriage becomes a stage carriage for the purposes of this section. It does so by virtue of the express enactment of sub-s. (2): "shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares." That is to say, in all cases where persons are carried in a motor vehicle for any journey in consideration of separate H payments made by them, whether to the owner of the vehicle or to anybody else, and whether or not including payment for anything besides carriage, the motor vehicle is deemed to be a stage carriage unless it can be brought within the proviso. Learned counsel who appeared here for the respondent, and who constructed an ingenious argument based upon a careful scrutiny of the various provisions of this somewhat complicated section, did not argue, and could not argue, that this vehicle was used on the I occasion in question for the conveyance of a private party. In my opinion, therefore, the justices came to a wrong conclusion in this matter, and they should have convicted the respondent of the offence with which he was charged.

HUMPHREYS, J.—I agree. The difficulty I have felt in the matter is whether the justices did not themselves take the view that an offence was here committed. Their opinion, or the statement which appears under the heading of their opinion, may be read as being this: Having regard to the fact that the two contentions were put forward (what they called "the conflicting contentions of the solicitors") and to the fact that the respondent did not know that he was breaking the law, and had no intention of breaking the law, they say:

> "We were of the opinion that the best way to deal with the case in the circumstances was to dismiss it and express our strong disapproval"

of the action of the respondent. If I were satisfied that that meant that they found that the offence was proved, but that under the terms of the old Summary Jurisdiction Act, which has now been replaced by the Probation of Offenders Act, 1907, they thought that, although the offence was proved, yet, having regard to all the circumstances of the case, including the extenuating circumstances in which the offence was committed, it was inexpedient to inflict punishment, it would be a case in which they would have been entitled to dismiss the information; but the matter is stated in such a way that I cannot say that I am satisfied that that is what they intended to do, and I entirely agree with the judgments which have been delivered as to the proper course to take in law upon the facts of this case.

Appeal allowed.

Solicitors: *Treasury Solicitor*; *J. Messer Bennetts*, Truro.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

R. *v.* BOLKIS

[COURT OF CRIMINAL APPEAL (Lord Hewart, C.J., Avory and Talbot, JJ.), November 21, December 5, 1932]

[Reported 148 L.T. 358; 97 J.P. 10; 49 T.L.R. 128; 77 Sol. Jo. 13; 24 Cr. App. Rep. 19; 31 L.G.R. 32; 29 Cox, C.C. 578]

Road Traffic—Notice of intended prosecution—Name and address of accused not ascertained in time for notice to be given—Name and address of registered owner of car ascertained in time—"Reasonable diligence" of police—Satisfaction of "court"—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 21, *proviso* (i) (1).

By the Road Traffic Act, 1930, s. 21: "Where a person is prosecuted for an offence under any of the provisions of this part of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving, and to careless driving, he shall not be convicted unless either (a) he was warned at the time the offence was committed that the question of prosecuting him for an offence under some one or other of the provisions aforesaid would be taken into consideration; or (b) within fourteen days of the commission of the offence a summons for the offence was served on him; or (c) within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence. Provided that (i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that (1) neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or (2) the accused by his own conduct contributed to the failure; and (ii) the requirements of this section shall in every case be deemed to have been complied with unless and until the contrary is proved."

The expression "the court" in the above proviso refers to the judge and not to the jury, and the expression "reasonable diligence" refers to diligence on the part of the officer in charge of the prosecution.

The proviso cannot apply in a case where the name and address of the registered owner of the vehicle are known to the police conducting the prosecution in time for a notice to be served on or sent to him within fourteen days of the commission of the offence, although the name and address of the driver are not then known, and, if the prosecution in such a case have complied with none of the alternative conditions precedent to conviction laid down in the section, that failure is a bar to conviction.

Notes. By s. 34 of the Road Traffic Act, 1934, a jury can convict of reckless or dangerous driving on a trial of the defendant for manslaughter although the requirements of s. 21 of the Act of 1930 have not been satisfied. By s. 11 (1) (e) of the Road Traffic Act, 1956, the provisions of s. 21 of the Act of 1930 are applied to pedal cyclists charged with dangerous or careless driving under s. 11 (1) (a) and (b) of that Act. By s. 8 (4) of the Act of 1956 the jury can convict of reckless or dangerous driving on a trial of the defendant under s. 8 (1) for causing death by such driving although the requirements of s. 21 of the Act of 1930 have not been satisfied.

As to reckless or dangerous driving, see 31 HALSBURY'S LAWS (2nd Edn.) 669 et seq., and for cases see DIGEST Supps., tit. Street Traffic, case 245b et seq. For Road Traffic Act, 1930, see 24 HALSBURY'S STATUTES (2nd Edn.) 569.

Appeal against conviction.

The appellant was convicted at Gloucester Assizes on Oct. 24, 1932, of driving a motor vehicle in a manner dangerous to the public, contrary to s. 11 of the Road Traffic Act, 1930, and was ordered by MACKINNON, J., to be bound over for two years in the sum of £5.

On Aug. 11, 1932, an accident, which gave rise to the charge, took place. The vehicle driven by the appellant came into contact with an omnibus, from which a mirror was knocked off. On the same day the Gloucestershire police wrote to the London County Council to obtain the name and address of the registered owner of the vehicle, but they did not receive the reply conveying the desired information till Aug. 18. On that day the Gloucestershire police wrote to the Metropolitan police, who, on Aug. 20, interviewed the registered owner and also the driver, but the Gloucestershire police did not obtain a reply from them till Aug. 25, and then ascertained for the first time the name and address of the appellant. No notice of the intended prosecution was served on or sent to the registered owner within fourteen days of the commission of the offence. On Aug. 29, the appellant received a summons in connection with the charge.

At the trial MACKINNON, J., ruled (i) that the expression "the court" in the proviso refers to the judge and not the jury; (ii) that the expression "reasonable diligence" in the proviso refers to the diligence of the officer in charge of the case; (iii) that, as there had been no improper delay on the part of the Gloucestershire police, the proviso applied and the prosecution could proceed. The jury, after finding the appellant guilty of the offence charged, added to their verdict a rider to the effect that the appellant did not know that he had knocked a mirror off the omnibus when he drove on.

Cur. adv. vult.

Paul Layton for the appellant.
R. C. Hutton for the Crown.

Dec. 5. The judgment of the court was read by

TALBOT, J.—In this case the appellant was convicted at the Gloucestershire Assizes before MACKINNON, J., under s. 11 of the Road Traffic Act, 1930, of driving a motor vehicle in a manner dangerous to the public. He appeals against his conviction on the ground that

> "the judge at the trial was wrong in holding that s. 21 of the Road Traffic Act, 1930, was not, on the admitted and proved facts, a bar to conviction under s. 11 of the said Act."

[His Lordship read s. 21 and continued:] The offence was committed on Aug. 11, but the appellant did not receive the summons until Aug. 29. No notice of the intended prosecution was served on, or sent to, either the appellant or the registered owner of the vehicle. The Gloucestershire police ascertained the name and address of the registered owner on Aug. 18. They did not ascertain the name and address of the accused before Aug. 25. Therefore, (i) no summons was served within fourteen days of the commission of the offence; (ii) no notice of the intended prosecution was served or sent. It having been impossible to warn the driver under para. (a) when the offence was committed, it follows that none of the conditions which s. 21 makes necessary for a conviction was fulfilled. Unless, therefore, the proviso applies, this conviction cannot stand.

At the trial the learned judge held, (i) that the words in the proviso "the court is satisfied" refer to the judge and not the jury; (ii) that the "reasonable diligence" mention in para. (i) (1) of the proviso is diligence of the officer in charge of the prosecution, in this case the chief constable of Gloucestershire. It appearing that two intervals of a week each occurred between the receipt by the London County Council and the Metropolitan police, respectively, of inquiries necessarily or reasonably addressed to them by the Gloucestershire police and their replies thereto, the learned judge declared himself satisfied that there had been no improper delay on the part of the Gloucestershire police. We think it is clear from the shorthand notes that in coming to this conclusion he was considering only a summons or notice to the accused.

If there were no other point in the case, we should dismiss the appeal. We agree with the judge as to the two points on the construction of the section mentioned above, and it would be impossible to entertain any objection to his decision of fact so far as a summons or notice to the appellant is concerned; nor were we asked to do so. Another point was, however, raised on the appeal which it is not suggested is not open to the appellant, though it does not appear to have been distinctly submitted to the learned judge. It is this: that, although the name and address of the accused could not, with reasonable diligence, have been ascertained in time, there was no such difficulty about the name and address of the registered owner of the vehicle, which were, in fact, known to the Gloucestershire police seven days only after the commission of the offence, namely, on Aug. 18; and there was, therefore, ample time for doing that which by s. 21 (c) is enough to justify a conviction under s. 11—that is, serve on or send by registered post to the registered owner of the vehicle a notice of the intended prosecution.

We think that this is fatal to the conviction. None of the alternative conditions imposed by the first part of s. 21 was in fact performed; one could have been performed, and not only cannot the officer in charge of the prosecution show that he could not with reasonable diligence have ascertained what was necessary in order to perform that one, but he had in fact ascertained it. It is not under the Act necessary to state in a notice to the registered owner the name or address of the person whom it is intended to prosecute. It is enough to state the nature, time, and place of the offence. The effect of s. 21 (apart from (a) which, in this case, is out of the question) is this. One of three conditions must be performed if a conviction is to be good for an offence to which the section relates; but if none of them could be performed, because the relevant names and addresses could not be, with reasonable diligence, obtained in time, the failure to perform them is excused. Here the prosecution have only shown that two of the conditions could not be performed, for the reasons stated, and they have, therefore, not excused their failure to perform any of the three. It is unnecessary to consider para. (2) of the proviso, since the fact that the appellant drove on without stopping, after committing the offence (in ignorance, as the jury found, that he had done any damage) did not delay the ascertainment of the facts necessary for giving the statutory notice to the owner.

For these reasons the appeal must be allowed and the conviction quashed.

Conviction quashed.

Solicitors: *Registrar of the Court of Criminal Appeal*; *Director of Public Prosecutions.*

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

THE CASTOR

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., assisted by Elder Brethren), March 1, 2, May 3, 4, June 6, 1932]

[Reported [1932] P. 142; 101 L.J.P. 88; 147 L.T. 359; 48 T.L.R. 604; 18 Asp.M.L.C. 312]

Shipping—Salvage—Value of salved property—Salved ship under time charter—Inclusion in appraisement of value of future earnings under charter.

In appraising the value of a vessel for the purpose of awarding salvage, the fact that the vessel was at the time of the services under a profitable and unexpired time charterparty can be taken into account, and the present value of future earnings under such charterparty can be included in the appraised value.

The Hohenzollern (1), [1906] P. 339, applied.

Notes. As to value of salved property, see 30 HALSBURY'S LAWS (2nd Edn.) 913–915, and for cases see 41 DIGEST 897, 898.

Cases referred to:

(1) *The Hohenzollern*, [1906] P. 339; 76 L.J.P. 17; 95 L.T. 585; 22 T.L.R. 778; 10 Asp.M.L.C. 296; 41 Digest 872, *7474*.

(2) *The Harmonides*, [1903] P. 1; 72 L.J.P. 9; 87 L.T. 448; 51 W.R. 303; 19 T.L.R. 37; 9 Asp.M.L.C. 354; 41 Digest 810, *6710*.

(3) *The Edison*, [1932] P. 52; 101 L.J.P. 12; 147 L.T. 141; 48 T.L.R. 224; 37 Com. Cas. 182; 18 Asp.M.L.C. 276; on appeal, [1933] All E.R.Rep. 144; sub nom. *Liesbosch, Dredger* v. *Edison S.S.*, [1933] A.C. 449; 102 L.J.P. 73; 77 Sol. Jo. 176; 38 Com. Cas. 267; 18 Asp.M.L.C. 380; sub nom. *The Edison*, 149 L.T. 49; 49 T.L.R. 289, H.L.; Digest Supp.

(4) *The San Onofre*, [1917] P. 96; 86 L.J.P. 103; 116 L.T. 800; 14 Asp.M.L.C. 74; 41 Digest 872, *7475*.

(5) *The Five Steel Barges* (1890), 15 P.D. 142; 63 L.T. 499; 6 Asp.M.L.C. 580; sub nom. *The Steel Barges*, 59 L.J.P. 77; 39 W.R. 127; 41 Digest 824, *6821*.

(6) *The Kaffir Prince*, [1917] P. 26; 31 T.L.R. 296; 41 Digest 872, *7473*.

(7) *The Kate*, [1899] P. 165; 68 L.J.P. 41; 80 L.T. 423; 47 W.R. 669; 15 T.L.R. 309; 8 Asp.M.L.C. 539; 41 Digest 809, *6706*.

Salvage Action.

The plaintiffs, owners, masters and crew of the steamship *Ousebridge*, of West Hartlepool, claimed salvage for services rendered to the Swedish motor vessel *Castor* and her cargo. The *Ousebridge*, 5,601 tons gross, whilst on a voyage from Nicolaieff to Baltimore via Oran, received a wireless message that the *Castor* was on fire in lat. 36° 34′ N., long. 22° 39′ W., and that her master had ordered the vessel to be abandoned. The *Ousebridge* proceeded to the *Castor*, and succeeded in making fast at about 4.30 p.m. on April 28, 1931. The *Castor* was then towed to St. Michaels, Azores, where she was moored in safety at about 9.45 a.m. on May 2, 1931. The *Castor*, 8,714 tons gross, was loaded with a cargo of oil. At the time of the services the *Castor* was running under a remunerative charterparty, which still had seven years to run. The value of the *Castor* was appraised at £72,820, but it appeared that the valuer, in making his appraisement, had not taken into consideration the value of the unexpired part of the time charter.

Dunlop, K.C., and *Naisby* for the plaintiffs.—The appraiser ought to have taken into account the value of the unexpired portion of the time charterparty, and he should have added something for the present value of the profits which the vessel will earn under it. The plaintiffs are entitled to an award on the value of the vessel to her owners as a going concern: (*The Hohenzollern* (1)). The same principle of valuation has been recognised in damage cases: (*The Harmonides* (2), see also *The Edison* (3)). If the appraiser has proceeded upon a wrong principle the plaintiffs are not bound by the appraisement. A

Digby, K.C., and *Carpmael* for the defendants.—The appraisement is conclusive, and ought not in this case to be set aside. In any case the appraiser has not proceeded on any wrong principle. The decisions in *The Harmonides* (2) and *The Hohenzollern* (1) must be read subject to the limitations of the decision in *The San Onofre* (4). B

Dunlop, K.C., replied.

Cur. adv. vult.

June 6. **LORD MERRIVALE, P.,** read the following judgment.—In addition to the controverted questions as to what was done by the *Ousebridge* and what was its effect, there was a stubborn contest at the hearing as to the value of the property salved, and a serious conflict as to the principle on which the value must be determined. Ordinarily C an appraisement of the ship, a valuation of her cargo, and a simple adjustment of relevant matters of account will provide the material for arithmetical ascertainment of the values in question. Here, however, a question of general importance has been raised, namely, whether in valuing the res in salvage cases the court can have regard to a charterparty in force at the time in question. This came about by reason that when the *Castor* was salved she was under time charter, with nearly seven years to run, with the Anglo- D Saxon Petroleum Co., Ltd.

The *Castor* had been built under the terms of a contract made in December, 1926, between her owners and the Anglo-Saxon Petroleum Co., which determined the design and structure of the ship to be built and gave the company an interest in her as soon as she should be completed, the principal term being that she should be under hire to the company for a term of years at fixed rates for the carriage of oil at 6s. 10½d. per ton E per month upon a dead weight capacity of 12,500 tons. Hence the charterparty. The *Castor's* gross earnings thereunder for a year were estimated by one of the witnesses at about £46,000 and, after payment of working expenses and allowances for various charges, including charges for depreciation, it was said on the plaintiffs' part that there was a net profit accruing to the owners under the charterparty of upwards of £12,000 per annum, and it was contended that, the charterparty having nearly seven years to F run, the present value of the prospective earnings of the *Castor* during that period must be taken into account as an element of value additional to her appraised value as a damaged ship of £72,820. Counsel for the plaintiffs also suggested in his final argument that the prospective earnings under the charterparty, if not treated as an element in the value of the vessel, ought to be regarded as freight at risk and part of the property or interest of her owners salved for them by the *Ousebridge*. For the defendants the G figures I have mentioned were not at all admitted. They regarded the net profit as only £4,000. It was contended by their counsel that the value to be taken into account was the appraised value and no more.

In view of this conflict I thought it was necessary to ascertain from the valuer by whom the appraisement of the *Castor* had been made whether he had valued upon the footing that the vessel was on hire to the charterers on the terms of the actual charter- H party, and I learned, and so informed the parties, that the charterparty had not been before the valuer. The vessel had been valued simply on the footing only of her actual employment. Evidence was given by expert witnesses as to the value of the *Castor* to her owners under the charterparty, and counsel discussed the question of value on this footing in light of a number of well-known legal authorities. The outstanding cases cited were; *The Five Steel Barges* (5), *The Harmonides* (2), and *The Hohenzollern* (1); I and in contrast with these the decision of SIR SAMUEL EVANS, P., in *The San Onofre* (4). The judgments in the recent case of *The Edison* (3) in the Court of Appeal were also mentioned. The substantial dispute, however, was whether the decision of the court in *The San Onofre* (4) limits or qualifies the principles applied in the earlier cases. As the question affects everyday practice it has been necessary to examine the cases closely.

LORD HANNEN'S judgment in *The Five Steel Barges* (5) is useful for the reminder it gives that salvage cases are not mechanically uniform in process or in effect. It was a personal action against barge builders to establish a salvage claim in respect of services

A rendered to five barges, whereof two, though still under the builders' control, had passed to the government for which they were built. LORD HANNEN, in holding that payment for salvage was recoverable in respect of the possessory interest of the builders in these two barges, gave his well-known pronouncement on the principles which in our courts govern every salvage award.

> B "It is [he said] a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him. . . . I think that proposition applies equally to the man who has had a benefit arising out of the saving of the property. . . . The same moral obligations to which the law has given force in the case of an owner applies equally to those who have an interest in the property."

C The jurisdiction in salvage cases LORD HANNEN also described as one of "a peculiarly equitable character." As to the test of value in these cases, *The Harmonides* (2) and *The Hohenzollern* (1) were accepted by counsel on both sides as authoritative decisions. *The Harmonides* (2), like *The Edison* (3), was a case of ascertainment of value of a ship sunk in collision, but the test applicable appears to be the same in case of salvage. That this was LORD GORELL's view appears from the proceedings in *The Hohenzollern* (1). D What LORD GORELL had defined as the test in the damage case of *The Harmonides* (2) was: "What is the value to the owners as a going concern of the vessel in question at the material time?" and in *The Hohenzollern* (1), BARGRAVE DEANE, J., after consultation with LORD GORELL, P., assessed salvage upon the footing that "the value is what the ship was worth in the damaged state to her owners."

Substantially the case of the defendants is that the judgment in *The San Onofre* (4) E limits the operation of the earlier decisions by establishing as a legal principle that in determining the value of a salved vessel for salvage purposes contractual arrangements which exist between the owners and charterers of the ship must be excluded from consideration. The facts as to *The San Onofre* (4) can be shortly stated. She, like the *Castor*, was a vessel built for the purpose of being chartered to an oil company under a time charter. The time charter was in force with fourteen years to run at the date of F the salvage. Her owners declared her value in her damaged condition to be not more than £160,000, that being the sum at which she stood in their books, with due allowance for depreciation and repair of damage. At the instance of the salvors, however, appraisement had been made in the ordinary course, and the value had been thereby fixed at nearly £370,000 as "the market value of the vessel as a going concern at the date of the completion of the salvage services." This larger value was held by the court G to be the value upon which the reward for the salvage services must be determined.

Certain passages in the judgment of *The San Onofre* (4) were specially relied upon for the defendants, and these in particular. The President said:

> "In no case, so far as I am aware, have the charters of a vessel been taken into account in assessing the value of a salved ship in salvage proceedings. . . . The ship is salved and may be arrested as she is, as the salvors are entitled to arrest the H res. If bail is not given, the ship may be sold. She would not be sold subject to charterparties, but as she existed to anyone who wanted to buy a ship of her description. . . . The court has nothing to do with the relationship between the shipowners and the charterers; nor, in my opinion, have the salvors anything to do with any such question."

I Read by themselves, as if they were statements of principle applicable in all cases, the words cited would, perhaps, establish the defendants' contention. They must, however, be applied to the facts with which the judgment deals. This is illustrated in respect of the question whether charterparties may ever be taken into account in assessing value for salvage by *The Kaffir Prince* (6). There, in determining a salvage award, the learned President took into account as an element in the value of the salvaged ship freight which the vessel was, by reason of the salvage, enabled to earn under a charterparty which was in being at the time of the salvage. In a damage case (*The Kate* (7)), LORD ST. HELIER had treated the charterparty as a material element of value.

So far as I am able to see there is nothing in *The San Onofre* (4) which in any way infringes or was intended to infringe the principle laid down in *The Hohenzollern* (1). All parties interested in the res were before the court, and were interested in the salvage claim and the amount of the award. Two sets of rights—proprietary and possessory—had been benefited, and an award was made on the footing of the full value of the whole. The actual judgment was nothing exceptional. Upon an appraisement salvage was awarded. In what proportions the sum payable was provided as between the owners and charterers is not reported. Apparently, they did not differ about it. As the vessel was not sold by auction, it did not become necessary to determine whether by virtue of the sale the owners had become entitled to the whole balance of the purchase-money on the footing that the charterparty had become discharged by operation of law. Had such a claim been made I cannot doubt that the equitable nature of the Admiralty jurisdiction in cases of salvage would have been vindicated.

As in *The Hohenzollern* (1), what has to be determined here is what is the value of the *Castor* to her owners as a going concern? What was she worth in her damaged state to her owners? The view I have expressed seems to me consistent with the judgments of the Court of Appeal in the recent case of *The Edison* (3) to which both parties referred. There, in the case of a vessel lost by collision damage, SCRUTTON, L.J., cited the judgment of LORD GORELL in *The Harmonides* (2), and added the words which directly affect the present inquiry. "The value of the ship," he said, "is an estimate on rough capitalisation of the earning power of the ship for its life"; and he added this: "You cannot give both the value of the ship and the profits it would probably earn."

Bearing the authorities in mind, what seems to me fallacious in the contention for the plaintiffs here is that after an appraisement which was manifestly based on some earning power they assert a right to enhance the appraised value by adding thereto the capitalised value of the ship's whole earning power under a charterparty. On the other hand, it seems to me inconsistent with authority and wrong in principle to exclude from consideration the earning power of the *Castor* under the charterparty, under which, so long as it subsists, she could alone earn money for her owners. The appraisement, as I have said, proceeds on the footing that the ship is an employed ship likely to be employed. To determine whether the agreed employment enhances the value so arrived at I have made the necessary further inquiries of the valuer. He advises me that the rate of hire is not exceptional so as to call for any adjustment on that ground, but that the agreed duration of the charterparty is an element of value proper for consideration in determining the *Castor's* value to her owners as a going concern. Acting to the best of my judgment upon the valuer's advice, I determine the salved value of the *Castor* at £85,000. There was no dispute between the parties as to the salved value of the cargo. Taking account of expenses involved amounting to £3,938, the value of the cargo at Lisbon was £20,828.

Having arrived at the values of the salved ship and cargo, I have to determine what should be the reward for the services rendered in salvage. It must be borne in mind that the salvage service involved loss of the *Ousebridge's* services to her owners for a period of six days, twenty hours, various expenses amounting to £1,177, and £117 expenses incurred by reason of the accident which happened to the seaman Prince. It is also material in respect of the claim of the owners of the *Ousebridge* that for several days their property, worth nearly £70,000, was exposed to risks involved in the salvage undertaking with no other prospect of compensation than that which depended upon the safe delivery of the *Castor* in port. As to the master and crew of the *Ousebridge*, they undertook their task in face of some real risks which were inevitable, and of possible risks which might well have been alarming, and for the master the responsibility he took as well as his actual risk and labour, must be taken into consideration. On the whole, I have come to the conclusion that the sum of £11,500 would not be an excessive award for the salvage. Out of this sum £1,000 should go to the master of the *Ousebridge*, and £2,300 to her officers and crew, rateably, except that £300 must be paid to the seaman Prince in respect of his injury in addition to his due share of the balance. Deducting from the total award of £11,500 the sum of £3,300, the balance of £8,200 will remain for the owners of the *Ousebridge*. I have been asked to apportion the salvage found

A payable as between ship and cargo, and I direct that the total sum I have named of £11,500 shall be apportioned between ship and cargo in proportion to their respective salved values of £85,000 and £20,828.

Solicitors: *Botterell & Roche*, for *Botterell, Roche, & Temperley*, West Hartlepool; *Stokes & Stokes*, for *Bramwell, Clayton, & Clayton*, Newcastle-upon-Tyne.

B [*Reported by* GEOFFREY HUTCHINSON, ESQ., *Barrister-at-Law.*]

C

R. *v.* KINGSTON-ON-THAMES CONFIRMING AUTHORITY. Ex parte SCALES

D [KING'S BENCH DIVISION (Lord Hewart, C.J., Avory and Branson, JJ.), December 15, 1932]

[Reported [1933] 1 K.B. 535; 102 L.J.K.B. 367; 148 L.T. 423; 97 J.P. 34; 49 T.L.R. 151; 31 L.G.R. 116]

E *Licensing—Licence—Application—Notice of application for on-licence—Amendment—Application for off-licence—Jurisdiction of justices to grant—Licensing (Consolidation) Act*, 1910 (10 *Edw.* 7 *& Geo.* 5, *c.* 24), *s.* 15 (2).

One P. gave notice of his intention to apply for a publican's licence in respect of certain premises. At the adjourned licensing meeting of the borough licensing justices he amended his application and asked for an off-licence only in respect of part of the premises. A number of objectors were heard, and the application as F amended was granted. The justices found that no one had been misled by the change in the form of the application. The confirming authority subsequently confirmed the off-licence after objectors had again been heard. One of the objectors sought to quash the order for confirmation, on the ground that the confirming authority had acted in excess of or without jurisdiction in confirming the grant of a licence which the licensing justices had no jurisdiction to grant on the notices of application as given.

G **Held:** the justices were the proper judges of the sufficiency of the notices; no one had been misled by the change in the form of the application; that which was permitted to be done under the licence granted was less than that which would have been permitted under the licence originally asked for, and, therefore, the justices were entitled to grant the licence asked for, and the confirming authority had power to confirm the grant.

H **Notes.** Section 15 (2) of the Licensing (Consolidation) Act, 1910, has been replaced by Sched. III, Part I, para. 3, to the Licensing Act, 1953.

As to applications for licences, see 22 HALSBURY'S LAWS (3rd Edn.) 543–545, and for cases see 30 DIGEST (Repl.) 12 et seq. For Licensing Act, 1953, see 33 HALSBURY'S STATUTES (2nd Edn.) 142.

I **Rule nisi** for certiorari.

Section 15 of the Licensing (Consolidation) Act, 1910, requires a person applying for a new justices' licence to give certain notices of the application, and by sub-s. (2) of that section:

> "Any notice to be given under this section shall set forth the name and address of the applicant, a description of the licence or licences for which he intends to apply, and a description of the situation of the premises in respect of which the application is to be made."

Mr. Perkins, the secretary of Bentalls, Ltd., gave notice under s. 15 of his intention A to apply at the annual licensing meeting of the licensing justices for the royal borough of Kingston-on-Thames

> "for the provisional grant to him of a justices' licence authorising him to hold an excise licence to sell under the Licensing (Consolidation) Act, 1910, any intoxicating liquor which might be sold under a spirit retailer's (or publican's) licence for B consumption either on or off the premises situate on the ground floor and the first and second floors of that part of Bentalls' Stores known as the Tudor Restaurant and also a department on the ground floor adjoining the entrance to the restaurant, and at the time used for the sale of electrical appliances."

At the adjourned annual licensing meeting, on April 25, 1932, Mr. Perkins amended his application, and asked instead for a justices' licence authorising him C

> "to hold an excise licence to sell beer, wines, and spirits by retail at the premises situate at Wood Street, in the said borough, for consumption off the premises, the said premises being the enclosed portion situate to the left or north of the entrance to the Tudor Restaurant and measuring 83 ft. by 25 ft or thereabouts."

A number of objectors appeared, and it was contended on their behalf that no notice of this application had been given under s. 15 (2) of the Licensing (Consolidation) Act, D 1910, and that the justices had no jurisdiction to hear the application. The justices held that the defectiveness of the notices had not misled anyone, and granted the off-licence asked for; and on May 23 it was confirmed by the confirming authority, the objectors having again been heard. A rule nisi for certiorari was granted at the instance of one of the objectors, requiring the confirming authority to show cause why their order confirming the justices' grant of the licence should not be quashed. The ground on E which the rule nisi was asked for was that the confirming authority had acted in excess of or without jurisdiction in confirming the grant of a licence which the justices had no jurisdiction to grant on the notices of application as given.

Norman Birkett, K.C., and *Gerald Dodson* showing cause.

R. M. Montgomery, K.C., *Sidney Lamb* and *Horace Fenton* in support of the rule.

F

LORD HEWART, C.J.—This is a rule nisi for a writ of certiorari to the confirming authority for the royal borough of Kingston-upon-Thames to show cause why a writ of certiorari should not issue to remove into this court the order made by the confirming authority on May 23, 1932, confirming a certain licence granted by the licensing justices for the borough authorising Mr. Perkins (on behalf of Bentalls, Ltd.) to hold an excise licence to sell beer, wines and spirits by retail at premises situate at Wood Street in the G said borough for consumption off the premises, being the enclosed portion situate to the left or north of the entrance to the Tudor Restaurant. Two grounds were named in the rule, but it is not necessary to refer to the first, because it has been abandoned. The effective ground is that the confirming authority acted in excess of jurisdiction or without jurisdiction in confirming the grant of a licence which the justices had no jurisdiction to grant on the notices of application as given. H

No doubt it is provided, by s. 15 (2) of the Licensing (Consolidation) Act, 1910, that any notice shall set forth a description of the licence or licences for which the applicant intends to apply, and it appears from the documents produced before this court that the original intention was to apply for a licence to sell

> "on or off the premises situate on the ground floor and the first and second floors of that part of Bentalls' Stores known as the Tudor Restaurant, and also a department on the ground floor adjoining the entrance to the restaurant." I

In fact, a change of mind took place, and what was asked for and what was granted was an off-licence. That course was taken in the presence of counsel and others representing an enormous number of off-licensees. Looking at all the facts, the chairman says: "It is not suggested that anyone has been misled, and we are satisfied that no one is misled." Subject to the surrender of another beerhouse licence they granted the off-licence asked for. That decision having been given, the justices held an adjourned

A confirming meeting on May 23, when the objectors were again heard, and the confirming authority unanimously decided to confirm the licence. It seems to me in those circumstances, whatever may be said on a small technical point, that counsel showing cause is substantially right. No one was misled, and that which was permitted to be done under the licence granted is but a part of that which would have been permitted to be done under the licence originally asked for. Counsel is right in saying that the justices B are the judges of the adequacy of the notice. Other considerations, no doubt, would apply if something more had been granted than what was asked for under the notices. Here something less was granted. In my opinion, the rule must be discharged.

AVORY, J.—I am of the same opinion. I think s. 15 must be construed in a practical way and not in a merely theoretical one, and as soon as the justices find that no one is C misled it is open to them to deal with the application on its merits. I am confirmed in that opinion when I look at the note of the chairman showing that the opposition included 136 off-licensees. It is clear that no one was taken by surprise.

BRANSON, J.—I agree.

Rule discharged.

D Solicitors: *Durham, Charlton, Carn, & Shelby*; *C. A. Maddin & Co.*, Surbiton.

[*Reported by* T. R. FITZWALTER BUTLER, ESQ., *Barrister-at-Law.*]

E

OCEAN COAL CO., LTD. *v.* POWELL DUFFRYN STEAM COAL CO., LTD.

F [CHANCERY DIVISION (Farwell, J.), March 10, 11, 1932]

[Reported [1932] 1 Ch. 654; 101 L.J.Ch. 253; 147 L.T. 10; 48 T.L.R. 290]

Company—Shares—Transfer—Restriction—Offer to other shareholders—Offer to purchase part of shares offered.

By art. 1 (a) of the articles of association of the T. company, a private company, a member desiring to transfer any of his shares to a third party must notify the G board of the number, the price proposed, and the name of the proposed transferee. By art. 1 (b) and (c) the board must offer to the other shareholders the number of shares offered at that price, and, if the offer is accepted, the shares must be transferred to the acceptors. By art. 1 (d), if the shares or any of them were not so accepted, the holder might transfer them or any of them at the same or any higher price to third parties approved by the board. The capital of the T. company was £600,000 H in 600,000 shares of £1 each, held in equal parts by the O. and P. companies. The P. company notified the board that they desired to sell 135,000 of their shares to third parties at the price of £2 per share. The board offered the 135,000 shares to the O. company, and the O. company desired to exercise their option to purchase as regards 5,000 shares only at the proposed price.

Held: on the true construction of the articles the "price proposed" in art. 1 (a) I meant the price for the total number of shares proposed to be sold, and the "offer" of the shares by the board in art. 1 (b) meant an offer of the block of shares and not of individual shares up to the number in the block, and, therefore, the O. company was not entitled to purchase only part of the 135,000 shares offered and the P. company were entitled to sell those shares to a third party.

Per FARWELL, J.: Under the articles a shareholder would not be entitled to refuse an offer for his shares on the ground that it was made by a number of the other shareholders who together offered to take up the total number of shares he wished to sell and not by one individual shareholder.

Notes. As to the transfer of shares in a company, see 6 HALSBURY'S LAWS (3rd Edn.) 248 et seq., and for cases see 9 DIGEST (Repl.) 358 et seq. A

Adjourned Summons.

The Taff Merthyr Steam Coal Co. was incorporated on Sept. 25, 1922, as a private company, promoted by the Ocean Coal Co. and the Powell Duffryn Steam Coal Co. for the purpose of acquiring and working a mineral area in South Wales. The capital of the company was £400,000 in 400,000 ordinary shares of £1 each. By art. 38 of the B articles of association it was provided that the ordinary shares should be divided into two classes of 200,000 shares each, of which one class, described as class A, should be issued to and held by the Ocean Coal Co., and the other class, described as class B, by the Powell Duffryn Co. On Jan. 15, 1926, the company passed an extraordinary resolution that its capital should be increased by the creation of 200,000 further ordinary shares of £1 each, ranking for dividend and in all other respects pari passu with the C existing ordinary shares, and that 100,000 of the new shares should be class A shares, and should be issued to the Ocean Coal Co., and that the other 100,000 should be class B shares, and should be issued to the Powell Duffryn Co. All these additional shares were issued, and at the material time 300,000 class A shares were held by the Ocean Coal Co. and 300,000 class B shares by the Powell Duffryn Co. The articles of association of the company contained special provisions as to the sale or transfer of shares, D and by art. 39 it was provided, so far as is relevant, as follows:

> "1. The registered holders for the time being of shares of the company shall be entitled to sell or transfer their shares of the same class to any other or others of the registered holders of shares in such class, but not to any other parties except subject to the following restrictions: (a) The holder of any shares in any class E desiring to sell or transfer any of his shares in such class to any person other than a registered holder of shares in the same class shall notify in writing to the board the number of shares proposed to be transferred, the price proposed, and the name, address, and description and quality of the proposed transferee (if any). (b) Within twenty-eight days of receipt of any such notice as aforesaid the board shall offer the shares comprised therein to the other shareholders of the company at the price F so named by notice specifying the number of shares offered, the price and the time, not being less than fourteen days or more than twenty-one days, within which the offer must be accepted or will be deemed to be declined. (c) The shares shall be sold to the parties so accepting the offer, and shall be transferred to them by the holder against payment of the price. If the total number so accepted is larger than the number offered, the shares shall be appropriated to the parties accepting in proportion G to the number of shares already held by them respectively, if they are willing to take them, but with preferential and proportionate appropriation to persons accepting who are already holders of shares of the same class as those offered. (d) If the shares so offered, or any of them, are not so accepted, the holder may sell and transfer them or any of them at the same or any higher price (but not any lower price without being again offered in like manner as above-mentioned) to third H parties approved by the board, which approval the board may give or withhold as they think fit, without being bound in any case to assign any reason for their decision, and no transfer of such shares shall be made or registered without such approval."

In October, 1931, the Powell Duffryn Co. were desirous of selling some of their B shares to an outside body and on Oct. 12, 1931, they notified the board of the Taff I Merthyr Co., pursuant to art. 39, that they were desirous of selling and transferring 135,000 B shares to Stephenson Clarke and Associated Companies at the price of £2 per share. On Oct. 29, 1931, the company informed the Ocean Coal Co., the only other shareholders, that the board of the company had considered the above notice, and that it had been resolved, in accordance with art. 39, that the 135,000 B shares should be offered to the Ocean Coal Co. at the price of £2 per share, and informed them that such offer must be accepted on or before Nov. 17, 1931, or it would be deemed to be declined. On Nov. 9, 1931, the Ocean Coal Co. informed the board of the Taff Merthyr

A Co. that they had resolved to exercise their option to purchase in respect of 5,000 of class B shares. The board informed the Powell Duffryn Co. of this resolution, and on Nov. 23, 1931, the Powell Duffryn Co. informed the board that they were not prepared to transfer to the Ocean Coal Co. 5,000 out of the 135,000 class B shares which they proposed to sell, and that they were advised that under art. 39 any acceptance—whether by one shareholder or more—must be of the whole of the shares offered, and B not of a part thereof. On Jan. 15, 1932, the Ocean Coal Co. issued this summons, asking for a declaration that, on the true construction of art. 39 and in the events which had happened, they were entitled to apply for and have transferred to them, at the price of £2 per share, 5,000 of the 135,000 class B shares of the company which the Powell Duffryn Co. had on Oct. 12, 1931, notified the board of the company of their desire to sell. The Powell Duffryn Co. were made defendants.

C *Morton, K.C.*, and *Charles Romer* for the plaintiffs.

Gavin Simonds, K.C., and *J. H. Stamp* for the defendants.

FARWELL, J., stated the facts, read art. 39 (1) (a), and continued: The obligation on the shareholder who desires to sell his shares in a case such as the present is to notify the board in writing the number of shares which he offers for sale, and the price of D such shares, and the name and address and qualification of the proposed transferee. If the language is to be construed with complete strictness, the price proposed must be the price proposed for the total number of the shares—that is to say, it is the price per share, but it is a price calculated on the total number of shares which are being offered for sale. There may be, as has been pointed out by counsel for the defendants, a considerable difference between the price at which a shareholder is willing to sell his E shares if he is desirous of selling a large or small number, and the price which he obtains for his shares may vary according to the number of shares he is proposing to sell. If one takes the illustration which counsel put of an offer of shares sufficient to give control of the company, it may well be that a purchaser would be prepared to pay a much higher price for a number of shares sufficient for that purpose, whereas he would not be willing to pay such higher price if the number of shares were reduced below the necessary F number. Therefore, it seems to me that, read strictly at any rate, the price proposed is the price for the total number of shares proposed to be sold.

[His Lordship read art. 39 (1) (b), and continued:] What is the meaning of the words "the offer" in para. (b)? Are there 135,000 separate shares offered, or is it an offer of one block of 135,000 shares? If I am to accept the plaintiffs' construction, I must, as it seems to me, treat the word "offer" there as meaning a separate offer of each of the G shares which are being offered for sale, but strictly the offer is not an offer of anything more or less than one block of 135,000 shares. That is the offer which is made under para. (b). The transferor says: "I am willing to sell 135,000 shares at a price of £2 per share." He is not, in my judgment, saying: "I am willing to sell my shares at the price of £2 per share up to the number of 135,000," which is the way in which the plaintiffs ask me to read the article. That is not the offer which is made.

H I come to para. (c):

> "The shares shall be sold to the parties so accepting the offer, and shall be transferred to them by the holder against payment of the price."

There, again, the offer, as I have already said, is an offer of a block of 135,000 shares; it is not an offer of each share at £2 a piece up to and not exceeding 135,000 in all. It is I an offer to sell 135,000 shares, and that is an offer which must be accepted, and can only be accepted by one or more persons who conjointly say: "We will take a transfer of the 135,000 shares." I am not impressed by the argument of counsel for the plaintiffs with regard to one member being prepared to take up a certain number of shares, because as I read this clause, if offers can be obtained from members of the company which together make up the total amount which is being offered for sale, then, of course the vendor must accept that offer. He cannot say: "I will not take the offer, because it is an offer, not by one member to take up the whole 135,000 shares, but by different people who together offer to take up the total amount." In my judgment, the offer is not accepted within the meaning of this article unless one or more members agree to take up the whole number of shares offered. Article 39 (1) (c) provides for what is to happen if the total number of shares so accepted is larger than the amount offered, but I do not think that that assists me in the question which I have to decide. As to para. (d), it seems to me that that paragraph again, although, perhaps, it is not wholly free from ambiguity, is, on its true construction, consistent with the view which I have already expressed as to the effect of the article as a whole. On the whole, it seems to me impossible to treat this article as having the effect of turning what is an offer to sell a given number of shares, say 5,000 shares, into an offer to sell one share at the price stated for the 5,000.

For these reasons the plaintiffs are not entitled to succeed on this summons, and it must be dismissed with costs.

Solicitors: *Ingledew, Sons, & Brown*, for *Ingledew & Sons*, Cardiff; *Slaughter & May.*

[*Reported by* E. K. Corrie, Esq., *Barrister-at-Law.*]

Re P. E. AND B. E. KERN

[Chancery Division (Clauson and Luxmoore, JJ.), February 22, 1932]

[Reported [1932] 1 Ch. 555; 101 L.J.Ch. 257; 146 L.T. 570;
[1931] B. & C.R. 150]

Bankruptcy—Property available for distribution—Repayment by creditor of sum received under not completed execution—Sum paid by debtor to creditor before date of relation back—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 37 (1), *s.* 40 (1).

On Aug. 22, 1930, creditors issued execution against the debtors' estate to enforce a judgment debt and costs of £214. The sheriff levied on that day. On Aug. 30, the parties having agreed that, if the creditors withdrew the sheriff, the debtors would pay them £100 forthwith and the balance of the debt by monthly instalments of £20, the debtors paid the £100 and the sheriff withdrew. Two further instalments of £20 were paid on Sept. 26 and Oct. 27, but, in default of the payment of further instalments, the sheriff re-entered on Dec. 13. On Dec. 16 a receiving order was made on the petition of the debtors, and they were adjudicated bankrupt, the sheriff again withdrawing. The trustee in the bankruptcy claimed from the execution creditors, under s. 40 (1) of the Bankruptcy Act, 1914, repayment of the sums mentioned on the ground that the creditors had not completed the execution before the date of the receiving order. The creditors admitted that they were liable to repay the two sums of £20, but contended that they were not liable to repay the £100 as that was paid to them before the date to which the title of the trustee related back under s. 37 (1) of the Act of 1914.

Held: there was nothing in s. 40 which laid down or imported any limit of time on the rights of the trustee, and, therefore, the £100 was repayable to the trustee by the creditors.

Notes. Considered: *Re Andrew, Official Receiver* v. *Standard Range and Foundry Co.*, [1936] 3 All E.R. 450.

As to the rights of creditors under executions, see 2 Halsbury's Laws (3rd Edn.) 541 et seq., and for cases see 5 Digest 638 et seq. For Bankruptcy Act, 1914, see 2 Halsbury's Statutes (2nd Edn.) 321.

Cases referred to:

(1) *Re Brelsford*, [1932] 1 Ch. 24; 146 L.T. 160; sub nom. *Re Brelsford, Official Receiver and Trustee* v. *Shell Mex, Ltd.*, 100 L.J.Ch. 365; [1931] B. & C.R. 21; Digest Supp.

A (2) *Re Fairley*, [1922] 2 Ch. 791; 92 L.J.Ch. 140; 38 T.L.R. 893; [1922] B. & C.R. 127; 21 Digest 521, *961.*

(3) *Re Chiandetti, Ex parte Trustee* (1921), 91 L.J.K.B. 70; 37 T.L.R. 984; [1921] B. & C.R. 82; 21 Digest 520, *960.*

(4) *Bower* v. *Hett*, [1895] 2 Q.B. 337; 64 L.J.Q.B. 772; 73 L.T. 176; 44 W.R. 4; 11 T.L.R. 540; 39 Sol. Jo. 669; 14 R. 710, C.A.; 5 Digest 816, *6937.*

B (5) *Slater* v. *Pinder* (1872), L.R. 7 Exch. 95; 41 L.J.Ex. 66; 26 L.T. 482; 36 J.P. 532; 20 W.R. 441, Ex. Ch.; 5 Digest 822, *6979.*

Appeal from an order of Exeter County Court in bankruptcy.

On Aug. 22, 1930, the creditors, Thomas Henry, Ltd., issued execution against the goods of the debtors on a judgment for £214. It was subsequently agreed between them C that, if the creditors withdrew the sheriff, who had levied, the debtors would pay them £100 on account of the judgment debt, and the balance by monthly instalments of £20, the sheriff to re-take possession in the event of default in payment of the instalments. The debtors, accordingly, on Aug. 30, 1930, paid the creditors £100 and the costs of the execution, and the sheriff withdrew. They also, on Sept. 26, 1930, paid the first monthly instalment of £20, and on Oct. 27, 1930, another £20 but they defaulted as to further D instalments, and on Dec. 13, 1930, on the creditors' instructions, the sheriff re-entered. On Dec. 16, 1930, a receiving order was made on the debtors' own petition, and was presented on the same day, they were adjudicated bankrupts, and the sheriff again withdrew. The execution creditors refused to repay to the trustee any of the sums they had received, and proceedings were taken by him by motion in the Exeter County Court. On Jan. 13, 1932, the county court judge adjudged that they were repayable E in pursuance of s. 40 of the Bankruptcy Act, 1914, being moneys paid under an execution not completed before the date when the receiving order was made. The creditors appealed.

H. W. Shawcross, for the creditors, referred to *Re Brelsford* (1), *Re Fairley* (2) ([1922] 2 Ch. at p. 795), and *Re Chiandetti* (3).

W. N. Stable, for the trustee, referred to *Re Brelsford* (1), *Bower* v. *Hett* (4), and *Re* F *Chiandetti* (3).

Shawcross, in reply, referred to MATHER'S SHERIFF LAW, 2nd Edn., p. 100, and *Slater* v. *Pinder* (5).

CLAUSON, J.—On Dec. 13, 1930, the sheriff's officer re-entered on the instructions of the judgment creditors, and three days afterwards a receiving order was made against G the judgment debtors. It does not actually appear to what date the title of the trustee related back; it is admitted that the £100 was paid long before the date to which the title of the trustee in bankruptcy to the property of the bankrupt could have related back, but that the two payments of £20 and £20, making together £40, were made since that date. Counsel for the creditors was not prepared to argue that there was anything invalid or illegal in the arrangement made for the sheriff to go out of possession and later H resume possession; and it will be understood that, in the observations I am now making, I am assuming, without in any way deciding, that there is no legal objection to that arrangement. Counsel for the creditors admitted that having regard to *Re Brelsford* (1) it was impossible for them to claim to retain the two sums of £20 and £20; but, as regards the £100, he put forward a point which could on the facts of that case have been argued in *Re Brelsford* (1), but which unquestionably was not then argued. While I he admits that the conditions, as laid down in s. 40 of the Act of 1914, which disentitle the judgment creditors to retain the sums now in question, namely, the £100 and the two sums of £20, have been fulfilled, he points out that the £100, differing in this respect from the two sums of £20, was received by the judgment creditors before the date to which the trustee's title could have related back under s. 37. As regards the two sums of £20, those, he admits, can be claimed by the trustee as part of the bankrupt's property passing to him under the doctrine of relation back. He submits, however, that s. 40 does not assist the trustee unless the latter can first establish a title under s. 37; at that point s. 40, so he submits, intervenes and prevents the judgment creditors from setting up a title against the trustee. His contention is that as regards the payment of the £100, s. 40 does not give any positive right to the trustee to claim that sum from the creditors, and, accordingly, they are entitled to retain it. A

In my view of the words of the section, the construction thus sought to be placed upon them is erroneous. It appears to me that the section says in terms as plain as one could desire that, if in the particular circumstances in the section mentioned, that is to say, of a receiving order having been made before completion of the execution, the B execution creditor has received fruits of the execution, he shall not retain those fruits of his execution against the trustee in bankruptcy—in other words, he must hand them to the trustee, if he asks for them. It appears to me that there is nothing in the section which lays down any limit of time or imports any other limitation on the trustee's rights. It is suggested that this construction has the result that, since an execution may, in accordance with the practice to which I have alluded, be prolonged for many C years, the hardship is involved that after a long lapse of time the trustee in bankruptcy may be entitled to go back to the beginning of the execution, and get back from the execution creditor sums which he has received, it may be, many years before. I confess that such a result does not strike me as a hardship. It must be borne in mind that it is the execution creditors' own act which kept this execution on foot, assuming it could legally be kept on foot; and, further, they kept it on foot for their own benefit in order, D no doubt, to obtain advantage by getting payment of instalments out of the execution debtors. I cannot see how the operation of the Act results in any hardship. The execution creditors have put themselves into this position entirely for their own purposes. If they chose to keep the execution on foot for a long time for their own purposes, I do not see how they can complain. Accordingly, as there seems to me to be no real hardship, I do not see why I should put any other construction on this section than that E which appears to me to follow from the plain and obvious meaning of the words.

Section 40 seems to me to be a substantive enactment, and the right of the trustee thereunder is not limited to the benefits of execution received by the execution creditors after the date to which the trustee's title to the bankrupts' property relates back. In my view, therefore, the order made by the county court judge was correct. The execution creditors are bound to account, not only for the two sums of £20 and £20, but also F for the sum of £100. The appeal must be dismissed.

LUXMOORE, J.—I agree.

Solicitors: *Philip Goodenday & Co.* for *A. Bieber & Bieber*, Liverpool; *Arnold Carter & Co.* for *C. Hamlyn Taylor*, Paignton.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*] G

Re HANLON. HEADS *v.* HANLON

[CHANCERY DIVISION (Eve, J.), October 18, 19, November 23, 1932]

[Reported [1933] Ch. 254; 102 L.J.Ch. 62; 148 L.T. 448; 76 Sol. Jo. 868]

Will—Condition—Condition subsequent—Strict construction—Uncertainty—In terrorem —Limits of doctrine—Gift of residue with condition that it should fail if legatee donee married or cohabited with named person.

The testator by his will made in 1928 gave his residuary personalty and all his realty to trustees upon trust to sell and invest the proceeds of sale and hold one moiety for the benefit of his wife for life, or during widowhood, and after her decease or re-marriage, whichever should first happen, for his children T. and M. at twenty-one, or, as to M., a daughter, on marriage, in equal shares, provided that if M. should marry one A, or live with him as his wife, or misconduct herself with him, or leave home with the intention of living with him, or be delivered of a child by him, the gift to her should be forfeited and she should be deemed to have died in the lifetime of the testator as a single woman. The testator died in 1932. On a summons taken out by the trustees asking whether this condition was valid or void for uncertainty or otherwise,

Held: (i) conditions subsequent intended to defeat a vested interest were always to be construed strictly, but here the conditions indicated distinctly on the happening of what events M.'s interest was to determine, and, therefore, none of the conditions was void for uncertainty;

(ii) nor were all the conditions void as being in terrorem, for that doctrine only applied to conditions relating to marriage and disputing the will and it did not affect the other conditions to which M. was subjected;

(iii) therefore, so long as A lived the trustees could not be authorised to make over to M. her share of the residue.

Notes. As to conditions in a will, see 34 HALSBURY'S LAWS (2nd Edn.) 103 et seq., and for cases see 44 DIGEST 434 et seq.

Cases referred to:

(1) *Re Sandbrook, Noel* v. *Sandbrook,* [1912] 2 Ch. 471; 81 L.J.Ch. 800; 107 L.T. 148; 56 Sol. Jo. 721; 44 Digest 444, *2686*.

(2) *Re Catt's Trusts* (1864), 2 Hem. & M. 46; 4 New Rep. 88; 33 L.J.Ch. 495; 10 L.T. 409; 10 Jur.N.S. 536; 12 W.R. 739; 71 E.R. 377; 44 Digest 461, *2810*.

(3) *Rochford* v. *Hackman* (1852), 9 Hare, 475; 21 L.J.Ch. 511; 19 L.T.O.S. 5; 16 Jur. 212; 68 E.R. 597; 44 Digest 449, *2719*.

(4) *Clavering* v. *Ellison* (1859), 7 H.L.Cas. 707; 29 L.J.Ch. 761; 11 E.R. 282, H.L.; 44 Digest 440, *2667*.

(5) *Re Bathe, Bathe* v. *Public Trustee,* [1925] Ch. 377; 133 L.T. 132; sub nom. *Re Bathe, Public Trustee* v. *Bathe,* 95 L.J.Ch. 37; 44 Digest 444, *2687*.

(6) *Jenner* v. *Turner* (1880), 16 Ch.D. 188; 50 L.J.Ch. 161; 43 L.T. 468; 45 J.P. 124; 29 W.R. 99; 44 Digest 456, *2781*.

(7) *Re Lanyon, Lanyon* v. *Lanyon,* [1927] 2 Ch. 264; 96 L.J.Ch. 487; 137 L.T. 806; 43 T.L.R. 714; 71 Sol. Jo. 865; 44 Digest 456, *2782*.

(8) *Jeffreys* v. *Jeffreys* (1901), 84 L.T. 417; sub nom. *Re Jeffreys, Jeffreys* v. *Jeffreys,* 17 T.L.R. 356; 44 Digest 443, *2682*.

(9) *Egerton* v. *Earl Brownlow* (1853), 4 H.L.Cas. 1; 8 State Tr.N.S. 193; 23 L.J.Ch. 348; 21 L.T.O.S. 306; 18 Jur. 71; 10 E.R. 359, H.L.; 44 Digest 192, *208*.

(10) *Lloyd* v. *Lloyd* (1852), 2 Sim.N.S. 255; 21 L.J.Ch. 596; 19 L.T.O.S. 84; 16 Jur. 306; 61 E.R. 338; 44 Digest 458, *2792*.

(11) *Bellairs* v. *Bellairs* (1874), L.R. 18 Eq. 510; 43 L.J.Ch. 669; 22 W.R. 942; 44 Digest 455, *2774*.

(12) *Duddy* v. *Gresham* (1878), 2 L.R.Ir. 442; 44 Digest 460, *2808 ii*.

Adjourned Summons

By his will, dated April 24, 1928, the testator bequeathed and devised his residuary personalty and all his realty upon trust for sale and investment of the proceeds, and directed the trustees to hold one moiety thereof upon trust to pay the income to his wife for life or widowhood, and after her decease or re-marriage, whichever should first happen, for his children, Thomas and Maisie Hanlon, who should live to attain the age of twenty-one years or, being female, marry under that age, in equal shares, provided that if Maisie should intermarry with A, or should live with him as his wife not being married to him, or misconduct herself with him in any manner, or leave home with the intention of living with him, or be delivered of a child or children of whom he was the father, the devise or bequest to her should be absolutely forfeited and void, and she should be deemed to have died in the testator's lifetime as a single woman. There were provisos as to gifts over of the shares of Thomas and Maisie in the event of the death of either of them before the testator, leaving issue living at his death, other than issue of Maisie by A. There was no gift over of her share in the event of the forfeiture thereof. The testator died on Dec. 22, 1931. The plaintiffs, the trustees, then took out this summons, asking whether the above condition was valid, or was void for uncertainty, as being in terrorem, or otherwise. Both the children attained twenty-one, and survived the testator. Thomas had married and had one child. There was evidence that A was married and had left the district where the testator lived, and that Maisie had not seen him for years.

F. B. Alcock for the trustees.

Leonard Stone, for the defendant Maisie Hanlon, referred to *Re Sandbrook* (1); *Re Catt's Trusts* (2); *Rochford* v. *Hackman* (3).

E. M. Winterbotham, for the infant child of Thomas, referred to *Re Sandbrook* (1); *Clavering* v. *Ellison* (4); *Re Bathe* (5); *Jenner* v. *Turner* (6); *Re Lanyon* (7); *Jeffreys* v. *Jeffreys* (8).

G. R. Younger for the widow.

Cur. adv. vult.

Nov. 23. **EVE, J.**, read the following judgment.—The summons in this case raises the question whether a clause of defeasance contained in the will of the testator, who died on Dec. 22, 1931, affecting the share of the respondent, Maisie Hanlon, in the testator's residuary estate is effective, or purely in terrorem, or void either for uncertainty or otherwise.

By his will, which is dated April 24, 1928, the testator bequeathed and devised his residuary personalty and the whole of his realty to his trustees upon trust for conversion and investment of the proceeds, and declared that the trustees should stand possessed of the trust funds as to one moiety thereof for his wife absolutely, and as to the other moiety upon trust to pay the income thereof to his wife during her life or widowhood, and on her decease or re-marriage upon trust for his children, Thomas Hanlon the younger, and Maisie Hanlon, who should attain twenty-one, or, being female, should marry under that age, in equal shares, subject, nevertheless, to the proviso as to the said Maisie Hanlon thereinafter mentioned. Then follows the proviso which I will read without disclosing the name or address of the individual against whom it is pointed:

> "Provided always that if my said child Maisie Hanlon shall intermarry with [A of &c., &c.,] or shall live with him as his wife although not married or shall leave home with the intention of living with him or shall misconduct herself with him in any manner or shall be delivered of a child or children of whom the said A shall be the father, then in any of the events before recited any devise or bequest either residuary or otherwise under this my will to the said Maisie Hanlon shall be absolutely void and forfeited and she shall be deemed to have died in my lifetime as a single woman."

Then follow two provisos, which do not exhaust all possible contingencies, but which I need not read, as neither of them can become operative, the testator's children having both survived him and attained vested interests.

What I have to deal with is a vested interest in remainder expectant on the death of the widow in a share of a mixed fund representing residue, subject to a clause of defeasance whereby, on breach of any of the conditions specified, the devise or bequest is to be absolutely void, and the beneficiary is to be deemed to have died in the testator's lifetime a single woman, in which case there would be a intestacy as regards her share. On her behalf it has been argued that the conditions are bad on the ground of uncertainty, or, alternatively, ought to be treated as in terrorem, and, therefore, void in the absence of a gift over. It is not disputed that conditions subsequent intended to defeat a vested interest are always construed strictly, that if the estate or interest is to be defeated it must be by clear and express terms, and to work a forfeiture there must be shown a breach of a defined line of conduct which the parties concerned must reasonably have known would work a forfeiture: see *Egerton* v. *Earl Brownlow* (9), and *Clavering* v. *Ellison* (4). In the latter case LORD CRANWORTH says (7 H.L.Cas. at p. 725):

> "I consider that from the earliest times one of the cardinal rules on the subject has been this: that where a vested interest is to be defeated by a condition or a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

Bearing these weighty authorities in mind, I do not think that I should be warranted in holding any of these conditions void for uncertainty. In my opinion, they indicate distinctly upon the happening of what event the interest is to determine—marriage, cohabitation, departure from home with intent to cohabit, sexual misconduct with the named individual, or the bearing of a child of whom he is the father. Proof of breach, it is true, might be more difficult in the case of some of the conditions than others; for example, the paternity of an illegitimate child might be far more difficult to establish than the marriage or cohabitation of the parties, but this would not justify a finding that the last of the conditions is less precise or distinct than the first two. They are all three expressed in terms clearly showing a defined line of conduct which the parties concerned must reasonably know will work a forfeiture.

Then it is said, there being no gift over in the will on breach, the doctrine of in terrorem is applicable, and the conditions must be treated as ineffective and void. This doctrine applies to cases where the subject of the gift is personalty or a mixed fund representing the proceeds of sale of real estate and personalty: see *Lloyd* v. *Lloyd* (10), *Bellairs* v. *Bellairs* (11), and *Duddy* v. *Gresham* (12), and would, primâ facie, be applicable here, but it would seem from VICE-CHANCELLOR WOOD's judgment in *Re Catt's Trusts* (2) that if a testator desires a gift to be revoked the mere fact that there is no gift over will not prevent the revocation taking effect. On the construction of the will before me it is, I think, clear that the testator intended the gift to his daughter to be revoked on breach of any of the conditions, and if this is right the absence of any gift over cannot arise here.

But this is not the real difficulty in her way. What she cannot get over is that the in terrorem doctrine only applies to conditions relating to marriage and disputing the will; it does not affect the other conditions to which she is subjected, and, in my opinion, so long as A is living the trustees cannot be authorised to make over to Miss Hanlon her share of the residue. I, therefore, answer the question put to me by saying that the defeasance clause is not void, and the costs must, I think, be raised and paid out of Maisie Hanlon's quarter of the residue. Of course, that does not prevent the next-of-kin agreeing, if they can do so, to an immediate distribution. They are the only persons interested in it.

Solicitors: *Doyle, Devonshire & Co.*, for *Hannay & Hannay*, South Shields; *The Official Solicitor.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

A

McCALL BROS., LTD. *v.* HARGREAVES. SAME *v.* SAME

[KING'S BENCH DIVISION (Goddard, J.), May 3, 4, 11, 1932]

[Reported [1932] 2 K.B. 423; 101 L.J.K.B. 733; 147 L.T. 257; 48 T.L.R. 450; 76 Sol. Jo. 433]

B

Bill of Exchange—Endorsement—Endorsement by drawers below that of endorser—Agreement by endorser to be liable to drawers on bill—Need to be in writing—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4—*Bills of Exchange Act*, 1882 (45 & 46 *Vict.*, *c.* 61), *s.* 20 (1).

An endorser endorsed a bill in pursuance of an agreement with the drawers that he would make himself liable thereon to the drawers, and subsequently the drawers endorsed the bill by writing their name underneath that of the endorser. In an action on the bill, C

Held: (i) the drawers had authority under s. 20 (1) of the Bills of Exchange Act, 1882, to complete the bill by adding their endorsement, and the fact that their endorsement was placed under that of the endorser instead of above it was immaterial; D

(ii) the absence of a written memorandum of the agreement by the endorser to be liable on the bill afforded the drawer no defence;

(iii) and, therefore, the drawers were entitled to succeed.

Notes. As to the liability of the endorser of a bill of exchange, see 3 HALSBURY'S LAWS (3rd Edn.) 215–217, and for cases see 6 DIGEST 308 et seq. For Statute of Frauds, 1677, see 4 HALSBURY'S STATUTES (2nd Edn.) 658, and for Bills of Exchange Act, 1882, see ibid., vol. 2, 505. E

Cases referred to:

(1) *M. T. Shaw & Co., Ltd.* v. *Holland*, [1913] 2 K.B. 15; 82 L.J.K.B. 592; 108 L.T. 543; 29 T.L.R. 341; 18 Com. Cas. 153, C.A.; 12 Digest (Repl.) 150, *950*.

(2) *Gerald McDonald & Co.* v. *Nash & Co.*, [1924] A.C. 625; 93 L.J.K.B. 610; 131 L.T. 428; 40 T.L.R. 530; 68 Sol. Jo. 594; 29 Com. Cas. 313, H.L.; Digest Supp. F

(3) *National Sales Corpn., Ltd.* v. *Bernardi*, *Bernardi* v. *National Sales Corpn., Ltd.*, [1931] 2 K.B. 188; 100 L.J.K.B. 386; 145 L.T. 48; 47 T.L.R. 380; 36 Com. Cas. 270; Digest Supp.

(4) *Steele* v. *McKinlay* (1880), 5 App. Cas. 754; 43 L.T. 358; 29 W.R. 17, H.L.; 12 Digest (Repl.) 150, *949*.

(5) *Wilkinson & Co.* v. *Unwin* (1881), 7 Q.B.D. 636; 50 L.J.Q.B. 338; 46 L.T. 123; 29 W.R. 458, C.A.; 12 Digest (Repl.) 199, *1383*. G

(6) *Singer* v. *Elliott* (1887), 4 T.L.R. 524, C.A.; 6 Digest 247, *1581*.

(7) *Jenkins & Sons* v. *Coomber*, [1898] 2 Q.B. 168; 67 L.J.Q.B. 780; 78 L.T. 752; 47 W.R. 48; 14 T.L.R. 425; 6 Digest 314, *2095*.

(8) *Re Gooch, Ex parte Judd*, [1921] 2 K.B. 593; 90 L.J.K.B. 932; 125 L.T. 583; [1921] B. & C.R. 100, C.A.; Digest Supp. H

(9) *Glenie* v. *Smith*, [1907] 2 K.B. 507; 76 L.J.K.B. 874; 97 L.T. 434; 23 T.L.R. 596; affirmed, [1908] 1 K.B. 263; 77 L.J.K.B. 193; 98 L.T. 515; 24 T.L.R. 177, C.A.; 6 Digest 203, *1250*.

Consolidated Actions in which the plaintiffs, as holders, sued the defendant, as endorser, of two bills of exchange, each for £300.

I

Cartwright Sharp for the plaintiffs.
Gerald Gardiner for the defendant.

Cur. adv. vult.

May 11. **GODDARD, J.,** read the following judgment.—In these consolidated actions the plaintiffs, as holders, sue the defendant as endorser of two bills of exchange, each for £300, the bills being drawn by the plaintiffs to their order on and accepted by a company named Wain, Shiell & Co., Ltd., of which the defendant was a director. The endorsement of the writ alleges that the defendant endorsed the bills pursuant to a verbal agreement, whereby the plaintiffs agreed to sell and deliver goods to the company in consideration of the defendant endorsing the bills without recourse against the plaintiffs as drawers. Various defences were pleaded, among them being that there was no notice of dishonour, which was abandoned at the trial, and those that were insisted on may be summarised as follows: (i) That the defendant endorsed the bills only to enable the plaintiffs to discount them, and not with the intention of making himself liable to the drawers; (ii) that an endorser is not liable to the drawer unless an agreement is proved whereby he undertook to be liable, and that such an agreement was neither pleaded nor proved; (iii) that to any such agreement the Statute of Frauds would be an answer, there being no written memorandum of such an agreement; (iv) that the plaintiffs had no authority to complete the bills in the way that they were completed, and that, as the bills had never been negotiated he was not liable to the plaintiffs, or, if he was, he had a right over of indemnity against them. A large number of cases were cited to me, and as it was argued that they were not consistent, I reserved judgment to consider them and to see if there is any longer any inconsistency between them.

The plaintiffs were cloth manufacturers at Trowbridge, and in February, 1931, were owed a considerable sum of money by Wain, Shiell & Co., Ltd., for cloth supplied. There were other pieces already made and awaiting delivery, but the plaintiffs were unwilling to deliver unless their overdue account was paid or secured and provision made for payment for the future deliveries. The company was endeavouring to secure extended credit, and, indeed, seem to have considered it unreasonable of the plaintiffs to require payment even of their overdue account, but I am satisfied that the attitude adopted by them, and the threats they made to withdraw the plaintiff's goods from their bundles of samples, were simply due to their inability to pay what they owed, and not to there being any agreement or trade custom for extended credit. The defendant had recently become a director of the company and held a debenture over their assets. He appears to have been the director directly in charge of the finances of the company, and was trying to extricate it from its difficulties. A meeting took place on Feb. 19, 1931, in London, at which were present Mr. Hammond, the plaintiffs' managing director; Mr. Armitage, their London representative; the defendant; and Mr. Shiell; and the position was discussed. It was suggested that bills should be given both for the amount owing by the company and also in respect of any further deliveries; but Mr. Hammond was not willing to accept the company's bills unless they were backed by the defendant. Mr. Hammond asked the latter "to guarantee the bills," and at first he refused to do so; the defendant says that all he agreed to do was to endorse the bills so that the plaintiffs might discount them, or otherwise raise money on them, but that he refused to make himself in any way liable to the plaintiffs either for the past or future indebtedness. I am, however, satisfied that Mr. Hammond refused to take bills or to make any further deliveries unless the defendant would agree to make himself responsible to the plaintiffs on the bills and that the defendant in the end did agree to do so. I accept the evidence of Mr. Hammond and Mr. Armitage in preference to that of the defendant, as to what took place at the interview, and I find that the defendant did agree to endorse the bills with the intention of making himself liable thereon to the plaintiffs. The bills, nine in number, were drawn by the plaintiffs and two are now sued on. They were accepted by the company, and when delivered the next day to the plaintiffs were found to lack the defendant's endorsement. Mr. Armitage took them back to the defendant before they had been endorsed by the plaintiffs, and he (the defendant) then wrote his name on the back of the bills and, as has happened in so many of the cases referred to in the argument, the plaintiffs subsequently endorsed them, writing their names underneath and not above that of the defendant.

I deal first with the points submitted by counsel for the defendant as to the lack of authority of the plaintiffs to endorse the bills as they did. He based his argument on the fact that the bills were endorsed by the plaintiffs after they had been endorsed by the defendant and in the wrong order, and while I understood him to admit that this would be no answer if the bills had been negotiated, he contended that as there had been no negotiation the plaintiffs could not recover. He relied particularly on *Shaw* v.

Holland (1), in which the facts were similar to those of the present case. In my opinion, however, these contentions are now disposed of by the decision of the House of Lords in *Gerald McDonald & Co.* v. *Nash & Co.* (2) and of Wright, J., in *National Sales Corpn., Ltd.* v. *Bernardi* (3), in which all the cases on this point are reviewed. Counsel for the defendant has pointed out that in *McDonald's Case* (2) there was apparently some misapprehension in the mind of the Lord Chancellor as to the facts found in *Shaw* v. *Holland* (1), but the decision of the House was that where an agreement is proved of the same nature and effect as I have found proved in this case, the drawers have authority under s. 20 of the Bills of Exchange Act, 1882, to complete the bills by adding their endorsement. In that case the drawer's endorsement was written above that of the defendant, and not, as here, below, but in *Bernardi's Case* (3) Wright, J., held that the order of the endorsements was immaterial, and he regarded *Shaw* v. *Holland* (1) as overruled by *McDonald's Case* (2). I respectfully agree with this decision. I think it is clear that *Shaw* v. *Holland* (1) depended on the fact that the court refused to find that the drawer had authority under s. 20 to do that which the House of Lords held in *McDonald's Case* (2) that there was authority to do under that section. That authority may be limited by circumstances that may be proved, but I find no such circumstances here or, indeed, anything to distinguish this case from either of the two decisions which I have mentioned. These points, therefore, fail.

It remains to deal with the defence of the Statute of Frauds. The way it is put is that the agreement of Feb. 19, 1931, was in effect an agreement by the defendant that he would pay the drawers if the acceptors failed to do so, and that he was, therefore, a guarantor for the acceptors, and in the absence of a written memorandum the agreement cannot be proved. He contends that while the decisions in both *McDonald's Case* (2) and *Bernardi's Case* (3) depended on the fact that there was such an agreement as existed in the present case, in neither case had the Statute of Frauds been pleaded or relied upon. I have ascertained on inquiry that in neither case was the statute pleaded. Several cases were referred to which at first sight seem to support the argument, but when carefully read I think it is clear they do not. The foundation of the argument was laid in *Steele* v. *McKinlay* (4), and there are passages in the speeches of Lord Blackburn and Lord Watson which do seem to support the contention; but it is to be observed that in that case there was no evidence as to the agreement under which the deceased endorser wrote his name on the bills. And in *Wilkinson* v. *Unwin* (5) the Court of Appeal had held that where bills are endorsed as here, with the intention that the endorser is to become liable to the drawer on them, the absence of a written agreement afforded no defence. Perhaps the matter may be stated thus. In *Steele* v. *McKinlay* (4) there was no evidence of an agreement by the endorser to be liable on the bill to the drawer and the House of Lords refused to find an agreement outside the bill itself which would be an agreement of guarantee. They were not (in the absence of any evidence on the subject) prepared to find that the endorser had incurred any liability other than that which the law merchant ordinarily imposes on an endorser, but in *Wilkinson's Case* (5) there was evidence and the Court of Appeal held that the endorser had undertaken a liability on the bill to the drawer and that the latter was entitled to sue on the bill and not on a contract of guarantee. The court expressly held that *Steele* v. *McKinlay* (4) did not oblige them to hold to the contrary.

The next case was *Singer* v. *Elliott* (6), in which it does seem that the Court of Appeal would have held that the Statute of Frauds was an answer, had it not been that they were able to find that there was a written agreement. It does not appear, however, that *Wilkinson* v. *Unwin* (5) was cited in that case, or that their attention was called to s. 20, and in view of the more recent decisions on the point I do not think that that case can now be regarded as an authority. The next case which appears to favour the defendant's contention was *Jenkins & Sons* v. *Coomber* (7), where it was held that a bill was irregular since the endorser put his name on it before the drawer had endorsed it. That part of the decision is now clearly overruled by *McDonald's Case* (2); but the court, having decided that the plaintiffs could not sue on the bill, had also held that they could not sue on the agreement by the defendant to guarantee payment, because of the absence of a memorandum. They were treating the causes of action on the bill and on the agreement as separate or alternative, and this also, in my judgment, is the explanation of the decision in *Shaw* v. *Holland* (1); there again the cause of action was stated alternatively on a bill and on a contract of guarantee. For reasons which were given by WRIGHT, J., in *Bernardi's Case* (3) the decision that the plaintiff could not sue on the bill must now be treated as overruled, but it is, in my opinion, clear that when HAMILTON, J., deals with the Statute of Frauds, he was considering, not the liability on the bill, but that on the alternative cause of action on the verbal agreement. The only other case which it was necessary to consider was *Re Gooch, Ex parte Judd* (8). As that was a bankruptcy motion there were no pleadings, but it appeared from the report that a point was taken on the Statute of Frauds in the argument, although it was not noticed in the judgment, the reason being that there also it was argued that there was no remedy on the bill because it was bad, and no remedy outside it because of the statute. As the court had rejected the argument that the bill was bad, it was unnecessary to deal with the alternative question. It would astonish most people to be told that the Statute of Frauds could ever be set up as an answer to a claim under a bill, and I am glad to find that there is nothing in the authorities which oblige me so to hold. In one sense it was, no doubt, true that the agreement which had been found to exist in all the cases cited as well as in this case was in one sense a contract of guarantee, but none the less an action would lie on the bill against a person who had endorsed it. The bills must be regarded as endorsed by the plaintiffs to the defendant, and re-endorsed by him to them; see *Glenie* v. *Bruce Smith* (9).

I think that the true effect is that the defendant had undertaken all the liabilities of an endorser and had agreed not to have recourse against the drawer, who was also the holder. There must, therefore, be judgment for the plaintiffs.

Solicitors: *Robins, Hay, & Waters*; *Keen, Rogers & Co.*, for *Reginald Hartley*, Royston.

[*Reported by* R. A. YULE, ESQ., *Barrister-at-Law.*]

Re SALTING. BAILLIE HAMILTON *v.* MORGAN

[CHANCERY DIVISION (Eve, J.), March 15, April 12, 15, 1932]

[Reported [1932] 2 Ch. 57; 101 L.J.Ch. 305; 147 L.T. 432;
76 Sol. Jo. 344]

Will—Condition—Forfeiture—If the annuitant "shall . . . do, or suffer, some deed, act or thing . . . whereby the income or some part thereof would if belonging absolutely to him become payable to some other person"—Order of court procured by annuitant authorising trustees to raise capital to pay his debts—Repayment secured by policy on annuitant's life—Annuitant to pay premiums, trustees to pay if annuitant defaulted—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 57 (1).

By her last will, dated July 25, 1917, as altered by a codicil dated July 21, 1923, the testatrix gave £150,000 to trustees to pay the income produced when invested to the plaintiff until he should assign, charge, or otherwise execute, do, or suffer some deed, act, or thing (other than giving a consent to the exercise of a power of advancement in favour of his children) whereby the income or some part thereof would if belonging absolutely to him become payable to some other person or corporation, and upon failure of such trust in his lifetime then upon discretionary trusts for the benefit of the plaintiff or his wife or children or (if none) others. On a summons by the plaintiff, who was married, but without issue, under the Trustee Act, 1925, s. 57, the trustees were by order dated March 7, 1932, authorised to raise £15,000 to pay debts and be applied otherwise for the plaintiff's benefit on the plaintiff effecting a policy of assurance on his life to secure repayment. The policy was ordered to be assigned to the trustees, they to pay the premiums other than the first out of the income of the legacy if the plaintiff himself did not pay the same within seven days of their becoming due.

Held: (i) the order did not forfeit the plaintiff's life interest, but a forfeiture would be incurred if the plaintiff neglected to pay the future premiums and to produce the receipts therefor to the trustees within the seven days, because (a) a tenant for life did not make income payable to anyone else by borrowing the capital and paying it away to his creditors, and so no forfeiture arose under that part of the order which authorised the payment of capital monies to or for the benefit of the plaintiff: *Re Brewer's Settlement* (1), [1896] 2 Ch. 503, applied; (b) the effect of an order under s. 57 was not that the settlement must be read as if the order were in terms set out in it, the same rules must be applied as if the transaction had been the subject-matter of a binding agreement outside s. 57 altogether, and the provision as to payment of premiums by the trustees was not, therefore, an act done or suffered by the plaintiff whereby any part of the income became, or would become, payable to any other person or corporation; (c) if the plaintiff neglected to pay the future premiums or produce the receipts within the seven days he would have suffered something by which the income actually became payable to others, and in that event a forfeiture would therefore be incurred;

(ii) in anticipation of the date on which the renewal premium was payable the trustees should each year retain in hand sufficient trust income to pay such premium, and must not pay the plaintiff the income so retained until they were satisfied that the premium had in fact been paid.

Notes. Considered: *Re Baring's Settlement Trusts, Baring Bros. & Co.* v. *Liddell*, [1940] 3 All E.R. 20; *Re Downshire's Settled Estates, Marquis of Downshire* v. *Royal Bank of Scotland, Re Chapman's Settlement Trusts, Chapman* v. *Chapman, Re Blackwell's Settlement Trusts, Blackwell* v. *Blackwell*, [1953] 1 All E.R. 103. Referred to: *Re Mair, Richards* v. *Doxat*, [1935] All E.R.Rep. 736.

As to the effect of court sanction of expenditure by trustees, see 33 HALSBURY'S LAWS (2nd Edn.) 299, para. 521, text and note (t), as to the effect of such sanction on a husband's protected life interest, see ibid., vol. 29, 598, para. 870, note (c), and as to the effect of forfeiture clauses in wills, see ibid., vol. 34, 422, para. 469. For the Trustee Act, 1925, see 26 HALSBURY'S STATUTES (2nd Edn.) 50.

Cases referred to:

(1) *Re Brewer's Settlement, Morton* v. *Blackmore*, [1896] 2 Ch. 503; 65 L.J.Ch. 821; 75 L.T. 177; 45 W.R. 8; 5 Digest 656, *5855*.

(2) *Cox* v. *Bockett* (1865), 35 Beav. 48; 55 E.R. 812; 44 Digest 1231, *10649*.

(3) *Re Mair, Williamson* v. *Mair*, [1909] 2 Ch. 280; 78 L.J.Ch. 711; 101 L.T. 70; 44 Digest 1232, *10657*.

(4) *Re Stimpson's Trusts, Stimpson* v. *Stimpson*, [1931] 2 Ch. 77; 100 L.J.Ch. 312; 145 L.T. 249; Digest Supp.

(5) *Re Carew's Trusts, Gellibrand* v. *Carew* (1910), 103 L.T. 658; 55 Sol. Jo. 140; 40 Digest 560, *1002*.

(6) *Re Loftus-Otway, Otway* v. *Otway*, [1895] 2 Ch. 235; 64 L.J.Ch. 529; 72 L.T. 656; 13 R. 536; sub nom. *Re Otway, Otway* v. *Otway*, 43 W.R. 501; 39 Sol. Jo. 449; 44 Digest 1237, *10688*.

Summons as to whether the plaintiff's protected life interest under a will had been forfeited by a court order sanctioning the raising and payment of capital to and for the benefit of the plaintiff and the securing of repayment of such capital by a life assurance policy on the plaintiff's life, with power to the trustees to pay the premiums if the plaintiff did not do so.

The following facts are taken from the judgment:

By her will dated July 25, 1917, as varied by a codicil thereto dated July 21, 1923, the late Millicent Emily Salting bequeathed to her trustees two sums, amounting in all to £150,000, upon trust to invest the same as therein mentioned, and, in the events which have happened, to pay the income thereof to the plaintiff until he should assign, charge, or otherwise execute, do so suffer some deed, act, or thing voluntary or involuntary (other than giving his consent to the exercise of the power of advancement in favour of his children in the said will contained), whereby the said income or some part thereof would, if belonging absolutely to him, become payable to any other person or corporation, or until he should die, and if the last preceding trust should come to an end in the lifetime of the plaintiff, then upon trust during the remainder of his life to pay or apply the said income for the maintenance and support or otherwise for the benefit of the following persons, namely, the plaintiff himself, his wife for the time being (if any), and his children or remoter issue (if any), or, should there be no wife or issue in existence for the time being, then the plaintiff himself, and his brothers, sisters, nephews, and nieces for the time being in existence, in such manner in all respects as the trustees should in their absolute and unfettered discretion think fit.

Circumstances have arisen in which the plaintiff was constrained to apply to the court for authority to the trustees to raise a sum of £15,000 out of the capital of the trust legacy, and to apply the same in the discharge of the plaintiff's debts and otherwise for his benefit upon his effecting and assigning to the trustees a policy of assurance to secure a like sum at his death, the policy and all the moneys to be received in respect thereof to be held by the trustees upon the trusts, as far as applicable from time to time, affecting the capital of the trust legacy.

Accordingly, by an order dated March 7, 1932, as corrected under Order 28, r. 11, on April 12, 1932, the judge being of opinion that the transaction thereby authorised was expedient within the meaning of s. 57 of the Trustee Act, 1925, it was ordered that the trustees should, out of the capital of the said trust legacy, raise the sum of £15,000, and pay and apply the same as therein mentioned, and that the plaintiff should forthwith effect the policy of assurance therein referred to and assign the same and the benefit thereof to the trustees, and that the trustees should stand possessed of the policy and of all moneys to be received in respect thereof upon the trusts so far as applicable from time to time affecting the capital of the trust legacy, and that the trustees should pay the premiums on the said policy other than the first premium (which had already been paid out of capital) out of the dividends and interest arising out of the said trust legacy, unless the plaintiff should within seven days after each renewal date produce to the trustees a receipt for the amount of the premium.

This summons was then taken out asking whether the above order operated to determine the plaintiffs' life interest.

Morton, K.C., and *Harman* for the plaintiff.—The effect of the order was that s. 57 of the Trustee Act, 1925, was written into the will: *Cox* v. *Bockett* (2). The effect of the raising of the £15,000 was that certain sums would be paid out of capital: *Re Brewer's Settlement* (1); *Re Mair* (3).

J. N. Gray, for children of the plaintiff's sister, submitted that there was a forfeiture and cited *Re Stimpson's Trusts* (4), *Re Carew's Trusts* (5), and *Re Loftus-Otway* (6).

Parshall for the plaintiff's wife.

Rawlence for the trustees.

Morton replied.

Cur. adv. vult.

April 15. **EVE, J.,** read the following judgment. The question is whether, upon the true construction of the will and in the events which have happened, namely, the making of the order of March 7, 1932, the plaintiff's interests thereunder have been determined.

It is conceded that no forfeiture arises under that part of the order which authorises the payment of capital moneys to or for the benefit of the plaintiff. It is true, of course, that he will cease to enjoy the income of so much of the capital as is expended in this way, but to what other person would it have become payable had it belonged to him absolutely? The tenant for life, by borrowing and paying it away to his creditors, does not make the income payable to anyone else; his action did not amount to an alienation of the income. This point is concluded in the plaintiff's favour by the judgment in *Re Brewer's Settlement* (1).

CHITTY, J., as he then was, puts the plaintiff's case in one sentence, where he says ([1896] 2 Ch. at p. 507):

> "I think that it would be an extravagant refinement to say that every sovereign as he paid it away still remained part of the trust and was producing an income, and that such income was payable to the persons who had received the sovereign or other the money thus paid away."

But it is contended that a forfeiture is brought about by that part of the order which authorises the trustees, in certain circumstances, to keep down the second and subsequent premiums on the policy out of the income arising from the trust legacy. I cannot accept the view put forward on behalf of the plaintiff that the effect of an order under s. 57 is to introduce the terms of the order into the settlement and read the same as if the order were in terms set out in the settlement. No doubt the making of such an order may, and often does, qualify the administration and management of the settled property, but in exercising the jurisdiction, the court must be cautious not to extend the operation of the order beyond what is necessary for the particular transaction, and in determining, as I have to do here, the construction of an order made under s. 57, it is obvious that I must apply the same rules as would be applicable if the transaction had been the subject-matter of a binding agreement outside s. 57 altogether. In both cases it is impossible to disregard the fact that the settlor has incorporated in the settlement a clause of defeasance to come into effect, amongst other things, if the plaintiff does any voluntary act—with one specified exception—whereby any part of the income would, if belonging absolutely to him, become payable to any other person or corporation.

I come back then to the simple question—does the concluding part of the order operate to work a forfeiture of the plaintiff's life interest? I do not think it does. The plaintiff may thereby be deprived of the enjoyment of part of the income, but I cannot hold that he thereby does an act whereby any part of the income becomes, or will become, payable to any other person or corporation. It is true that if he neglects to do something more, that is to say, to pay the future premiums and to produce the receipts within the seven days, he will have suffered—voluntarily or involuntarily—something by which the income will actually become payable to others, and in that event a forfeiture will, in my opinion, be incurred; but so long as he pays the premiums and the trustees are not called upon to apply any part of the settled income in so doing, I do not think his life interest will be affected. I declare that under the order as so amended, the plaintiff's life interest has not been determined.

It will be incumbent on the trustees each year, in anticipation of the date on which the renewal premium is payable, to retain in hand a sufficient part of the trust income to pay such premium, and they must not pay over the same to the plaintiff until they are satisfied that the premium has, in fact, been paid.

The costs of all parties as between solicitor and client will be retained and paid out of the capital sum to be raised under the order.

Declaration accordingly.

Solicitors: *Withers & Co.*; *Flower & Nussey.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at- Law.*].

A

WEST MIDLANDS JOINT ELECTRICITY AUTHORITY *v.* PITT AND OTHERS. MINISTER OF TRANSPORT *v.* SAME

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), February 15, 16, 17, 18, March 22, 1932]

B

[Reported [1932] 2 K.B. 1; 101 L.J.K.B. 401; 147 L.T. 122;
96 J.P. 159; 48 T.L.R. 332; 30 L.G.R. 219]

Electricity—Wayleave—Overhead electric lines—Consent by Minister of Transport—Consent subject to "terms, conditions and stipulations"—Exclusion of pecuniary terms—Right of owner of land to compensation—Method of assessment—Electric C *Lighting Act,* 1882 (45 *&* 46 *Vict., c.* 56), *s.* 17—*Acquisition of Land (Assessment of Compensation) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 1—*Electricity (Supply) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 100), *s.* 22 (1).

By s. 22 (1) of the Electricity (Supply) Act, 1919, the Minister of Transport might give his consent to the placing of an electric line across any land subject to "terms, conditions and stipulations." Section 17 of the Electric Lighting Acts, D 1882, provided that "undertakers . . . shall make full compensation . . . for all damage sustained by reason or in consequence of the exercise of" their powers under the Electricity Supply Acts, and for the determination of such compensation by arbitration.

Held: (i) the "terms" referred to in s. 22 (1) did not include pecuniary terms, and a landowner across whose land an electric line had been placed, was, accordingly, E entitled to compensation as of right, and was entitled to have that compensation assessed by arbitration; (ii) the provisions of the Lands Clauses Consolidation Act, 1845, relating to the acquisition of lands otherwise than by agreement were not applicable to the taking of land under s. 22 (1).

Notes. The powers of the Minister of Transport under s. 22 (1) have now been trans- F ferred to the Minister of Fuel and Power; see now the Ministry of Fuel and Power Act, 1945, s. 1 (2), and Sched. 1. Various minor amendments to s. 22 (1) were made by the Electricity Act, 1947, s. 57, and Sched. 4, Part 1 (8 HALSBURY'S STATUTES (2nd Edn.) 917), but those do not affect the decision in this case. In cases where the Acquisition of Land (Assessment of Compensation) Act, 1919, applies, compensation is now, by virtue of the Lands Tribunal Act, 1949, s. 1 (3) (a) (i) (28 HALSBURY'S STATUTES (2nd Edn.) G 317), assessed by the Lands Tribunal.

Referred to: *Canadian Electrical Association* v. *Canadian National Railways*, [1934] A.C. 551.

As to the power of the Minister to impose terms, conditions or stipulations when consenting to the placing of an electric line across land, see 14 HALSBURY'S LAWS (3rd Edn.) 433, para. 839, text and note (j). For the Electricity Supply Act, 1919, and the H Electric Lighting Act, 1882, see 8 HALSBURY'S STATUTES (2nd Edn.) 891, and 835 respectively. For the Lands Clauses Consolidation Act, 1845, and the Acquisition of Land (Assessment of Compensation) Act, 1919, see ibid., vol. 3, 890 and 975 respectively.

Cases referred to:

(1) *A.-G.* v. *Horner* (1884), 14 Q.B.D. 245; 54 L.J.Q.B. 227; 49 J.P. 326; 33 W.R. 93; 1 T.L.R. 28, C.A.; on appeal (1885), 11 App. Cas. 66; 55 L.J.Q.B. 193; I 54 L.T. 281; 50 J.P. 564; 34 W.R. 641; 2 T.L.R. 202, H.L.; 33 Digest 533, *103*.

(2) *Re Dudley Corpn. and Earl of Dudley's Trustees* (1881), 8 Q.B.D. 86; 51 L.J.Q.B. 121; 45 L.T. 733; 46 J.P. 340, C.A.; 36 Digest (Repl.) 276, *280*.

(3) *Normanton Gas Co.* v. *Pope and Pearson, Ltd.* (1883), 52 L.J.Q.B. 629; 49 L.T. 798; 32 W.R. 134, C.A.; 42 Digest 942, *682*.

(4) *London and North-Western Rail. Co.* v. *Evans*, [1893] 1 Ch. 16; 62 L.J.Ch. 1; 67 L.T. 630; 41 W.R. 149; 9 T.L.R. 50; 2 R. 120, C.A.; 42 Digest 621, *222*.

(5) *Edinburgh Street Tramways Co.* v. *Torbain* (1877), 3 App. Cas. 58; 37 L.T. 288, H.L.; 42 Digest 644, *492*.

(6) *Shelfer* v. *City of London Electric Lighting Co.*, *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287; 64 L.J.Ch. 216; 72 L.T. 34; 43 W.R. 238; 11 T.L.R. 137; 39 Sol. Jo. 132; 12 R. 112, C.A.; 28 Digest 415, *408*.

(7) *Canada Southern Rail. Co.* v. *International Bridge Co.* (1883), 8 App. Cas. 723, P.C.; 42 Digest 664, *744*.

(8) *Read* v. *Joannon* (1890), 25 Q.B.D. 300; 59 L.J.Q.B. 544; 63 L.T. 387; 38 W.R. 734; 2 Meg. 275; sub nom. *Reid* v. *Joannon*, 6 T.L.R. 407, D.C.; 30 Digest (Repl.) 227, *713*.

(9) *Charing Cross, West End, and City Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K.B. 772; 83 L.J.K.B. 1352; 111 L.T. 198; 78 J.P. 305; 30 T.L.R. 441; 12 L.G.R. 807, C.A.; 42 Digest 666, *769*.

(10) *Re Smith, Green* v. *Smith* (1883), 24 Ch.D. 672; 52 L.J.Ch. 921; 49 L.T. 297; 42 Digest 632, *351*.

(11) *R.* v. *Allen* (1872), L.R. 1 C.C.R. 367; 41 L.J.M.C. 97; 26 L.T. 664; 36 J.P. 820; 20 W.R. 756; 12 Cox, C.C. 193, C.C.R.; 42 Digest 632, *350*.

(12) *Wells* v. *London, Tilbury and Southend Rail. Co.* (1877), 5 Ch.D. 126; 37 L.T. 302; 41 J.P. 452; 25 W.R. 325, L.J. & JJ.A.; 42 Digest 743, *1678*.

(13) *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ltd.*, [1919] A.C. 744; 88 L.J.Ch. 464; 121 L.T. 361; 83 J.P. 261; 35 T.L.R. 552; 17 L.G.R. 569, H.L.; 42 Digest 705, *1217*.

Appeal against a judgment of MACNAGHTEN, J.

The plaintiffs, the West Midlands Joint Electricity Authority and the Minister of Transport (as successor, for relevant purposes to the Board of Trade) claimed declarations against the defendants, a number of landowners. The facts appear in full in the judgment of SLESSER, L.J.

The declarations claimed were:

> "(a) That the Minister of Transport in giving his consent under s. 22 of the Electricity (Supply) Act, 1919, to the placing of an electric line across any land is entitled to give such consent subject to a term, condition, or stipulation as to the monetary payment to be made by a joint electricity authority in respect of the wayleaves for such line.
>
> "(b) That four several consents of the Minister of Transport, dated May 30, 1930, under s. 22, to the placing by the plaintiff authority of certain electric lines across certain lands of the defendants subject to the terms and conditions therein set forth were valid and binding on the defendants.
>
> "(c) That the plaintiff authority on complying with the terms and conditions were entitled to place and keep the electric lines across the lands of the defendants.
>
> "(d) That where the Minister of Transport gives his consent under s. 22 to the placing of an electric line across any land, an official arbitrator, under the Acquisition of Land (Assessment of Compensation) Act, 1919, has no jurisdiction to determine any question as to the compensation to be paid for the wayleaves for such line, the Minister of Transport being the proper authority for determining any such question."

The landowners admitted the facts, and said that the Minister's purported consents were stated to be subject to certain terms and conditions, including certain rents to be paid by the joint authority for towers according to size and position (ranging from 4s. to 20s. a year for each tower).

The landowners gave notice to the plaintiff authority that they claimed certain sums which the plaintiff authority refused to pay.

They further contended that the Minister, having given his consent under s. 22, was functus officio and was thereafter not interested in the question whether or not the plaintiff authority were or were not liable to pay compensation, or of the proper tribunal to assess such compensation. They submitted that the court had no jurisdiction, or, alternatively, that in its discretion it ought not to grant the declarations asked for by the Minister.

By way of counterclaim the landowners claimed:

> "(a) A declaration that the consents of May 30, 1930 were ultra vires and void; (b) a declaration that if and when the Minister gave his consent under s. 22 to the placing of an electric line across land the owners and occupiers were entitled to claim compensation under the Lands Clauses Act, 1845, and amending Acts; or, alternatively, to have their claims determined by arbitration under ss. 17 and 28 of the Electric Lighting Act, 1882."

They also claimed a declaration that the term as to rental was ultra vires and that the consents were ultra vires by reason of omission to define with reasonable exactitude the nature and position of the electric line to be placed across the landowners' land.

By the Electricity (Supply) Act, 1919, s. 22 (1):

> "A joint electricity authority or any authorised undertakers may place any electric line below ground across any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground in cases where the placing of such lines above ground is otherwise lawful. . . . Provided, that, before placing any such line across any land, the joint electricity authority or undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, it shall not be lawful to place the line across that land without the consent of the Board of Trade; and the Board of Trade may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions and stipulations as they think just. . . ."

By s. 39 (1) provision is made for the transfer of the powers of the Board of Trade to the Minister of Transport. This transfer took place soon after the passing of the Act, and references to the Board of Trade in the Act are therefore to be read as references to the Minister of Transport.

MACNAGHTEN, J., made a declaration

> "that the claims of the several defendants in respect of the wayleaves across their lands acquired by the West Midlands Joint Electricity Authority under s. 22 (1) of the Electricity (Supply) Act, 1919, ought to be determined by arbitration pursuant to the provisions of the Electric Lighting Act, 1882, and the Acquisition of Land (Assessment of Compensation) Act, 1919,"

and gave judgment for the landowners with costs, but he also held that the provisions of the Lands Clauses (Consolidation) Act, 1845, relating to the acquisition of lands otherwise than by agreement were not applicable to the taking of land under s. 22 (1).

The plaintiffs appealed against the grant of the declaration, and the landowners cross-appealed against the decision that the Lands Clauses Act provisions were not applicable.

Craig Henderson, K.C., and *S. G. Turner, K.C.*, for the West Midlands Joint Electricity Authority, the plaintiff in the first action.

The Attorney-General (*Sir Thomas Inskip, K.C.*), and *William Bowstead* for the Minister of Transport, the plaintiff in the second action.

Tyldesley Jones, K.C., and *A. M. Trustram Eve* for the landowners, the defendants.

Cur. adv. vult.

March 22. The following judgments were read.

LORD HANWORTH, M.R.—This is an appeal from a decision of MACNAGHTEN, J., dated Dec. 21, 1931, whereby he gave judgment for the defendant landowners on the the claim and on the counterclaim.

The first above-named action was brought by writ dated Aug. 2, 1930, and the second by writ dated Jan. 30, 1931, and the two actions were consolidated by an order dated March 24, 1931. The statement of claim delivered in the consolidated action prayed on behalf of both the plaintiffs that a declaration should be made that the Minister of Transport—as successor to the Board of Trade—in giving his consent under s. 22 of the Electricity (Supply) Act, 1919, to the placing of an electric line across any land is entitled to give such consent subject to a term, condition, or stipulation as to the monetary payment to be made by a joint electricity authority in respect of the wayleaves for such line.

There were other claims for declarations that the four several consents made by the Minister on May 30, 1930, at the instance of the plaintiff authority, enabling them to place certain electric lines across the lands of the defendant landowners, were valid, and justified action being taken accordingly by the authority, and also that the official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, had no jurisdiction to determine any question as to the compensation to be paid for the wayleaves for such electric lines.

The main question, however, that was determined in the action and to be determined in this court, is whether the Minister of Transport has power under s. 22 of the former Act, incidentally, by imposing an appropriate condition, to settle what is the monetary payment to be made by the plaintiff authority to the landowners as compensation in respect of the right over the landowners' land given to the authority by the consent of the Minister.

It is unnecessary to repeat the facts and preliminaries to the proceedings before Macnaghten, J., for they have been sufficiently stated by him and repetition is unnecessary.

It is clear from that statement that it is not a mere wayleave or licence which is given by the Minister over the defendants' land. The powers granted have been exercised and thirty-three towers have been erected on the lands belonging to the several defendants, the total area occupied by these towers being some 10,643 sq. ft.; and, as Macnaghten, J., observes, it is obvious that these towers themselves must interfere with the use of the defendants' fields. It is not the mere occupation of surface from which an interference with the defendants' property can be gauged, but the necessary user of the approaches for repairs or alterations must not be overlooked, even if the compensation is to be settled at the outset, once for all.

The actual consents given in this case by the Minister appear to follow a form of consent which has been made use of in many cases by owners and occupiers, subject to this, that the right of withdrawal of the consent upon giving twelve months' previous notice contained in these forms and numbered four in each of them, was eliminated, and the Minister reserved to himself the power to review this consent at any time after a lapse of something more than four years in actual date, after Oct. 16, 1934.

The decision now to be given is no doubt important, for it affects a large number of cases where rights are required to erect what are called pylons, and to carry electric lines across lands in the areas which have been allotted to various authorities for the development and provision of electrical power. It is not suggested that the authorities are to acquire these rights without paying for them. The principle laid down in *A.-G.* v. *Horner* (1) and other cases is fully accepted, namely, that there is a legal right to be paid compensation; but the contention is that s. 22 provides a short and easy method whereby compensation can be assessed and given without the troublesome, and possibly prolonged, procedure of an arbitration.

The question lies within a narrow compass. Does s. 22 in its reference to "terms, conditions, and stipulations as they (now he) think just," include the settlement of this compensation?

It is well to remember that others beside the owner and occupier of the land upon which these pylons may be ordered to be erected may be injuriously affected. A contiguous owner may have to give support to the land in which the pylon is erected: see *Dudley Corpn.* v. *Dudley* (2); and *Normanton Gas Co.* v. *Pope & Pearson, Ltd.* (3); and see *London and North-Western Rail. Co.* v. *Evans* (4).

Next, the section itself contemplates that consent may be given unconditionally, and although the Attorney-General called our attention to the words, "as they think just", and rightly said that the court ought not to presume that any injustice would be done by anyone entrusted to exercise these powers, yet the words seem inappropriately placed in a clause which is to enable compensation to be awarded for rights acquired or lands taken.

The last clause of sub-s. (1) must be noticed when attention is directed to "the effect—if any—on the amenities or value of the land of the placing of the line in the manner proposed." They seem to point to the purpose of the section being to determine difficulties which may arise as to the nature and position of the lines proposed, the possibility of an alternative and less unsightly route and the like, rather than to compensation.

The Attorney-General called attention to the earlier part of the proviso and claimed that as one of the terms which the owner and occupier may attach to their consent may be and in practice in many cases will be, a condition requiring a money payment, so in the later part of the same clause "terms" must also include a money payment. I do not find this argument conclusive. The demand may be made for a sum to be paid by way of compensation which the undertakers regard as exorbitant, and the response may be that the Minister's consent is given subject to a proper sum being determined by arbitration and paid to the owner or occupier whose demand is not admitted.

That is a term which may be imposed. But I cannot think that the section is to be read as ancillary, or as an alternative to s. 17 of the Electric Lighting Act, 1882, which deals with compensation and which I refer to more particularly later on, merely because the words in one part of the section may well have a reference to a demand for a specific sum of money.

The observations of LORD BLACKBURN in *Edinburgh Street Tramways* v. *Torbain* (5) (3 App. Cas. at p. 68) are relevant to this point.

Section 22 is precise in its terms. Subsection (2) (a) imposes conditions as to the power of placing lines across or along any railway, canal, inland navigation, dock or harbour; and s. 15 of the Schedule to the Electric Lighting (Clauses) Act, 1899, is applied, which in terms refers to the compensation to be paid in the exercise of the works contemplated under that Act. Clause (c) (1) of the same subsection excludes the proviso to sub-s. (1) and runs:

> "Make an order for the placing of the electric lines subject to such pecuniary terms as the Railway and Canal Commission think just."

Further, s. 23, which deals with the supply of fittings, apparatus and appliances, in terms provides that the authority

> "may demand and take such remuneration or rents and charges and make such terms and conditions as may be agreed upon."

The obvious comment arises that where the statute refers to compensation or pecuniary terms, it uses explicit words and in the latter instance given, it deals with remuneration as distinct from other terms.

These comments might not be of the same weight if there were no provision for assessing compensation, and it was necessary to presume that somewhere in the statute there was a provision for compensation to be paid—implied if not explicit—following the observation of BRETT, M.R., in *A.-G.* v. *Horner* (1) (14 Q.B.D. at p. 257). But that difficulty does not arise here. It is possible to construe the words of s. 22 as referring to terms, conditions, and stipulations which may or may not be required, according to the circumstances of the case—if not required the consent may be given without them; and not to the cases where some compensation, even if trifling, or only sufficient to keep open the right to it, ought in all cases to be given.

The several Acts dealing with electric lighting and supply are by s. 40 of the Act of 1919 to be construed together, and the same rule is to be found in s. 31 of the Act of 1922, with the result that the Acts for the forty years, 1882 to 1922, whether for lighting or supply, are to be construed as one Act, and later the Act of 1926 was added to the sequence.

Full compensation is required by s. 17 of the Act of 1882 to be given to all persons for all damage sustained by them

> "by reason or in consequence of the exercise of such powers . . . in case of difference to be determined by arbitration"; A

and s. 28 provides that for the purpose of an arbitration a fit person is to be nominated by the Board of Trade—now the Minister of Transport. It is not contended by the Attorney-General that s. 17 does not apply. What is argued is that in addition to the rights given to the person who suffers damage, there is also power given to the Minister to determine the payment to be made under s. 22 of the Act of 1919, and that if that B determination is made by the Minister, the rights given by s. 17 of the Act of 1882 cannot be invoked. The only limitation that the Attorney-General contends for under s. 17 is that it is not to include damage for user, in accordance with the authority of *Shelfer* v. *City of London Electric Lighting Co.* (6).

Reading the statutes as a comprehensive whole, I cannot find any necessity to read into the proviso to s. 22 the power for which the Attorney-General contends, and the C terms of the other subsections of s. 22 afford a contrast to any such inclusive meaning being intended in the proviso.

It is involved in this conclusion that there is no necessity to seek the assistance of the Lands Clauses Consolidation Act for the purpose of finding a system of compensation. Section 17 and s. 28 of the Act of 1882 with its provision determining a mode of appointment of an arbitrator meet the case. D

One other matter must be referred to, although it was not fully argued and cannot, therefore, be decided in the present case. That is that a question has been raised, and it seems by no means an easy one, whether the Minister of Transport can bring an action for a declaration such as he seeks in the present case. I will not discuss it, but it is right to point out that this judgment cannot be quoted as an authority for the contention that he is able to do so. E

For these reasons, in addition to those contained in the judgment of MACNAGHTEN, J., with which I agree, I am of opinion that he came to a right decision and that the appeal must be dismissed with costs. Upon the question of the application of the Acquisition of Land (Assessment of Compensation) Act, 1919, I also agree with MACNAGHTEN, J., and with the observations made by SLESSER, L.J., which I have had an opportunity of reading, and to which I do not desire to make any addition. F

The cross-appeal on behalf of the landowners, the defendants in the action, therefore, fails and must be dismissed with costs.

SLESSER, L.J.—Although the matter which falls to be decided in this appeal is one of very considerable importance, the issues which the case has raised fall within a narrow compass. G

The Minister of Transport and the West Midlands Joint Electricity Authority (a statutory body constituted by an order of the Minister of Transport made under s. 7 of the Electricity (Supply) Act, 1919) have sought from the court a number of declarations, the effect of which is to state that the Minister, in giving his consent to the compulsory placing of an electric line across land, is entitled in giving such consent to attach a term as to the amount of monetary payment (if any) to be made by the joint electricity H authority, or, in some cases, undertakers who wish to place an electric line across land to the owners or occupiers of the land. I do not set out the declarations in extenso, but this is what I conceive to be the substance of the declarations sought.

The case turns upon a proper interpretation of s. 22 (1) of the Electricity (Supply) Act, 1919. The first part of the section is enabling and gives power to a joint electricity authority or any authorised undertakers to place an electric line below ground across I any land, and above ground across any land other than land covered by buildings or used as a garden or pleasure ground. So far no question arises, but the problem which we have to consider lies in the construction of the proviso which follows this power so compulsorily to place electric lines across land. This proviso is in the following terms:

> "Provided that, before placing any such line across any land, the joint electricity authority or undertakers shall serve on the owner and occupier of the land notice of their intention, together with a description of the nature and position of the lines proposed to be so placed; and if, within twenty-one days after the service of the

> notice, the owner and occupier fail to give their consent or attach to their consent any terms or conditions or stipulations to which the joint electricity authority or the undertakers object, it shall not be lawful to place the line across that land without the consent of the Board of Trade; and the Board of Trade may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions and stipulations as they think just; and in deciding whether to give or withhold their consent, or to impose any terms, conditions or stipulations (including the carrying of any portion of the line underground) the board shall, among other considerations, have regard to the effect, if any, on the amenities or value of the land of the placing of the line in the manner proposed."

It will be observed that this proviso, broadly speaking, has two limbs. The first provides that the joint electricity authority or undertaker must serve on the owner and occupier of the land notice of their intention to place the line across the land with a description of the nature and position of the proposed lines; on this the owner or occupier may, within a prescribed period, either consent or "attach to their consent any terms, conditions or stipulations." If the authority or undertaker object to these terms, conditions or stipulations, they cannot place the line across the land without the consent of the Minister of Transport. In the present case the defendant landowners did attach conditions to their consents, some of which were of a financial nature. They demanded wayleave rentals on the following scale:

	Arable land.	Grass land.	Other land.
Per steel tower	40s.	40s.	40s.
Per half-sections of steel tower	20s.	20s.	20s.

This schedule of annual rental was higher than that which the joint electricity authority had offered, their offer having been as follows:

	Arable land.	Grass land.	Other land.
Overhead Conductors.			
Per steel tower	16s.	8s.	4s.
Per half-sections of steel tower	8s.	4s.	2s.
Per A. or H. Pole	8s.	4s.	2s.
Per Single Pole	4s.	2s.	1s.
Per Stay	6d.	6d.	6d.
Underground Cables.			
Per 100 yards of trench, all classes of land	—	—	1s.

In addition the landowners required an owners' condition to which their consent was sought, namely:

> "If any dispute or difference shall arise between the authority and the owner in respect of the said electric lines, such dispute or difference shall be referred for settlement to the Minister of Transport, whose decision shall be final"

to be amended, so as to provide that any dispute should be referred for settlement to a single arbitrator appointed by the Surveyors' Institution.

A The joint authority told the landowners they were not prepared to agree to the increased rentals although they indicated that they might possibly have accepted the modification as to the arbitration.

On these facts the matter fell under the second limb of the proviso to the section, which is to the effect that (it having been provided, as I have said, that it would not in these circumstances be lawful to place the lines across the land without the consent of the Minister of Transport), the B

> "Board of Trade [now the Minister of Transport] may, if after giving all parties concerned an opportunity of being heard they think it just, give their consent either unconditionally or subject to such terms, conditions, or stipulations as they think just."

On April 30, 1920, an inquiry was held at Bridgnorth by an inspector on behalf of the C Minister of Transport, at which all parties concerned were given an opportunity of being heard. The landowners were represented by counsel who stated that he was merely watching on behalf of his clients and submitted that, in so far as the inquiry concerned compensation, his clients had a right to have it dealt with, not under the Electricity (Supply) Acts, but under the Acquisition of Land (Assessment of Compensation) Act, 1919.

D Notwithstanding this submission, the inquiry proceeded and the Minister of Transport on Oct. 16 gave his consent to the placing of the electric lines over the lands of the landowners, and, among other matters, attached as a term and condition to his assent the pecuniary term that the authority should pay to the owner certain annual sums as rental for the wayleave as follows: (a) In respect of the said electric lines placed above ground on the said lands of the owner for each tower erected or stay placed on such E lands: (i) A sum of 20s. per tower with base exceeding 13 ft. square, a sum of 16s. per tower with base not exceeding 13 ft. square, and a sum of 4s. per stay being on arable land; (ii) a sum of 10s. per tower with base exceeding 13 ft. square, a sum of 8s. per tower with base not exceeding 13 ft. square, and a sum of 2s. per stay being on mowing grass land; (iii) A sum of 5s. per tower with base exceeding 13 ft. square, a sum of 4s. per tower with base not exceeding 13 ft. square, and a sum of 6d. per stay F being elsewhere. (b) In respect of the said electric lines placed below ground across the said lands of the owner a sum of 1s. for each 100 yards or part thereof of the route of such lines. Such sums to be paid in advance on the first day of April in each year. On the erection of each tower or the placing below ground of each 100 yards or part thereof of the route of such electric lines a proportion of such annual payment applicable to the period up to the first day of April next succeeding was to become immediately payable. G

He also modified the original offer, condition 4 of the joint electricity authority, that the consent might be withdrawn by the owner upon giving to the authority twelve months' notice and substituted a power in himself to review the consent at any time after Oct. 16, 1934, so that the owner would remain without any power at any time to withdraw. He further modified the provision 8 in the original proposed consent of the joint electricity authority that disputes should be referred to the Minister of Trans- H port for settlement and substituted the following:

> "Provided that if any dispute or difference shall arise between the authority and the owner or occupier of the said lands under the said standard forms of wayleave agreement such dispute or difference shall be referred for settlement to a single arbitrator appointed by the Surveyor's Institution, whose decision shall be final I and the provisions of the Arbitration Act, 1889, shall apply to such reference."

The declarations sought do not concern immediately these two latter modifications with regard to the arbitration or the right of the owner to withdraw, but are immediately concerned with the pecuniary terms which the Minister has thought fit to attach to his consent, providing for the payment of moneys by the electricity authority as rentals for the wayleaves of annual sums which I have above read out.

The landowners contend that the Minister, in attaching pecuniary terms for what is in effect compensation for placing these lines and/or the necessary towers which support

A the lines and for occupying part of the land, is doing something beyond his statutory authority. Their argument in substance is this: They point out that the Electricity (Supply) Act, 1919, is but one of a series of electricity Acts dating from the Electric Lighting Act, 1882, to the Electricity (Supply) Act, 1926, and that, by s. 52 of the last-mentioned Act, that Act and its predecessors are to be construed as one. In particular, they point out that in the Act we are here to consider, namely, the Electricity (Supply) B Act, 1919, it is provided by s. 40 (2) that "this Act shall be construed as one with the Electric Lighting Acts"; so that the whole of these Acts constitute one code.

The effect of a provision that Acts shall be construed as one Act is that the court must construe every part of each of the Acts "as if it had been contained in one Act, unless there is some manifest discrepancy, making it necessary to hold that the later Act has to some extent modified something found in the earlier Act": (per LORD SELBORNE, L.C., C in *Canada Southern Rail. Co.* v. *International Bridge Co.* (7) (8 App. Cas. at p. 727).

Treating the Acts as one, subject to the consideration mentioned by LORD SELBORNE, it becomes immediately apparent that the legislature thought fit at a very early stage of the legislation to provide specifically machinery for compensation for damage caused in the exercise of powers in relation to the execution of works under the Electricity Acts. This provision is contained in s. 17 of the Electric Lighting Act, 1882, to the following D effect:

> "In the exercise of the powers in relation to the execution of works given them under this Act, or any licence, order, or special Act, the undertakers shall cause as little detriment and inconvenience and as little damage as may be, and shall make full compensation to all bodies and persons interested for all damage sustained by them E by reason or in consequence of the exercise of such powers, the amount and application of such compensation in the case of difference to be determined by arbitration."

It will be observed that this section speaks of the exercise of powers given them under this Act, but it is clear, having regard to the fact that the Electricity Supply Acts are to be construed as one, that the expression "this Act" in the Act of 1882 must now be construed to mean the exercise of the powers in relation to the execution of works F under the Electricity Acts generally. Thus: where two Acts were to be read and construed together as one Act, but a proviso contained in one but not in the other that "nothing in this Act shall exempt the company from liability" was held to mean "nothing in the combined Acts shall so exempt them": (*Read* v. *Joannon* (8); *Charing Cross, West End, and City Electricity Supply Co.* v. *Hydraulic Power Co.* (9).

Although a considerable amount of time was consumed in discussing the meaning of G the words "execution of works" and the subsequent words

> "shall make full compensation for all damage sustained by reason of or in consequence of the exercise of such powers,"

I do not understand the Attorney-General to dispute that, if this section be applicable, compensation may be properly given for all matters arising out of the execution of the H works other than user, and as we are not here concerned with the quantum of such compensation or even directly concerned in the principles upon which it should be given, I deliberately abstain from dealing with this matter which is not directly relevant to the question which we have to decide, beyond saying that, for myself, having read and considered the authorities, I think it is clear that under this section compensation may be given for damage caused by the execution of the works but not for damage I caused by their user when constructed: see *Shelfer* v. *City of London Electric Lighting Co.* (6).

The argument for the landowners proceeds in this way: They do not suggest, as I understand them, that the word "terms," which the Minister may attach to his consent, in itself of definitive necessity, excludes pecuniary terms, but they say that in the context of these Acts, since the machinery for compensation has already been set up by s. 17 of the 1882 Act, the word "terms" in s. 22 of the 1919 Act has no such extended meaning and that it is for the Minister to show that, in the language of LORD SELBORNE in the *Canada Southern Rail. Co.'s Case* (7) (8 App. Cas. at p. 727),

> "there is some manifest discrepancy making it necessary to hold that the later Act has to some extent modified the provisions of the earlier Act." A

If this be not their argument, it is at any rate the way in which the problem primarily presents itself to me. I can find no such manifest discrepancy. I start with the fact that the legislature has provided compensation for contemplated statutory invasions of the subject's rights. The Minister contends that, even on this view, s. 22 of the 1919 Act has also provided for compensation and in that section superseded the earlier provision for compensation. With this argument I deal later. But at any rate it is clear that in s. 17 of the 1882 Act we find unambiguous machinery for that purpose. If this be so, it would follow that the terms which the Minister may impose under s. 22 of the 1919 Act are terms authorising the exercise of powers in relation to the execution of works, and, on such authorisation, the right to compensation would arise as in s. 17 of the 1882 Act provided, and it would be beyond the Minister's power, by providing any other machinery than that which the legislature has provided or by imposing terms, to vary the Act of Parliament. B C

The nature of the machinery provided in the Electric Lighting Act, 1882, for the assessment of compensation is contained in s. 28 of the same Act which directs that "where any matter is . . . directed to be determined by arbitration, such matter shall, except as otherwise provided, be determined by an engineer or other fit person to be nominated as arbitrator by the Board of Trade on the application of either party." Such a person appears to me to be the proper arbitrator subject to the effect of the later legislation which subsequently I discuss. D

In the present case the Minister has, without sending the matter to arbitration, himself fixed the compensation. This appears to me to be in conflict with ss. 17 and 28 of the 1882 Act, which indicate the method by which compensation is to be given, and I therefore think that what he has attempted to do is beyond his powers. E

I now proceed to give reasons why I have come to the conclusion that s. 22 of the 1919 Act does not operate to give power to the Minister to dispense with the machinery for arbitration provided in the Act of 1882. The Attorney-General has endeavoured to confront the court with a dilemma. He points out, and I think rightly, that in the first limb of the proviso to s. 22 (1), when the subject is being asked to give his consent, he may attach as a term to his consent a pecuniary demand. I think this is right, and I am with the Attorney-General to this extent that the long researches into which we entered at his invitation into the use of the word "term" in the Electricity Acts, the Telegraph Acts and other Acts do show, as indeed I think any competent dictionary would show, that the word "term" may normally include terms as to pecuniary matters. But this first limb is dealing with negotiation. When we come to the consent of the Minister he is imposing terms in invitum, and in such a case it appears to me that the existence of s. 17 does require a different connotation to be placed upon the word "term" in this latter limb, because the legislature has already, in the 1882 Act, dealt with rights compulsorily taken and to that extent has limited the power of the Minister to impose pecuniary terms in the case of compulsory invasion of rights. F G

The Attorney-General argued that the court will be slow to give a different meaning to the same word appearing in the same section but, as LORD BLACKBURN said in *Edinburgh Street Tramways Co.* v. *Torbain* (5) (3 App. Cas. at p. 68): H

> "The words used with reference to [one set of circumstances] may convey an intention quite different from what the self-same set of words used in reference to another set of circumstances and another object would or might have produced." I

And I cannot see why this view, which is based on both logic and common sense, must be excluded from interpretation merely because the same words happen to fall within the same section or proviso. To my mind there is all the difference between the insertion of pecuniary terms as a matter of negotiation by the owner with the local authority or undertaker and the imposing of terms compulsorily for which the machinery for compensation has already been provided by the legislature. Had the legislature not thought fit to provide for compensation in such a case the Attorney-General's argument would have far more weight, because primâ facie the use of the same word in different senses

A does produce difficulties. But there have been cases where a word has been used in totally different senses in one section. In *Re Smith, Green* v. *Smith* (10) (24 Ch.D. at p. 678), NORTH, J., said: "The word 'property' is used in s. 54 of the Bankruptcy Act, 1869, in two totally different senses." So, also, in *R.* v. *Allen* (11) (L.R. 1 C.C.R. at p. 373), the language being "whosoever being married shall marry any other person during the life of the former husband or wife," it was pointed out by the court that the B proposition that the same effect must be given to the term "marry" in both parts of the sentence could not possibly hold good because of the existing legislation. Thus, because, if necessary, different interpretations may and ought to be given to a word in one section, the dilemma of the Attorney-General does not hold out any terror for me.

This conclusion really decides this case in favour of the landowners, but the Attorney-General has also argued that, if s. 17 of the 1882 Act is a machinery of compensation, C it has been superseded by a later method in the Act of 1919; and that the terms which the Minister may impose, if they be pecuniary terms, may be in themselves a machinery for awarding compensation. He says that the fact that the Minister may give consent unconditionally is no more than a refusal of compensation after consideration of the justice of the matter in a proper case, and that the authorities, which suggest that primâ facie an Act shall be construed on the assumption that the legislature intended D compensation to be given for the invasion of rights, are not applicable because here the Minister may assess compensation, but I am not sure that this is correct. The Minister may always impose as conditions to his consent what I will call physical terms only, which do not include compensation; this could certainly amount to a refusal of compensation in a particular case. But he may also give consent unconditionally. I think that if he may deny compensation by making physical conditions without compensation, E the power to give consent unconditionally points not so much to a consideration of the right to compensation and a refusal of it, as rather to a refusal of all conditions pecuniary or physical in giving his consent, without any consideration of the rights of the subject to any compensation at all. An unconditional consent would thus be an assent to the invasion of rights without compensation, and there is very high authority on this point to the effect that the courts will be very slow to assume that the legislature has, in the F absence of express words, authorised the taking of the property of the subject without providing for compensation. I need not cite these authorities. They will be found collected in MAXWELL ON THE INTERPRETATION OF STATUTES, 7th Edn., p. 245. It is sufficient to quote from LORD BRAMWELL in *Wells* v. *London, Tilbury and Southend Rail. Co.* (12) (5 Ch.D. at p. 130):

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> "We may well approach the construction of an Act of Parliament of this kind in the belief that it was not intended to confiscate a private right, for this would be a simple case of confiscation, and we ought not to suppose that this was intended by the legislature."

In this connection it is interesting to observe that in the Electricity (Supply) Act, 1926, H it is expressly provided that the Minister of Transport may make orders with regard to the lopping and felling of trees and that in such a case "he may determine any question as to what compensation (if any) is to be paid" (s. 34 (3)).

Of course, if the Attorney-General is right that unconditional assent does mean a consideration of a claim for compensation and its denial on the merits, this canon will not apply, but I doubt very much, for the reason I have stated, whether this is a proper I construction. It follows that the authorities on this head thus afford yet another reason which militates against the view for which the Attorney-General contends.

I proceed to add two further reasons why I think the contentions of the Minister of Transport are ill-founded, reasons which are not strictly necessary to support the conclusion at which I have arrived, but which owing to the gravity of the case I have thought proper to add.

The first is this: By s. 2 (2) of the 1919 Act the power of placing lines across land conferred by the section is expressed to include the power of placing a line across or along any railway. In the case of electric lines placed along the course of a railway, the proviso to sub-s. (1) does not apply, and, in its place, failing agreement between the electricity authority or undertakers and the railway company, the electricity authority or undertakers may apply to the Minister of Transport, who may decide against them that the line shall not be so placed, but if the Minister of Transport does not make the decision, he is to refer the matter to the Railway and Canal Commission, who may make an order for the placing of the electric lines, subject to such pecuniary terms as the Commission think just. Now it would appear that were it not for this para. (c) of sub-s. (2), the electric lines so proposed to be placed along a railway might do damage to the railway caused in the execution of the works, and so might fall within s. 17 of the 1882 Act, and the question of compensation would then be referred to the arbitrator under s. 28 of that Act (apart from the Acquisition of Land Act, 1919, which I subsequently discuss). There, however, it is provided, in terms, that the question of pecuniary compensation shall be considered by the Railway and Canal Commission, and this is a case where, owing to the exclusion of the proviso, the Minister could not, in any event, impose terms whether pecuniary or otherwise.

Next, in the case of electric lines placed across but not along a railway (para. (a)), or across a canal (para. (b)), s. 15 of the Schedule to the Electric Lighting (Clauses) Act, 1899, applies, and para. (c) of that section provides that the owners may, if they think fit, serve a requisition on the undertakers requiring that any question in relation to compensation shall be settled by arbitration, so that the result would appear to be that, either by arbitration in the case of a line across a railway, or by consideration before the Railway and Canal Commission in the case of a line along a railway, a judicial tribunal is required to consider the matter, which is consistent with the view that ss. 17 and 28 of the Act of 1882 still apply to cases other than railways, but that the only difference in the case of a railway is the nature of the arbitration court. On the Attorney's view a railway company would have a right to a judicial arbitration which would be denied in the case of any owner or occupier whose right was invaded and who did not happen to be a railway or canal. Such a construction may be necessary, but is perilously near an absurdity.

Yet another reason why I cannot accept the contention of the Minister is to be found in s. 39 (2) of the Electricity (Supply) Act, 1919, whereby, inter alia, it is provided that

> "the Minister of Transport shall refer to the Electricity Commissioners for their advice all matters connected with the exercise and performance of the powers and duties transferred to him under the section."

The powers and duties transferred to him under this section are those mentioned in sub-s. (1) of the same section, namely, "all the powers and duties of the Board of Trade under this Act or the Electric Lighting Act." So that his power of imposing terms as a condition of assent or giving consent unconditionally under s. 22 of the same Act is a matter which he is required to refer to the Electricity Commissioners for advice.

Now the Electricity Commissioners are constituted under s. 1 (1) of the 1919 Act "for promoting, regulating, and supervising the supply of electricity," and if the Minister be right in saying that he has the power to consider and determine compensation under s. 22 (1) he must, before arriving at such a determination, consult a body of persons who are stated in s. 1 to be constituted for the purpose of promoting, regulating, and supervising the supply of electricity. This also affords strong ground for doubting whether the legislature ever intended that the power to impose terms other than those generally in connection with the promotion, regulation, and supervision of the supply of electricity; and it appears that Parliament certainly did not intend and has not in fact legislated to produce the result that the Minister can determine questions of compensation.

Finally, on this matter, counsel for the landowners indicated yet another curious result which would arise if the Minister of Transport were correct in his view. The authorities, which I do not quote, go to show that an adjacent owner to an owner whose rights are invaded may have a claim for compensation if his lands are injuriously affected or onerously burdened. The language of s. 17 of the Act of 1882 says that full compensation shall be given to all bodies and persons interested, and these words are certainly wide enough to include an adjacent owner. In the case of an owner adjacent, the Attorney-General cannot argue that the consent of the Minister, even if it includes or excludes compensation for the owner affected, can possibly determine the compensation of the adjacent owner. But, as I understand it, it is not denied that the adjacent owner may in such a case have a remedy under s. 17 of the 1882 Act, so that, on the Minister's view the adjacent owner would be in a position to demand a judicial arbitration, whereas the owner himself, whose injury would in most cases be considerably greater, would be at the mercy of the Minister. Such a conclusion, if not producing another absurdity, is another ground for hesitating to conclude that the language of s. 22 (1) has the meaning for which the Attorney-General contends.

There remains only the further decision of Macnaghten, J., with which I agree, that in the case of the present plaintiffs, the Joint Electricity Authority, the Acquisition of Land (Assessment of Compensation) Act, 1919, applies. It is conceded that the body is a public authority within the meaning of that Act. And when once it is held that s. 17 of the Act of 1882 applies to this case it appears to me clear that the landowners may say that, in the words of s. 1 (1) of the Acquisition of Land Act, such land has been authorised to be acquired compulsorily by a public authority. The only argument against this view is that on such a construction the result would be that the Acquisition of Land Act would apply in the present case, but would not apply where there were undertakers who were seeking to acquire the rights in land and were a body of persons trading for profit. I agree that such a body would be excluded by s. 12 (2) of the Acquisition of Land Act, but in such a case s. 28 of the Electric Lighting Act, 1882, would still apply, and the matter would be determined by a person nominated as arbitrator by the Minister.

This does not seem to me to cause any difficulty; from 1882 to 1919 all matters relating to compensation would have been so referred. In the interest of local authorities the 1919 Act amended the 1882 Act and provided other means of arbitration, which other means were not to be used in the case of persons trading for profit. In any event, this discrepancy of treatment is no reason for refusing to read the language of the legislature in its natural meaning, and I have come to the conclusion that Macnaghten, J., was right in refusing to grant the declarations sought.

As to the cross-appeal, counsel for the landowners has argued that he has retained a power, alternatively, to proceed under the Lands Clauses Acts for compensation. The Act of 1882 on which he is driven to rely for compensation at all, and I think properly relies, by s. 12 (1), provides in terms that the Lands Clauses Acts shall be incorporated except the enactments with respects to the purpose and taking of lands otherwise than by agreement.

By s. 5 of the Lands Clauses (Consolidation) Act, 1845, it is provided that

> "whereas it may be convenient in some cases to incorporate with Acts of Parliament hereafter to be passed some portion only of the provisions to this Act—it shall be sufficient in any such Act to enact accordingly"

and thereupon the clauses so incorporated shall form part of the Act, but I see no reason to suppose that it was ever intended that by a kind of proleptic implication parts of the Lands Clauses Act which were not incorporated should be incorporated, and the clear fact emerges that the 1882 Act does not incorporate the 1845 Act in the case of land taken otherwise than by agreement.

For these reasons I think the appeal and the cross-appeal must fail.

ROMER, L.J.—In exercise of the powers conferred upon them by s. 22 (1) of the Electricity (Supply) Act, 1919, the West Midlands Joint Electricity Authority have placed a number of pylons upon lands of the respondent landowners, and by means of such pylons are maintaining on and over such lands a line of high voltage electric cables. It is not disputed that for this statutory appropriation of parts of their lands and this statutory infringement of their rights of property, the landowners are entitled to receive compensation. The question to be decided upon this appeal is how and by whom the amount of that compensation is to be ascertained. The Minister of Transport, taking the view that by virtue of the proviso to s. 22 (1) the compensation is to be fixed by

him at such a sum as he may think just, has imposed upon the authority as a term or A
condition of giving his consent to their carrying the pylons and lines of cable over the landowners' lands, the obligation of paying the landowners certain rentals. The landowners, on the other hand, entertaining somewhat different views from those of the Minister as to what is just in the circumstances, and in any case objecting on principle to landowners being deprived of their property on the terms of receiving only such compensation, if any, as the Minister of Transport for the time being may happen to B
think just, contend (i) that the compensation in such cases should be ascertained in accordance with the provisions of the Lands Clauses Consolidation Act, 1845, and of any other Acts amending or extending that Act; (ii) alternatively, that the compensation ought to be determined by arbitration under ss. 17 and 28 of the Electric Lighting Act, 1882, as amended, so far as the present case is concerned, by the Acquisition of Land (Assessment of Compensation) Act, 1919. C

MACNAGHTEN, J., has decided against the contention of the Minister of Transport, and has made a declaration that the compensation ought to be determined by arbitration pursuant to the Electric Lighting Act, 1882, and the Acquisition of Land (Assessment of Compensation) Act, 1919. From that decision the Minister and the joint electricity authority have appealed to this court. The landowners have also served a cross-notice of appeal asking that the declaration should be varied by adding a declara- D
tion giving effect to the first of their contentions, which I have just mentioned.

Obviously, the first question to be determined, and the one that goes to the root of the whole matter, is the meaning to be attributed, in the proviso to s. 22 (1) of the Electricity (Supply) Act, 1919, to the words "subject to such terms, conditions and stipulations as they think just." Do these words include terms, conditions and stipulations as to the amount to be paid for compensation, or do they not? For the purpose E
of answering this question it is essential to bear in mind a principle relating to the construction of statutes that has often been laid down by the courts, and has been stated by LORD ATKINSON in *Central Control Board* (*Liquor Traffic*) v. *Cannon Brewery Co., Ltd.* (13) ([1919] A.C. at p. 752):

> "An intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms." F

It is quite clear that the proviso in question contemplates the possibility of the Minister of Transport giving his consent to the placing of an electric line across the land of a subject unconditionally, which means, of course, if the plaintiffs are right, without the payment of any compensation at all. But an electric line cannot be so placed without G
taking away some of the rights of property of the owner or occupier of the land, and the exercise by the joint electricity authority or undertakers of the consequential power of entering on the land for the purpose of repairing or altering the line would be a further statutory invasion of such rights of property. If, therefore, the plaintiffs are right, the section does show an intention, in some cases at any rate, to take away the property of a subject without giving him compensation. It was said by the H
Attorney-General that the Minister of Transport would, in practice, always provide for compensation as a term of giving his consent. Whether or not this can safely be predicated of every future Minister of Transport may perhaps be doubted. That the holders from time to time of that office will always act in perfectly good faith can, of course, be taken for granted, but they may not always hold the same ideas of what is "just" where the owners of land are concerned. But, however that may be, the import- I
ant consideration from the point of view of ascertaining the meaning of the legislature is that it in terms gives the Minister power to consent unconditionally. In accordance with the principle to which I have referred, this alone is a reason for not giving to the words "terms, conditions, and stipulations" the meaning for which the plaintiffs contend. But even apart from the reason afforded by the power of giving an unconditional consent, an equally good one is, I think, afforded by the fact that the terms, conditions and stipulations to be imposed are merely to be such as the Minister of Transport may think just. If the words enable the Minister to fix the compensation,

A the landowner will no doubt in many cases—it may be in all cases—get compensation of some kind. But he does not obtain a legal right to compensation as I understand those words. The compensation to which the statement of LORD ATKINSON refers is surely compensation commensurate with the invasion of his property that the landowner has incurred, and not a compensation commensurate merely with the sense of justice possessed by the Minister of Transport for the time being. For these reasons I am, B I conceive, precluded from treating the proviso as having the operation contended for by the plaintiffs unless it shows in unequivocal language that such was the intention of the legislature. It was urged by the Attorney-General that such an intention is expressed by the proviso in clear and unequivocal language. He pointed out that in other sections of this same Act the word "terms" or the words "terms and conditions" are clearly used as including pecuniary terms. This seems to be so—see ss. 6, 12, 15 and C 19—though it may be noticed that in s. 12 (3) the phrase used is "on such terms and conditions as to price and otherwise." But there are an almost infinite variety of terms and conditions, and the question whether or not these words include in any particular case some particular kind of term or condition must depend upon the context in which they are used.

Because in one section of the Act and by virtue of the context the words clearly D include pecuniary terms, I am not compelled to hold that they include such terms in another section where the context seems strongly to point the other way. But the Attorney-General then said, and this seems to me a much more cogent argument, that the words "terms or conditions or stipulations," when first used in the proviso, must include pecuniary terms, and that the same meaning should be given to the words when they occur some four or five lines lower down. The landowner, he said, would E clearly be entitled to attach to his consent terms as to the payment of some particular amount of compensation, or as to the method of ascertaining compensation in some particular way. But I doubt whether this be so, or rather whether, if the landowner did so, he would be imposing a term or condition within the meaning of the proviso. If the proviso were not there, an authority or undertaker exercising the powers given by sub-s. (1) would, as presently pointed out, have to pay F compensation, either by virtue of s. 17 of the Electric Lighting Act, 1882, or, if the 1919 Act stood by itself, by virtue of the Lands Clauses Consolidation Act, 1845. In such a case, therefore, whenever the owner was asked to consent to the line being placed across his land, the payment of compensation, to be ascertained in the appropriate way, would be taken for granted. If his consent were given merely "subject to payment of proper compensation," he would not fail to give his consent. If, how- G ever, he consented, subject to payment of a certain sum for compensation, he would have failed to give his consent to that to which he was asked to consent. The result is the same when the proviso is added, if the words, "terms, conditions, or stipulations" are treated as extending to terms relative to the amount of compensation to be paid. In the first case supposed, his consent would be given. In the second case it would not, and the matter would go to the Minister of Transport, not because the landowner had H attached any terms or conditions or stipulations within the meaning of the proviso, but simply because the landowner had failed to give his consent. The whole proviso, as it seems to me, is quite intelligible and will work quite well without giving to the words "terms or conditions or stipulations" the meaning for which the plaintiffs contend, a meaning which for the reasons already stated, should not be given to them unless the language leaves no alternative.

I It might be that no alternative would be left if the consequence of adopting the construction contended for by the landowners were that there was no provision for compensation at all. In that case the principle to which I have referred would necessitate the proviso being treated in the way the plaintiffs desire. Better such compensation, if any, as the Minister of Transport may think just than no compensation at all. But it is, in my opinion, quite clear that compensation is amply provided for by s. 17 of the Act of 1882. It is enacted by s. 40 (2) of the Electricity (Supply) Act, 1919, that the Act shall be construed as one with the Electric Lighting Acts. That being so, the power given by s. 22 (1) of the Act of 1919, is one of the "powers in relation to the execution of works given them under this Act" within the meaning of s. 17 of the Act of 1882. Having had the advantage of reading SLESSER, L.J.'s judgment, I need not further enlarge either on this point or on the application to the present case of the Acquisition of Land (Assessment of Compensation) Act, 1919. It is sufficient to say that I agree with his conclusion and the reasons that he gives for it. It only remains to consider the question arising on the cross-appeal of the landowners.

If the Act of 1919 stood by itself, it seems clear that the Lands Clauses Consolidation Act, 1845, would be incorporated. Section 1 of that Act provides as follows:

> "This Act shall apply to every undertaking authorised by any Act which shall hereafter be passed and which shall authorise the purchase or taking of lands for such undertaking and this Act shall be incorporated with such Act and all the clauses and provisions of this Act save so far as they shall be expressly varied or excepted by any such Act shall apply to the undertaking authorised thereby so far as the same shall be applicable to such undertaking."

Section 22 (1) of the Act of 1919 clearly authorises an undertaking, and also the taking of lands for the purposes of the undertaking, lands for the purpose of the Act of 1845 including an easement over land. The Act of 1845 is not expressly varied or excepted by the later Act. But the Act of 1919 is to be construed as one with the Electric Lighting Acts. Section 12 of the Electric Lighting Act of 1882 expressly incorporates the Lands Clauses Acts "except the enactments with respect to the purchase and taking of lands otherwise than by agreement." This exception was quite unnecessary seeing that the Act of 1882 did not authorise the compulsory acquisition of land. Had the section, in pursuance of s. 5 of the Act of 1845, merely incorporated the provisions of that Act relating to the purchase of land by agreement, I do not think that the other clauses and provisions of that Act would necessarily have been excluded from the Electricity (Supply) Act, 1919, which did confer powers of compulsory acquisition of land. But unless the position is affected by some later Electric Lighting Act, there would, in my opinion, be an insuperable difficulty occasioned by the express exclusion from the Act of 1882 of those other clauses and provisions. The matter does not, however, end there. By s. 1 of the Electric Lighting Act, 1909 (which is another of the Electric Lighting Acts referred to in s. 40 (2) of the Electricity Act, 1919), the Board of Trade were given power to authorise by provisional order the compulsory acquisition of land for the purpose of a generating station, and sub-s. (2) (so far as material) provides as follows:

> "For the purpose of the acquisition of land authorised to be taken compulsorily under any such provisional order the provisions of the Lands Clauses Acts which relate to the purchase and taking of lands otherwise than by agreement are subject to the modifications set out in the First Schedule to this Act incorporated with the Electric Lighting Acts as well as the provisions of those Acts already so incorporated by the Electric Lighting Act of 1882."

It may be a question whether the words "For the purpose of" at the beginning of this subsection limit the applicability of the incorporated Acts or merely indicate the reason why the legislature made the incorporation. Some ground is afforded for the latter view by the opening words of the First Schedule, which are as follows:

> "The following modifications shall have effect in the construction of the provisions of the Lands Clauses Acts incorporated by this Act for the purpose of the Electric Lighting Acts."

When, however, the body of the Schedule is looked at, one is, I think, driven to the conclusion that the applicability of the incorporated Acts is limited, and is not of general application. For these reasons, I think the clauses and provisions of the Act of 1845 relating to the acquisition of lands otherwise than by agreement are not applicable to the taking of land under the powers of s. 22 (1) of the Electricity (Supply) Act, 1919. The cross-appeal must, therefore, be dismissed.

The matter is not, however, of any great practical importance. The only advantage that the defendants would obtain from a decision on this point in their favour is that they

A could claim compensation for damage occasioned to their adjoining lands by the user of the electric cables on their lands, compensation which they could not claim under the provisions of s. 17 of the Act of 1882. But we were told by counsel for the landowners that of the bodies and persons entitled to exercise the powers of s. 22 (1) the only body exempted from liability for nuisance occasioned by their operations is the Central Electricity Board.

B In the result I think that the decision of MACNAGHTEN, J., on both points was correct, and I agree that both the appeal and the cross-appeal should be dismissed with costs.

Appeal and cross-appeal dismissed.

Solicitors: *Treasury Solicitor*; *Taylor, Rowley & Co.*, for *Restall, Round, & Gloster*, Birmingham; *Pettitt, Ramsay, & Lampard*, for *Pitt & Cooksey*, Bridgnorth.

C [*Reported* by GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

D

ISRAELSON *v.* DAWSON (PORT OF MANCHESTER INSURANCE CO., LTD., GARNISHEES)

E

[COURT OF APPEAL (Scrutton and Greer, L.JJ.), June 21, 1932]

[Reported 1 K.B. 301; 102 L.J.K.B. 387; 148 L.T. 420]

Execution—Garnishee order—Insurers liable to indemnify judgment debtor against judgment creditor's claim—Garnishee proceedings by judgment creditor against insurers—R.S.C., Ord. 45, *r.* 1.

F

Insurance—Indemnity policy—Judgment against insured in respect of liability covered by policy—Garnishee proceedings by judgment creditor against insurers—R.S.C., Ord. 45, *r.* 1.

An insurance company insured the defendant under a policy by which they agreed to indemnify him and his relatives or friends when driving a motor car G as regards all sums for which he should become legally liable to pay in respect of accidental bodily injury to, and accidental damage to property of, third persons caused by use of the car. The policy contained conditions as to notice of accident, control of proceedings against the assured by the company, and as to any difference or dispute between the parties being settled by arbitration. The plaintiff recovered judgment against the defendant for £150 damages in an action, alleging negligence H on the part of the defendant, his servant or agent, for personal injuries and damage to clothes resulting from his colliding with the motor car. The judgment remaining unsatisfied, the plaintiff judgment creditor instituted garnishee proceedings under R.S.C., Ord. 65, r. 1, against the insurance company to attach sums alleged to be due to the defendant under the policy.

Held: the policy constituted a promise by the insurance company to indemnify I the defendant, but not necessarily by paying him the judgment debt; accordingly there was no attachable debt due from the insurers under the policy within the meaning of Order 45, r. 1, and the garnishee proceedings were therefore misconceived.

Adams v. *London General Insurance Co.* (1) (1932), 42 Ll.L.R. 56, distinguished by GREER, L.J.

Notes. The effect of s. 10 (1) of the Road Traffic Act, 1934, is to create a statutory debt in respect of which the third party can sue the insurers for the amount of any judgment recovered by the third party against the insured in respect of any such liability as is required to be covered by a policy under s. 36 (1) (b) of the Act of 1930. This includes a liability for death or bodily injury, and much of the discussion in the judgments in this case is, therefore, now of only academic interest. The law laid down in this case still applies, however, with regard to claims in respect of liabilities to which s. 36 (1) (b) does not apply.

Referred to: *Jabbour* v. *Custodian of Israeli Property*, [1954] 1 All E.R. 145.

As to what debts are attachable, see 16 HALSBURY'S LAWS (3rd Edn.) 80, para. 121; as to payment of claims after a garnishee order has been made against insurers, see 22 HALSBURY'S LAWS (3rd Edn.) 259, para. 508, text and note (*k*), as to rights of third parties against insurers on policies of motor insurance, see ibid. 374–377, paras. 768–770, and as to the enforcement of indemnities in equity, see 18 HALSBURY'S LAWS (3rd Edn.) 537–538, para. 983.

Cases referred to:

(1) *Adams* v. *London General Insurance Co.* (1932), 42 Ll.L.R. 56; Digest Supp.

(2) *Randall* v. *Lithgow* (1884), 12 Q.B.D. 525; 53 L.J.Q.B. 518; 50 L.T. 587; 32 W.R. 794, D.C.; 29 Digest 338, *2732*.

(3) *Electric Printing Works Co.* v. *Cooper* (1923), 14 Ll.L.Rep. 125.

(4) *Scott* v. *Avery* (1856), 5 H.L.Cas. 811; 25 L.J.Ex. 308; 28 L.T.O.S. 207; 2 Jur.N.S. 815; 4 W.R. 746; 10 E.R. 1121, H.L.; 2 Digest 350, *263*.

Appeal from a decision of CHARLES, J., in Chambers.

By a policy dated April 17, 1930, the defendant, George Thomas Dawson, was insured with the Port of Manchester Insurance Co., Ltd., by which the company agreed to

> "indemnify the insured (or alternatively any relative or friend driving the car with the general consent and knowledge of the insured, provided such relative or friend has not been refused any motor vehicle insurance or continuance thereof by any insurance company or underwriters, and that he or she is not otherwise insured) as regards all sums for which the insured or such person driving shall become legally liable to pay in respect of: (a) Accidental bodily injury to any person (including passengers in the car when being driven by the insured or by the insured's licensed driver), but excluding any person who is a member of the insured's household or in the insured's service and any person driving the car; and/or (b) accidental damage to property other than property actually belonging to or held in trust by or in the custody or control of the insured, or being conveyed by the car, caused by use of the car in the United Kingdom and Irish Free State."

Amongst the conditions of the policy were the following:

> "1. The insured or his legal personal representatives shall give notice in writing to the head or any branch office of the company immediately upon the occurrence of any accident and/or loss and/or damage with full particulars thereof (including names and addresses of witnesses of accident). Every letter, claim, writ, summons or process shall be notified or forwarded to the head or any branch office of the company immediately on receipt. Notice shall also be given in writing to the head or any branch office of the company immediately the insured or his legal personal representatives shall have knowledge of any impending prosecution or inquest in connection with any accident for which there may be liability under this policy. In respect of this condition time shall be [of] the essence of the contract.
>
> "2. The insured shall not, except at his own cost negotiate, pay, settle, admit, or repudiate any claim without the written consent of the company. The company shall be entitled to undertake, in the name and on behalf of the insured, the absolute conduct and control of any proceedings and any settlement of the same. The insured shall render to the company all necessary information and assistance to enable the company to settle or resist any claim or to institute proceedings.
>
> "5. Upon any difference or dispute arising between the company and the insured touching this policy or any claim arising hereunder or otherwise in any manner relating thereto the same shall be referred to arbitration. Such arbitration shall be, if the insured resides in England or elsewhere than in Scotland and Ireland, subject to the provisions of the Arbitration Act, 1889. If the insured resides in

A Scotland or in Ireland, such arbitration shall be subject to the enactments there applicable to arbitration. The obtaining of an award in such arbitration shall be a condition precedent to any liability on the part of the company."

By an action in the High Court, Lewis Israelson, the plaintiff, alleging negligence on the part of the defendant, his servant or agent, claimed damages for personal injuries B and also damage to his clothing incurred from colliding with a motor car on March 6, 1932, hired by and in the possession of the defendant. The action came on for trial on April 14, 1932, before a judge and a common jury, but the defendant did not appear. Verdict for the plaintiff was given for £150 damages, and judgment was entered for that amount. This judgment not having been satisfied, the judgment creditor took out a summons that all debts due from the Port of Manchester Insurance Co., Ltd., to the C defendant should be attached to answer the judgment, and on May 5, 1932, MASTER JELF made a garnishee order nisi. MASTER BALL on May 20, 1932, dismissed the application to make this order absolute, but on appeal, CHARLES, J., sitting in Chambers on May 27, 1932, reversed the decision of MASTER BALL and ordered that the judgment creditor and the garnishees should proceed to the trial of an issue.

The garnishees, the insurers, appealed.

D *H. D. Samuels* for the insurance company, the garnishees.

James Dickinson, K.C., and *I. F. Reuben* for the judgment creditor, the plaintiff.

By Order 45, r. 1, of the Rules of the Supreme Court:

> "The court or a judge may upon the ex parte application of any person who has obtained a judgment or order for the recovery or payment of money, either before E or after any oral examination of the debtor liable under such judgment or order, and upon affidavit by himself or his solicitor stating that judgment has been recovered, or the order made, and that it is still unsatisfied, and to what amount, and that any other person is indebted to such debtor, and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to such debtor shall be attached to answer the judgment or order together F with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court or a judge or an officer of the court, as such court or judge shall appoint, to show cause why he should not pay to the person who has obtained such judgment or order the debt due to him from such debtor, or so much thereof as may be sufficient to satisfy the judgment or order, together with the costs aforesaid . . . ."

G **SCRUTTON, L.J.**—This case suggests many questions which may arise for future discussion; but for this court there is one short point which arises at the outset. The plaintiff, who had suffered personal injuries in a collision with a motor car, sued the person whom he alleged to be liable. The claim was for the most part for damages for injury to his person, but there was also a small claim for damage to his clothes. The defendant denied that he or his servant or agent committed the acts alleged in the H statement of claim; his defence was that the motor car was not driven by anybody for whom he was liable. But when the case was called on, the defendant did not appear, and the plaintiff obtained a verdict and judgment for £150 against the defendant. A few days later an application was made to set aside the judgment, and an order was made that if the defendant paid £150 into court there should be a new trial, but it is not clear whether the defendant paid this sum into court. Also it is said that the defendant I claimed arbitration on the policy against his insurance company, the Port of Manchester Insurance Co., but the company say that he has withdrawn it, and that is not admitted by the defendant. The present proceedings come before the court in this way: the plaintiff, having got judgment for £150, against the defendant, took proceedings to garnishee what he says is a debt due from this insurance company to the defendant, that is to say, an amount alleged to be due from the insurance company to the defendant under this policy against third-party risks.

Whether this claim is sound depends on whether where a sum is owing under the policy the insurers are "indebted to such debtor," the defendant, within the meaning of Order 45, r. 1, of the Rules of the Supreme Court. The plaintiff took out a summons A for a garnishee order nisi addressed to the insurance company calling upon them to show cause why a debt due from them to the defendant should not be attached to satisfy the judgment, and an order nisi was made. On the application to make the order nisi absolute MASTER BALL dismissed it and declined to order an issue, probably on the ground that it did not appear that there was a debt due from the insurance company to the defendant. On appeal to the judge in chambers, CHARLES, J., allowed the B appeal, and from his decision the insurance company appeal to this court. It does not appear that in the proceedings before the learned judge any reference was made to the terms of this policy or to the pleadings, and no notice was taken of the fact that the policy was issued before s. 38 of the Road Traffic Act, 1930, came into operation—Jan. 1, 1931: (see the Road Traffic Act, 1930 (Date of commencement) Order No. 1, 1930, S.R. & O. 1930, No. 1003). The learned judge, however, directed that the C plaintiff, the judgment creditor, and the garnishees, the insurance company, should proceed to the trial of an issue; but he did not define the issue or direct who was to be the plaintiff and who the defendant upon the issue. It may be that he ordered the issue to ascertain whether the garnishees, the insurance company, owed anything to the defendant. It is clear that he would not have made the order in this form unless he considered that there was a debt owed to the defendant by the company. D

I have come to the conclusion that as between the assured and the insurers there was no debt. There may be a claim by the assured for breach of contract or upon an indemnity, but there was nothing which could be called a debt or indebtedness within the meaning of Order 45, r. 1, of the Rules of the Supreme Court. It follows that the learned judge should not have made this order. He was not referred to the two cases cited to us by counsel for the insurance company: (*Randall* v. *Lithgow* (2); and *Electric* E *Printing Works Co.* v. *Cooper* (3)). I appreciate that difficulties may arise in the future from the language used in the Road Traffic Act, 1930. This policy covering a year was taken out nine months before s. 38 of the Road Traffic Act, 1930, came into force. There may be a question whether under that section such a policy is "a policy . . . given for the purposes of this part of this Act"; and there may be other questions for consideration, for instance, about the clause in *Scott* v. *Avery* (4) and the meaning of F sub-s. (4) of s. 36 of the Act, and about notice. I see that SWIFT, J., in *Adams* v. *London General Insurance Co.* (1) expressed a doubt as to whether the language used by the legislature in the Road Traffic Act, 1930, is effective in carrying out the presumed intention of Part V of that Act, and I express no opinion upon the effect of the protection given by that part of the Act. At the time that this order was made there was no attachable debt due from the insurance company to the defendant. The appeal, G therefore, must be allowed, the order of CHARLES, J., set aside, and that of MASTER BALL restored.

GREER, L.J.—I agree. When an application is made under Order 45, r. 1, to attach a debt, it may be that the person who is said to owe the debt, the garnishee, does not dispute his indebtedness. In that case the order nisi is made absolute, and execution H may be issued to attach the debt at once. But, on the other hand, the garnishee may say: "I dispute the debt," in which case, if a primâ facie case is made out that the garnishee is indebted to the judgment debtor, an order should be made for the trial of an issue. An order for the trial of an issue should not be refused, because there is a doubt as to who will succeed upon the issue. In order to found jurisdiction to make any order for attachment or for the trial of an issue, the applicant, the judgment creditor, I must make out a case by his affidavit that there is what is, in law, a debt due from the garnishee to the judgment debtor.

After due consideration of the arguments presented and cases cited before us, I have come to the conclusion that in this case there is due from the insurance company to the defendant in the action, not a debt, but a promise, which is to be found in the first part of cl. 1 of this policy relating to third-party risks; it is in these words:

> "The company shall indemnify the insured . . . as regards all sums for which the insured . . . shall become legally liable to pay in respect of: (a) Accidental bodily

A injury to any persons (including passengers in the car when being driven by the insured or by the insured's licensed driver), but excluding any person who is a member of the insured's household or in the insured's service and any person driving the car; and/or (b) accidental damage to property other than property actually belonging to or held in trust by or in the custody or control of the insured or being conveyed by the car, caused by use of the car in the United Kingdom and Irish Free B State."

The question at issue is whether this insurance company promised by this provision in the policy to pay to the defendant in the action the £150 for which judgment has been given against him, at the suit of the plaintiff. After full consideration I have come to the conclusion they have not so promised; but that what they had promised is to indemnify him against such payment as he may have to make, and this they may do, C not by paying the defendant anything, but by paying to the person to whom the defendant owes the money the amount he has to pay them. That is not a promise to pay the defendant; the risk undertaken is to indemnify the defendant against legal liability incurred by him when driving a motor car. For these reasons I agree with the judgment delivered by SCRUTTON, L.J.

I also agree with him in thinking that many difficulties may arise when it becomes D necessary to decide what is the liability of this insurance company under their policy, and, that being so, in the exercise of my discretion I should not consider that this is a case in which any garnishee order should be made. The learned judge below does not appear to have exercised his discretion, but to have thought that he was bound by the decision of SWIFT, J., in *Adams* v. *London General Insurance Co.* (1). However, that decision did not fetter his discretion, because, apart from the alleged misrepresentation E by the assured, there was no dispute in that case as to whether there was or was not a debt, and, there being no such dispute, the garnishee order was made. For these reasons I agree that the appeal must be allowed.

Appeal allowed.

Solicitors: *L. Bingham & Co.*; *Saunders, Sobell & Co.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

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G

D. MORRIS AND SONS, LTD. *v.* JEFFREYS

[KING'S BENCH DIVISION (Swift, J.), November 16, 1932]

[Reported 148 L.T. 56; 49 T.L.R. 76]

H *Bankruptcy—Lease—Disclaimer—Release of surety for rent—Sub-lease of part of demised premises—Bankruptcy Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 54 (1) *and* (2).

Disclaimer of a lease by a trustee in bankruptcy under s. 54 (1) and (2) of the Bankruptcy Act, 1914, operates as a discharge of a surety for payment of the rent, since the effect of s. 54 is to relieve the bankrupt and his estate from further liability, and, if a surety were not also relieved, he would have a claim against the I bankrupt who, in that case, would not be released from the claim for rent. This is so, notwithstanding that part of the demised premises have been sublet before the bankruptcy.

Notes. As to disclaimer by a trustee in bankruptcy, see 2 HALSBURY'S LAWS (3rd Edn.) 457 et seq., and for cases see 5 DIGEST 938 et seq. For Bankruptcy Act, 1914, see 2 HALSBURY'S STATUTES (2nd Edn.) 321.

Case referred to:

(1) *Stacey* v. *Hill*, [1901] 1 K.B. 660; 70 L.J.K.B. 435; 84 L.T. 410; 49 W.R. 390; 17 T.L.R. 311; 45 Sol. Jo. 325; 8 Mans. 169, C.A.; 5 Digest 951, *7793*.

Action tried by SWIFT, J. The plaintiffs, as lessors of premises, No. 1187, Finchley Road, Golders Green, claimed against the defendant, who was a party to the lease as guarantor for the payment of the rent, a sum due for rent which had not been paid owing to the bankruptcy of the lessee.

By a lease dated Sept. 19, 1929, the plaintiffs demised to a Mr. P. M. Leigh the premises in question, which consisted of a shop and other accommodation. The lease contained a covenant by the defendant in the following terms:

> "The surety in consideration of the demise hereinbefore contained having been made at his request hereby covenants with the lessors that the lessee shall pay the rents hereby reserved on the days and in the manner aforesaid, and that in case of default of such payment of rent as aforesaid the surety will pay and make good the same to the lessors on demand."

By an agreement made on Dec. 2, 1929, Leigh sublet a portion of the premises to a Mrs. Miller, and that sub-tenancy was existing on April 26, 1932. On Nov. 4, 1931, Leigh was adjudicated a bankrupt, and Mr. F. S. Salaman was appointed the trustee in his bankruptcy, and on April 26, 1932, the trustee disclaimed the lease from the plaintiffs to Leigh. The plaintiffs thereupon commenced this action, seeking to make the defendant liable for rent as surety under the clause in the lease set out above. The defendant admitted liability up to the date of the disclaimer, and brought into court the amount of the rent up to April 26, 1932, but he said that the effect of the disclaimer was to put an end to his liability as from that date, and he relied on *Stacey* v. *Hill* (1). For the plaintiffs it was argued that *Stacey* v. *Hill* (1) did not apply, as in that case no other person was interested in the premises, whereas in the present case the sub-tenant had a subsisting interest, and, further, on the ground that *Stacey* v. *Hill* (1) dealt only with rent in arrear.

The Bankruptcy Act, 1914, s. 54, provides:

> "(1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous convenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within twelve months after the first appointment of a trustee, or such extended period as may be allowed by the court, disclaim the property. . . . (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed, as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

Tindale Davis for the plaintiffs.
Beyfus for the defendant.

SWIFT, J. [after stating the facts as above set out continued:] The defendant's answer to the claim was a tender of the rent due up to April 26, 1932, and a payment into court of that amount, and he alleges that, the lease having been disclaimed, he as surety is released from any further liability in the matter.

In my view, this contention is correct. I think the matter is conclusively decided by *Stacey* v. *Hill* (1), but, even if it were not so, I think that the whole trend of judicial opinion in regard to the matter is in favour of the argument put forward by the defendant. That argument in short is that the effect of the operation of the Bankruptcy Act is to relieve the bankrupt and his estate of any and every liability, and, if in such a case as this, the surety is not released, he would have a remedy against the bankrupt, and so the bankrupt and his estate would not be released from the lessors' claim for rent.

Counsel for the plaintiffs sought to distinguish the facts in *Stacey* v. *Hill* (1) from the facts in this case, and contended that that decision was not binding on me on the ground (i) that *Stacey* v. *Hill* (1) dealt only with rent in arrear, and, as no rent could, after the disclaimer, be in arrear, no liability could be imputed to the surety; and (ii) that in *Stacey* v. *Hill* (1) no other person was interested in the premises, while in this case Mrs. Miller had an interest in the property. I do not think that either of these contentions is good. While it is true that *Stacey* v. *Hill* (1) dealt only with rent in arrear, there is nothing in the judgments which indicates or suggests that the principle is not equally applicable to a surety who guarantees a payment of rent in futuro. The true principle is, to my mind, stated by A. L. SMITH, M.R., when he said (84 L.T. at p. 411):

> "The effect of the subsection is that in such a case the lease is put an end to altogether as between the lessor and the bankrupt lessee, the intention being that the bankrupt shall be altogether freed from any obligation arising under or in relation to it; and, consequently, no other person being interested in the lease, it ceases to exist. As the lease is determined, no rent can, subsequently to the disclaimer, become due under it; the reversion on the term is in effect accelerated; and the lessor gets back his property, and can let it to another tenant, for aught I know, at a higher rent. Then what is the effect on the liability of the surety? It is suggested that, although no more rent can become due from the bankrupt lessee, nevertheless, the surety remains liable for rent subsequently accruing. I do not think that is so. The object of the section is that the bankrupt and his estate should be entirely freed from liability for future rent in respect of the lease; but if the plaintiffs' contention is correct that object would not be attained. I think the defendant was right in the construction which he sought to put on the words at the end of the subsection,
>
> > 'except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability.'
>
> If the surety is liable to pay rent in futuro on his guarantee, he would be entitled to indemnity against the bankrupt or his property. It is therefore necessary, in order to release the bankrupt and his property from liability under the lease, subsequently to the disclaimer, that the words at the end of the subsection should be brought into play in such a case."

I do not think that the sub-tenant's interest makes the least difference in this case. The adjudication of bankruptcy against Leigh gives her certain rights against the lessors and gives them certain rights against her; but the disclaimer of the lease seems to me to relieve both those parties from any liability to Leigh, and him from any liability to them, and their rights against each other are to be determined according to s. 54 of the Bankruptcy Act, 1914. If by operation of law the principal is discharged, then, in my view, the surety must also be discharged. The very foundation of a contract of suretyship is that if a surety is called upon to pay he shall take the place of and have the rights of the creditor against the principal debtor, and if the principal debtor is relieved from liability, in my view it follows inevitably that the surety is also released. I, therefore, give judgment for the defendant, with costs.

Solicitors: *Syrett & Sons*; *M. A. Jacobs & Son.*

[*Reported by* V. R. ARONSON, ESQ., *Barrister-at-Law.*]

SYKES *v.* WILLIAMS

[Court of Appeal (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), October 26, 27, 28, 1932]

[Reported [1933] Ch. 285; 101 L.J.Ch. 418; 148 L.T. 121; 49 T.L.R. 9; 76 Sol. Jo. 798]

Rent-Charge—Grant of land in consideration of rent-charge to be paid half-yearly—Proviso for re-entry by "the vendor, owner for the time being of the said yearly rent-charge" on non-payment for a year—Non-payment for over thirteen years—Survival of right of re-entry—Real Property Limitation Act, 1833, *s.* 34—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict., c.* 57), *s.* 1.

By a deed dated June 7, 1912, a vendor granted certain land to a purchaser and reserved "a perpetual yearly rent-charge of £25 issuing out of the land . . . and payable by two equal half-yearly payments on March 25 and Sept. 29 in every year, the first . . . payment . . . to be made on March 25, 1913. . . . Provided always . . . that if and whenever the said yearly rent-charge . . . shall be in arrear . . . for the space of one year next after either of the said half-yearly days . . . it shall be lawful for and the purchaser . . . hereby grants unto the vendor, his heirs, executors, administrators, and assigns, owner or owners for the time being of the said yearly rent-charge . . . full and free liberty, power and authority to enter into and upon the said plot of land." The rent-charge was never paid. On May 13, 1932, the vendor issued a writ for possession of the land, relying on this proviso for re-entry.

Held: the vendor was not entitled to possession because (i) the right to claim the rent-charge had been extinguished under the Limitation Acts on March 25, 1925, i.e., twelve years after the first payment had become due, and so from then on the rent-charge was no longer payable and no arrears under it could be recovered; (ii) on the true construction of the deed the power of re-entry was given to the vendor, his heirs, etc., solely in the character of "owner or owners for the time being of the rent-charge," and, the rent-charge having been extinguished, the vendor no longer fulfilled the description of "the owner . . . for the time being of the rent-charge."

Notes. The Real Property Limitation Acts, 1833 and 1874, have been repealed and replaced by the Limitation Act, 1939, s. 8 of which now makes the same provision as was formerly made by s. 34 of the 1833 Act, as amended.

As to when time begins to run against the owner of a rent-charge, see 20 Halsbury's Laws (2nd Edn.) 701, para. 922, and ibid., vol. 28, 249, para. 453. As to extinction of the owner's title, see ibid. 248, para. 451, and for cases on the subject see 32 Digest 408, *863–864*. For the Limitation Act, 1939, s. 8, see 13 Halsbury's Statutes (2nd Edn.) 1159.

Case referred to:

(1) *Barratt* v. *Richardson and Cresswell*, [1930] 1 K.B. 686; 99 L.J.K.B. 451; 142 L.T. 606; 46 T.L.R. 279; Digest Supp.

Appeal from a decision of Eve, J.

By a conveyance of June 7, 1912, between the plaintiff, of the one part, and the defendant and Hugh Williams, the grantees, of the other part, a plot of land in Edgeley, Stockport, upon part of which four messuages had since been erected, was granted to the grantees and their heirs to the use that the plaintiff, his heirs, and assigns, should receive a perpetual yearly rent-charge of £25 issuing out of the land and the buildings erected or to be erected thereon, payable in equal half-yearly instalments on March 25 and Sept. 29 in every year, the first calculated from Sept. 29, 1912, to be made on March 25, 1913, and subject thereto and the statutory powers for recovering payment thereof to the use of the grantees, their heirs, and assigns, as tenants in common in equal shares, and the grantees and each of them covenanted with the plaintiff to pay the said rent-charge in manner aforesaid, free from all deductions except landlord's property tax. And it was provided that whenever the same or any part thereof should be in arrear for a year, whether demanded or not, or if there should be any breach of any of the grantees' covenants, then, notwithstanding the waiver of any previous default, it should be lawful for the plaintiff or the owners for the time being of the rent-charge at any time during the lives of the issue of the then late Queen and the survivors and survivor of them and twenty-one years thereafter, and such further time as should be lawful, to enter upon the said land and any buildings thereon or any part thereof in the name of the whole and repossess as if the conveyance had not been made.

Hugh Williams died on Nov. 1, 1924, and letters of administration to his estate were granted on Sept. 11, 1926, to the defendant and Thomas Williams. By virtue of the transitional provisions of the Law of Property Act, 1925, an appointment of new trustees of May 10, 1927, and a conveyance of May 11, 1927, the defendant became entitled to part of the said land and four messuages erected thereon.

No part of the said rent-charge was ever paid. The plaintiff submitted that the period within which the right of entry was exercisable had not expired and claimed possession of these four messuages, mesne profits, and costs.

The defendant admitted the plaintiff's allegations, but contended that such right of entry was at the date of the writ—May 13, 1932—barred and extinguished by the Real Property Limitation Acts, 1833 and 1874, but, if it was not so, he claimed relief from forfeiture under s. 146 of the Law of Property Act, 1925, or otherwise as the court should think fit.

Eve, J., held that, although the claim to possession was not made within twelve years next after the right to make such entry had first accrued, the plaintiff's claim to possession was not barred by s. 1 of the Real Property Limitation Act, 1874, and s. 3 of the Real Property Limitation Act, 1833, but that his right to re-enter accrued afresh in respect of each subsequent quarter day whenever any part of the rent reserved under the lease was in arrear for twenty-one days, and he was therefore entitled to rely on the last non-payment of rent before writ issued or any previous non-payment up to twelve years before writ (*Barratt* v. *Richardson* (1) applied), and that the plaintiff was accordingly entitled to re-enter, but granted the defendant relief from forfeiture on terms.

The defendant appealed.

Sir Gerald Hurst, K.C., and *J. M. Easton* for the defendant, the owner of the land charged.

H. Johnstone and *Dennis Johnston* for the plaintiff, the owner of the rent-charge.

LORD HANWORTH, M.R.—This appeal raises a number of very interesting points which have been ably presented to us by counsel on both sides, but a great number of the points, interesting though they are, do not really arise if we take a particular view as to the construction of the document creating the rent-charge with which we have to deal in this case. Although those points are interesting, and one of them is a point on which Eve, J., has given his decision, it would really be dealing with matters which lie outside the domain on which this judgment can rest if we were to go into them.

The facts which give rise to this matter can be quite shortly stated. On June 7, 1912, the plaintiff conveyed a certain plot to a purchaser at a yearly rent-charge of £25. By that conveyance the plaintiff conveyed to the purchaser a plot of land at Edgeley, in the Borough of Stockport, which is described upon the plan attached to the conveyance, and there was excepted and reserved to the vendor, his heirs, executors, administrators, and assigns

> "all rights restricting the free use of any adjacent or neighbouring lands . . . to the use that the vendor his heirs and assigns shall receive a perpetual yearly rent-charge of £25 issuing out of the land hereby conveyed and the buildings erected or to be hereafter erected thereon and payable by two equal half-yearly payments on March 25 and Sept. 29 in every year, the first half-yearly payment or a proportionate part thereof calculated from Sept. 29, 1912, to be made on March 25, 1913, and subject to the said rent-charge and to the statutory powers and remedies for recovering and compelling payment thereof."

There was also a proviso which is in these terms:

> "Provided always and these presents are executed upon this express condition that if and whenever the said yearly rent-charge of £25 or any part thereof shall be in arrear and unpaid for the space of one year next after either of the said half-yearly days hereinbefore appointed for payment thereof (whether demanded or not), or if there shall be a breach of any of the covenants . . . it shall be lawful for and the purchasers for themselves and each of them for himself his heirs, executors, administrators, and assigns hereby grants unto the vendor, his heirs, executors, administrators, and assigns, owner or owners for the time being of the said yearly rent-charge hereby limited, at any time during the lives and life of the parties hereto [and then comes a provision so that the proviso shall not offend the rule against perpetuity] full and free liberty power and authority to enter into and upon the said plot of land."

The events which took place are somewhat curious. It will be observed that the first time when the rent was payable was March 25, 1913. It was not paid, and a year from the date when the first payment became due would be March 26, 1914. But the rent-charge has never been paid at all. I have noted that date for the purpose of clarity. The twelve years after the date when the first payment ought to have been made would be March 25, 1925. The right of re-entry which arises after a year during which there has been non-payment would be, taking twelve years, March 26, 1926. I emphasise those dates, but the main date is March 26, 1925, which is the date which completes the twelve years after the rent-charge or part thereof first became due.

The writ in the present action was issued on May 13, 1932. It was issued, therefore, more than seven years after March 25, 1925. We have to apply to the claim which is made the Statute of Limitations (3 & 4 Will. 4, c. 27), 1833. The defendant admits that no part of the yearly rent-charge has ever been paid, and he says:

> "That the said yearly rent-charge and all covenants and powers of re-entry incident thereto or granted by the said conveyance of June 7, 1912, are and were at the date of the issue of the writ in this action barred and extinguished by virtue of the Real Property Limitation Act, 1833,"

to which I have referred, as amended by the Act of 1874. We all know that chapter 27 of the Statute of 1833 and the Real Property Limitation Act, 1874, are to be read together. The Act of 1874 repealed certain sections, to which our attention was drawn by Mr. Denis Johnston, but for the rest the Act of 1833 remains standing subject to this, that the span of limitation is twelve years instead of twenty years.

There are certain propositions which are beyond controversy. As soon as the twelve years from the date when the payment first became due, which was March 25, 1913, expired, that is to say on March 25, 1925, the remedy in respect of the arrears of rent-charge was barred, and not only was the remedy barred, but by virtue of s. 34 of the Act of 1833 the right to claim it was extinguished. I will read s. 34:

> "At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished."

It is a violent section. Its plain and simple words extinguish, after the period of limitation has run, the right and title of any person to the land and the rent for the recovery of which an entry or distress action or suit might have been made within such period; all that right is extinguished. Counsel for the plaintiff does not dispute that from and after March 25, 1925, his position was that he could not have recovered any of the arrears by reason of the terms to which I have referred. Section 42 says:

> "No arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent . . . shall be recovered."

Therefore, we have a case in which by March 25, 1925, the right was extinguished and the arrears were irrecoverable. What is left? What does the covenant stand to do—

to pay the arrears which are irrecoverable? It is claimed that once the rent-charge has gone and the arrears have gone, the re-entry cannot be exercised, but it is said on behalf of the plaintiff that the plaintiff had the right to re-enter upon the land, and the action here is for possession of the said property, the subject of the rent-charge. The way in which it is put is this. It is said that a right accrued twice a year, that there was a successive right of re-entry consequent upon the failure to pay the rent-charge, that that successive right of re-entry accrued, and was still in being and had not been lost, and that accordingly an action for the land could be founded upon it by virtue of the proviso with regard to re-entry. That right had not gone, although the power of enforcing payment of the rent-charge had gone. In other words, this conveyance conveyed the property subject to a defeasance which still remained good. It was a defeasance in accordance with the proviso which enabled an entry to be made; the deed did not give an absolute fee, but one which was subject to be defeated on a certain condition if that condition was not fulfilled. In other words, we have to come back to this: What is the meaning of the conveyance and of the proviso? Was this left as a right of re-entry, I will say, in gross, although the money, payment of which was to be secured and for which this proviso was the sanction, was no longer payable or recoverable? I turn, therefore, to look at the terms of the proviso. I have already read them, but I wish to emphasise this portion: In the event of the non-payment at the due date and for the space of one year after

> "it shall be lawful for and the purchasers for themselves and each of them . . . grants unto the vendor his heirs executors administrators and assigns owner or owners for the time being of the said yearly rent-charge."

It is impossible to leave out those words for they contain characteristics which must be fulfilled by the vendor, his heirs, executors, administrators, and assigns, and unless those characteristics are fulfilled the vendor does not fulfil the terms of that part of the proviso. Can they be said to be "the owner or owners for the time being of the said yearly rent-charge hereby made?" The rent-charge itself is no longer payable; the right entitling them to it has become extinguished and no arrears can be recovered. In what sense are they "the owner or owners for the time being of the said yearly rent-charge"? Once you accept the view, and it is incontestable, that the right and title has been extinguished, that the arrears are irrecoverable, the rent-charge has passed into the limbo of history and there is no owner of the rent-charge, certainly no owner for the time being of the rent-charge. Therefore, this proviso, which it is attempted to use in the way I have already indicated, is one which the plaintiff, his heirs, executors, administrators, and assigns, cannot fulfil, because they are not "the owner or owners for the time being of the yearly rent-charge."

That being so, all the structure of the argument which has been addressed to EVE, J., and to us in favour of the plaintiff fails. The plaintiff and his heirs, executors, administrators and assigns are not, and cannot be, identified as the persons who are the owner or owners for the time being of the said yearly rent-charge, which is no longer in existence, and the arrears of which are no longer recoverable.

This seems to be a definite and vital point. The many questions which might arise on the construction of s. 3 of the Act of 1833 need not be inquired into. It is on this ground that the whole structure of the argument for the plaintiff rests. We are unable to agree with the construction placed by EVE, J., on the deed of June 7, 1912, and the result is that we find there was not a right which the plaintiff could exercise. Accordingly the appeal must be allowed with costs here and below.

LAWRENCE, L.J.—Counsel for the plaintiff admitted that the rent-charge created by the deed of June 7, 1912, was extinguished in the year 1925 by virtue of s. 34 of the Real Property Limitation Act, 1833, no payment having been made in respect thereof since it was created. He also admitted that the extinction of the rent-charge involves the extinction of the right to recover any arrears. Notwithstanding these admissions, however, counsel contended that the power of re-entry contained in the deed of June 7, 1912, was not barred at the date of the issue of the writ on May 13, 1932. That somewhat startling contention was based on the proposition that the power of re-entry in default of payment of the rent-charge contained in the deed operated as a common law condition of the grant, and, therefore, the purchasers under the deed took the estate granted to them upon a condition, with the result that their estate was defeasible if the condition of payment of the rent-charge were not fulfilled. Counsel relied on the distinction between such a power of re-entry and the power conferred by s. 44 of the Conveyancing Act, 1881 (which was then in force), to enter into possession and hold the land charged and take the income thereof until thereby the rent-charge and all arrears were fully paid, the latter condition being one which was annexed to the rent-charge and would be extinguished with the rent-charge, the former being a condition not annexed to the rent-charge which would survive even although the rent-charge were extinguished. In my opinion we have not got to decide that question, interesting though it may be.

The short and conclusive answer to the claim by the plaintiff in this action, in my judgment, is that on the true construction of the deed of June 7, 1912, the power of re-entry is given to the vendor, his heirs, executors, administrators, and assigns, solely in the character of "owner or owners for the time being of the rent-charge," and, the rent-charge having been extinguished, the plaintiff does not fulfil the description of the "owner for the time being of the rent-charge."

On that short ground, I agree that this appeal succeeds and ought to be allowed with costs.

ROMER, L.J.—In my opinion, according to the true construction of the deed with which we have to deal in this case, the plaintiff is not entitled to enforce the right of re-entry given to him by that deed unless he is in a position to assert at the time that he seeks to enforce that right that he is the owner of the rent-charge which was thereby created. It is clear, and, indeed, is conceded on the part of the plaintiff, that on March 26, 1925, the rent-charge ceased to exist; that is to say, the plaintiff's title to the whole rent-charge became extinguished. At that time, therefore, his right to enforce or recover any arrears of the rent-charge came to an end. As was mentioned by the Master of the Rolls, while the rent-charge was in existence arrears could be recovered up to six years, not more than six years being recoverable having regard to s. 42 of the Act. But when the rent-charge has not been paid for twelve years no arrears whatsoever are recoverable because the rent-charge has ceased to exist as from that date. That being so, it being impossible for the plaintiff to assert that at the date he issued the writ in this action he was the owner of the rent-charge, the action, in my opinion, necessarily fails, and on this ground I agree that the appeal should be allowed with the consequences that have been mentioned by the Master of the Rolls.

I do not think it necessary or desirable to express any view whatsoever upon the many other interesting points that have emerged in the course of the argument.

Appeal allowed.

Solicitors: *W. H. Speed & Co.*, for *Brooks, Davies & Co.*, Stockport; *A. Ferns & Co.*, Stockport.

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

A

Re LEE, BEHRENS & CO., LTD.

[Chancery Division (Eve, J.), February 16, 1932]

[Reported [1932] 2 Ch. 46; 101 L.J.Ch. 183; 147 L.T. 348; 48 T.L.R. 248; [1931] B. & C.R. 160]

B *Company—Pension—Annuity to widow of managing director—Need to prove benefit to company—Need to prove grant incidental to company's business—No sanction to grant by shareholders' meeting.*

By a resolution made on Jan. 27, 1928, by L. B. & Co. and S. L. B. & Co., Ltd., those companies agreed to execute a deed of covenant in favour of the widow of J. R. S., formerly a managing director of L. B. & Co., by which they undertook C to pay her an annuity of £500 as from Nov. 11, 1927. In 1931 L. B. & Co. went into voluntary liquidation and the widow lodged a proof for £8,000, the capital value of her annuity, which proof was rejected by the liquidator. A clause in L. B. & Co.'s memorandum of association gave the company power to provide for the welfare of the widows of persons formerly in the employment of the company.

Held: (i) assuming that there were no grounds for impugning the bona fides of D the directors or of the widow, there was no evidence by any one of them of either of the other two conditions necessary to the validity of the grant of the annuity, namely, that the course adopted was taken for the benefit, or to promote the prosperity, of the company, or that the assumption of so burdensome a liability was reasonably incidental to the carrying on of the company's business;

(ii) a managing director was not a servant of the company of which he was E managing director, and, therefore, the above-mentioned clause in the memorandum did not avail the widow;

(iii) sanction to the payment of the annuity had not been obtained at a duly convened meeting of the shareholders;

(iv) accordingly, the liquidator was right when he rejected the widow's proof.

Notes. As to the powers and duties of directors generally, see 6 Halsbury's Laws F (3rd Edn.) 293 et seq., and for cases see 9 Digest (Repl.) 558 et seq.

Cases referred to:

(1) *Henderson* v. *Bank of Australasia* (1888), 40 Ch.D. 170; 58 L.J.Ch. 197; 59 L.T. 856; 37 W.R. 332; 4 T.L.R. 734; 9 Digest (Repl.) 568, *3743*.

(2) *Hutton* v. *West Cork Rail. Co.* (1883), 23 Ch.D. 654; 52 L.J.Ch. 689; 49 L.T. 420; 31 W.R. 827, C.A.; 9 Digest (Repl.) 497, *3274*.

G (3) *Cyclists' Touring Club* v. *Hopkinson*, [1910] 1 Ch. 179; 79 L.J.Ch. 82; 101 L.T. 848; 26 T.L.R. 117; 54 Sol. Jo. 134; 17 Mans. 11; 8 Digest (Repl.) 662, *75*.

(4) *Wimbledon and Putney Commons Conservators* v. *Tuely*, [1931] 1 Ch. 190; 100 L.J.Ch. 77; 144 L.T. 310; 47 T.L.R. 17; 74 Sol. Jo. 819; 29 L.G.R. 78; Digest Supp.

(5) *Normandy* v. *Ind, Coope & Co., Ltd.*, [1908] 1 Ch. 84; 77 L.J.Ch. 82; 97 L.T. 872; H 24 T.L.R. 57; 15 Mans. 65; 9 Digest (Repl.) 568, *3744*.

(6) *Re G. Newman & Co.*, [1895] 1 Ch. 674; 64 L.J.Ch. 407; 72 L.T. 697; 43 W.R. 483; 11 T.L.R. 292; 39 Sol. Jo. 346; 2 Mans. 267; 12 R. 228, C.A.; 9 Digest (Repl.) 179, *1158*.

(7) *Re Stewart, Ex parte Pottinger* (1878), 8 Ch.D. 621; 47 L.J.Bcy. 43; 38 L.T. 432; 42 J.P. 743; 26 W.R. 648, C.A.; 4 Digest 485, *4358*.

I (8) *Stroud* v. *Royal Aquarium and Summer and Winter Garden Society, Ltd.* (1903), 89 L.T. 243; 9 Digest (Repl.) 179, *1160*.

(9) *Hampson* v. *Price's Patent Candle Co.* (1876), 45 L.J.Ch. 437; 34 L.T. 711; 24 W.R. 754; 10 Digest (Repl.) 1255, *8847*.

Adjourned Summons.

The facts appear in the judgment.

Manning, K.C., and *Christie*, for the applicant, referred to *Henderson* v. *Bank of Australasia* (1); *Hutton* v. *West Cork Rail. Co.* (2); *Cyclists' Touring Club* v. *Hopkinson* (3); *Wimbledon and Putney Commons Conservators* v. *Tuely* (4).

Mulligan, for the liquidator, referred to *Normandy* v. *Ind, Coope & Co., Ltd.* (5); *Re G. Newman & Co.* (6); *Cyclists' Touring Club* v. *Hopkinson* (3); *Re Stewart, Ex parte Pottinger* (7); *Stroud* v. *Royal Aquarium, &c., Society, Ltd.* (8) and *Hampson* v. *Price's Patent Candle Co.* (9). A

EVE, J.—Lee Behrens & Co., Ltd. (hereinafter referred to as "the company"), was incorporated in January, 1909, and went into voluntary liquidation on March 10, 1931. B

The applicant, Mrs. Gertrude Elizabeth Southerden, lodged a proof in the winding-up for the sum of £8,000, the capitalised value of an annuity of £500 per annum, alleged to be payable to her by virtue of a deed of covenant dated June 29, 1928, and on Nov. 3, 1931, the liquidator rejected the claim on the grounds (i) that the contract to pay the annuity was ultra vires of the company and void; (ii) alternatively, that the contract could only be authorised by a meeting of the shareholders duly convened for that purpose, C and there was no such meeting convened or held; and (iii) that the annuity was a mere gratuity which it was ultra vires of the company to pay otherwise than out of profits, and that since June, 1928, there had not been and there never would be any profits out of which to pay it. The company was insolvent. By the present summons the applicant seeks to have the decision of the liquidator reviewed, and her claim admitted. D

The company was a private one closely associated with another private company known as S. L. Behrens & Co., Ltd., and for some years the applicant's husband, the late Mr. J. R. Southerden, acted as managing director of the company. He died on Sept. 23, 1923, and at a board meeting held on Oct. 24, whereat were present Mr. G. B. and Mr. N. E. Behrens, a resolution was passed placing on record their great regret at the loss they had sustained by the death of Mr. Southerden, "who rendered invaluable services to the company during the many years he was associated with it." E On March 19, 1924, a resolution was passed by the board agreeing the commission due to the deceased to the date of his death at £533 9s. 1d. Nothing further relating to Mr. Southerden or the applicant is to be found in the minute book until June 29, 1928, when there was a meeting of the board, whereat it was resolved that three documents received from Messrs. W. W. Young, Son and Ward relative to the estate of J. R. Southerden F be executed. The three documents were an agreement, a release and indemnity and a deed of covenant. It is not necessary to examine the first two of these documents in any detail. They relate to the administration of Southerden's estate, and it appears from them at the time of his decease he was indebted to the company to a considerable amount, and that after his death the company made large payments to his widow of a voluntary and benevolent character. G By the third of the three deeds, made between the company and S. L. Behrens & Co., Ltd. (thereafter together referred to as "the two companies"), of the one part, and the applicant, of the other part, the two companies, in consideration of the services rendered by the husband of the applicant during his life to the two companies, or one of them, thereby jointly and severally covenanted with the applicant that the two companies would pay to her during her life by quarterly payments an annuity of £500 calculated from Nov. 11, 1927, and it was thereby provided H that, although as between the applicant and the two companies such companies were jointly liable as principals for the payment of the said annuity, as between such other parties Lee, Behrens & Co. was principally liable and S. L. Behrens & Co. was to be a surety only.

It is not contended, nor in the face of a number of authorities to the contrary effect could it be, that an arrangement of this nature for rewarding long and faithful service I on the part of persons employed by the company is not within the power of an ordinary trading company such as this company was, and, indeed, in the company's memorandum of association is contained (cl. 3) an express power to provide for the welfare of persons in the employment of the company or formerly in its employment, and the widows and children of such persons and others dependent upon them by granting money or pensions, providing schools, reading rooms, or places of recreation, subscribing to sick or benefit clubs or societies or otherwise as the company may think fit. But, whether they may be made under an express or implied power, all such grants involve an expenditure of

A the company's money, and that money can only be spent for purposes reasonably incidental to the carrying on of the company's business, and the validity of such grants is to be tested as is shown in all the authorities by the answers to three pertinent questions: (i) Is the transaction reasonably incidental to the carrying on of the company's business? (ii) Is it a bona fide transaction? and (iii) Is it done for the benefit and to promote the prosperity of the company? Authority for each of the foregoing proposi-
B tions is to be found in the following cases: *Hampson* v. *Price's Patent Candle Co.* (9), *Hutton* v. *West Cork Rail. Co.* (2), and *Henderson* v. *Bank of Australasia* (1).

In the present case the court is left entirely without any material for determining whether the transaction was characterised by any of these several attributes. Assuming, as I am quite prepared to do, that there are no grounds for impugning the bona fides of the board or the applicant, no one of them has given evidence to suggest that the
C course adopted was taken for the benefit or to promote the prosperity of the company, or that the execution of the deed of covenant and the assumption of so burdensome a liability was reasonably incidental to the carrying on of the company's business. All that I have in the way of evidence are affidavits proving the death of Southerden and probate of his will, verifying the memorandum and articles and the minute book of the company, the three deeds executed on June 29, 1928, and the certificate of the applicant's
D birth. Neither of the two directors who authorised the sealing of the deeds has made any affidavit, and the only material paragraphs in the applicant's affidavit are where she says:

> "(ii) My late husband was for many years prior to his death managing director of the company. (iii) After the decease of my said husband considerable negotiations took
> E place between me and the directors of the company and S. L. Behrens, Ltd., with a view to providing me with a pension, and eventually it was agreed that the company and S. L. Behrens, Ltd., and myself should enter into a deed of covenant under which the company and S. L. Behrens, Ltd., were to jointly and severally pay me an annuity of £500."

The conclusion to which, in my opinion, such evidence as is available irresistibly
F points is that the predominant, if not the only, considerations operating in the minds of the directors were a desire to provide for the applicant, and that the question what, if any, benefit would accrue to the company never presented itself to their minds.

If there were nothing more in the case than what I have just indicated, I should feel myself bound in the circumstances to support the liquidator's rejection of the applicant's proof. But there is another and, perhaps, more insurmountable difficulty with
G which she is faced, and it is that this annuity is a gift or reward given out of the company's assets by the directors to one of their own body, and this is something they cannot do unless authorised by the instrument which regulates the company or by the shareholders at a properly convened meeting—that is, a meeting convened by a notice disclosing the intention to make the proposal. The authority for this proposition is of *Re George Newman & Co., Ltd.* (6). The paragraph in the company's memo-
H randum, which has been referred to, does not assist the plaintiff, for "a director is not a servant of the company"; per Bowen, L.J., in *Hutton* v. *West Cork Rail. Co.* (2) (23 Ch.D. at p. 672); nor is any managing or other director a person in the employment of the company: *Normandy* v. *Ind, Coope & Co., Ltd.* (5). The alternative of getting authority from the shareholders at a meeting duly convened for the purpose was never thought of, or, if thought of, was dismissed as superfluous inasmuch as the shares were
I in the hands of so few, and, so far as was known, nobody was likely to object. It was the same in *Newman's Case* (6), but Lord Lindley, in giving judgment on behalf of Lord Halsbury, A. L. Smith, L.J., and himself, disposed of this point in the following terms ([1895] 1 Ch. at p. 686):

> "Even if the shareholders in general meeting could have sanctioned the making of these presents, no general meeting to consider the subject was ever held. It may be true, and probably is true, that a meeting, if held, would have done anything which Mr. George Newman desired, but this is pure speculation, and the liquidator, as representing the company in its corporate capacity, is entitled to insist upon and

> to have the benefit of the fact that even if a general meeting could have sanctioned what was done such sanction was never obtained. Individual assents given separately may preclude those who give them from complaining of what they have sanctioned, but for the purpose of binding a company in its corporate capacity individual assents given separately are not equivalent to the assent of a meeting. The company is entitled to the protection afforded by a duly convened meeting, and by a resolution properly considered and carried and duly recorded."

All of which is peculiarly appropriate to the present case.

In my opinion, the rejection of this proof by the liquidator was quite right, and I must, therefore, dismiss this summons with costs.

Solicitors: *Billinghurst, Wood, & Pope*; *W. W. Young, Son, & Ward.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re WILLIAM C. LEITCH BROS., LTD. (No. 1)

[CHANCERY DIVISION (Maugham, J.), April 5, 6, 7, 8, 1932]

[Reported [1932] 2 Ch. 71; 101 L.J.Ch. 380; 148 L.T. 106]

Company—Winding-up—Fraudulent trading—Debts incurred by company when no reasonable prospect of payment—Declaration against director of personal liability—Definite amount—Limitation—Distribution among creditors—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 275 (1).

By s. 275 (1) of the Companies Act, 1929: "If in the course of the winding-up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company . . . the court . . . may, if it thinks proper to do so, declare that any of the directors . . . of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally liable without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct." By s. 275 (6) such a declaration is to be deemed a final judgment within the meaning of s. 1 (1) (g) of the Bankruptcy Act, 1914.

If a company continues to carry on business and to incur debts at a time where there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business "with intent to defraud" within the meaning of s. 275 (1).

The subsection contemplates that a declaration against a guilty director shall be for a definite amount. It is in the discretion of the court to make an order without limiting it to the amount of the debts of those creditors proved to have been defrauded by the acts of the director in question, though, no doubt, the order would in general be so limited.

In the circumstances of the present case the court made a declaration that the director was personally liable in respect of the sum of £6,000, a part of the debts or other liabilities of the company, the director's liability under the declaration being a charge on a debenture issued by the company and held by him. It would be left to a further application to determine the persons who were to have the benefit of anything that might be recovered as a result of the declaration (see post, p. 897).

Notes. Section 275 (1) of the Companies Act, 1929, has been replaced by s. 332 (1) of the Companies Act, 1948, and s. 275 (2), s. 275 (6), and s. 276 (3) of the earlier Act

A by s. 332 (2), s. 332 (4), and s. 333 (3) of the later Act respectively. The words "any person" and "any such person" in s. 332 (1) and (2) have been substituted for "any of the directors" and "any such director" in s. 275 (1) and (2).

Referred to: *Re Patrick and Lyon, Ltd.*, [1933] All E.R.Rep. 590.

As to offences before or in the course of a winding-up, see 6 HALSBURY'S LAWS (3rd Edn.) 703 et seq., and for cases see 10 DIGEST (Repl.) 943 et seq. For Companies Act, B 1948, see 3 HALSBURY'S STATUTES (2nd Edn.) 452.

Cases referred to:

(1) *R.* v. *Thompson* (1910), 5 Cr. App. Rep. 9, C.C.A.; 15 Digest (Repl.) 1196, *12153*.

(2) *R.* v. *Brownlow* (1910), 74 J.P. 240; 26 T.L.R. 345; 4 Cr. App. Rep. 131, C.C.A.; 14 Digest (Repl.) 652, *6632*.

C (3) *Re Cohen, Ex parte Trustee*, [1924] 2 Ch. 515; 94 L.J.Ch. 73; [1924] B. & C.R. 143; sub nom. *Re Cohen, Ex parte Trustee* v. *W. R. Snow & Co.*, 69 Sol. Jo. 35, C.A.; Digest Supp.

(4) *Re G. Stanley & Co.*, [1925] Ch. 148; 94 L.J.Ch. 187; 133 L.T. 37; 69 Sol. Jo. 36; [1925] B. & C.R. 1; 10 Digest (Repl.) 1032, *7138*.

Adjourned Summons.

D The company, William C. Leitch Bros., Ltd., was incorporated, on Dec. 19, 1926, to acquire the business of a perambulator and furniture manufacturer and merchant, carried on at four addresses in Manchester by the respondent, William Cleghorn Leith. By the agreement for the sale of the business to the company, dated Jan. 13, 1927, it was provided that in consideration of the sale the company should pay the respondent £5,000, to be satisfied by the allotment to him or his nominees of 1,000 fully-paid £1 E ordinary shares in the capital of the company and by the issue to him of a debenture for £4,000, bearing interest at 6 per cent. per annum, secured by a charge on all the property of the company both present and future, including uncalled capital, and should take over the debts and liabilities of the respondent's business which amounted to £769 11s. 4d. Further, by the articles of association of the company it was provided that the respondent should be the first governing director of the company, with power to F fix his own remuneration and to appoint other directors.

On Jan. 15, 1927, the company issued the debenture to the respondent. The alleged value on Sept. 30, 1926, of the assets of the respondent's business sold to the company, as shown by a balance sheet made up from the respondent's books, was £3,964 2s. 1d., excluding goodwill, in respect of which there was no entry. Some of the premises remained vested in the respondent after completion of the sale. After the formation G of the company the directors—the respondent and his brother—appointed the respondent managing director at a salary of £1,000 a year. Subsequently, the company was debited with the sum of £1,000 by way of salary from Sept. 30, 1926, to March 31, 1927—the first six months of the company's existence—an amount £500 in excess of that due to the respondent in respect of that period. During that period the company made a net loss of £2,550 14s. 9d., but it made a profit of £677 during the year ended on H March 31, 1928. During the following year there was a loss of £215, and from March 31, 1929, to May 9, 1930, there was a further loss of £1,057. As directors, the respondent and his brother purported to pay to a preference shareholder by way of dividend from Jan. 15, 1927, to March 1, 1928, the sum of £21 2s., and also a further sum of £250 8s., by way of dividend for the year ended on March 31, 1928, upon ordinary shares which had been allotted to themselves. The company was financially embarrassed during I 1929, and by March, 1930, it was unable to pay its debts as they became due. On March 1, 1930, the company, to the knowledge of the respondent, owed about £6,500 for goods which had been supplied to it, and had no means of paying. After March 1, 1930, the respondent ordered goods to an amount of about £6,000, and these goods became subject to the charge contained in the debenture held by him. The respondent had lent to the company, on June 20, 1929, the sum of £600, of which £100 was repaid on Dec. 6, 1929, £100 on Jan. 2, 1930, £150, on March 10, 1930, and £150 on April 1, 1930. The creditors of the company issued seven writs between April 5 and May 5, 1930. As debenture holder, the respondent, on May 9, 1930, appointed a receiver on

the ground that interest on the debenture had not been paid, and the receiver appointed A
the respondent to be manager of the business. The respondent had opened a shop in his wife's name at Glasgow, and he removed to that shop £260 worth of goods from the shops he managed for the receiver; and collected debts due to the company to the amount of £1,300, which he kept on account of interest due to him under the debenture, and subsequently gave receipts therefor to the receiver. The receiver dismissed the respondent from the position of manager. B

On April 4, 1930, an account which the company had with the Midland Bank, Ltd., was overdrawn to the amount of £800 10s. The bank had originally allowed the overdraft for the amount of £600 on a guarantee by the respondent; but the overdraft had been increased, and was secured by the respondent's guarantee and also by the deposit of title deeds. Repayment of the overdraft to the extent of £684 6s. 8d. was made between April 10 and June 5, 1930. The respondent, during the period from the C
beginning of January, 1930, to the end of May, 1930, had ordered goods greatly in excess of what was required for the business of the company, and also of what had been generally ordered for the company over a like period. At a statutory meeting of creditors held on June 5, 1930, a resolution was passed for the compulsory winding-up of the company. On June 23, 1930, an order was made by the court accordingly. By the present summons the liquidator sought a declaration that the respondent, having D
been knowingly a party to the carrying on of the company's business with intent to defraud creditors, was personally liable for all the company's debts or other liabilities, without any limitation of liability, and that his liability might be made a charge on his debenture, on the ground that the ordering of goods for which the company could not pay constituted fraud on the company's creditors; that the respondent was liable to contribute to the company's assets £500, as compensation for misfeasance in accepting E
for remuneration during the first six months of the existence of the company £1,000 instead of £500 to which alone he was entitled; £21 2s. and £250 8s. as compensation for misfeasance in paying those sums out of the company's capital; £300 as compensation for misfeasance in fraudulently preferring himself by repaying to himself £150 on March 10, 1930, and £150 on April 1, 1930, after the company had become unable to pay its debts as they became due; and £684 6s. 8d. as compensation for misfeasance in F
fraudulently preferring himself and the Midland Bank, Ltd., by paying off the company's overdraft at that bank, which he had guaranteed, when the company had become unable to pay its debts as they became due; and that the respondent might be ordered to pay to him, within four days of the service on the respondent of the order to be made on the summons, the sums of £271 10s., £300, and £684 6s. 8d., with interest at 5 per cent. per annum from the dates on which the respective acts of misfeasance were G
committed. The claim for £271 10s., paid as dividend, was admitted to be in excess of the sum paid out of the assets of the company and was reduced to £154. The Companies Act, 1929, provides:

> "Section 275 (1). If in the course of the winding-up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, the court H
> on the application of the Official Receiver or the liquidator or any creditor or contributory of the company may if it thinks proper to do so declare that any of the directors, whether past or present, of the company who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct." I

By sub-s. (6) where such a declaration is made it shall be deemed to be a final judgment within the meaning of s. 1 (1) (g) of the Bankruptcy Act, 1914.

Cyril Atkinson, K.C., and *I. Bennett*, for the liquidator, referred to *R.* v. *Thompson* (1) and *R.* v. *Brownlow* (2); *Re Cohen* (3) and *Re Stanley* (4).

Lustgarten for the respondent.

MAUGHAM, J. [after stating the facts, continued:] The conclusion of fact to which I am bound to come is that, at any rate, from March 1, 1930, the company was carrying on business with intent to defraud creditors, to the knowledge, and, indeed, under the direction of the respondent. That leads me to the question of the true construction of s. 275 of the Companies Act, 1929, a question of great difficulty. In my opinion, I must hold with regard to the meaning of the phrase carrying on business "with intent to defraud creditors" that, if a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment of those debts, it is in general a proper inference that the company is carrying on business with intent to defraud. As I have intimated, I am satisfied that the respondent knew what the position was from March 1, 1930; and I hold further, that the respondent deliberately went on trading in the name of the company in order, as he hoped, to safeguard his own position, and without any regard to the interests of the creditors.

Then arises the question: What is the result of that finding under s. 275 of the Companies Act, 1929? [His Lordship read sub-s. (1), and continued:] That seems to leave the declaration, so far as the amount is concerned, simply a matter of discretion for the court; but if the declaration is made in reference to a fixed amount, is that amount to be apportioned among the creditors who have been defrauded, or does it go to swell the general assets available in the liquidation? A number of other difficulties arise on the construction of the subsection, namely, whether the declaration of the court must be in respect of a particular sum or may be in general terms. A declaration that the director in question is personally liable for all the debts of the company, after, e.g., March 1, 1930, would be almost useless in the case of an ordinary liquidation, because it is ordinarily impossible, except at a late stage of the liquidation, to state who are the creditors to whom the debts are due, and what are the amounts due to them. It will be noted that the debts are not proved on the hearing of the originating summons, and in many cases—without saying that it is so in every case—it is exceedingly difficult for the court to ascertain, on the hearing of the summons, who are the creditors of the company who have been defrauded within the meaning of the section. Further than that, it seems to me that s. 275 (6) requires the declaration to be in relation to a definite amount, since it provides that

> ". . . where the declaration . . . is made in the case of a winding-up in England, the declaration shall be deemed to be a final judgment within the meaning of s. 1 (1) (g) of the Bankruptcy Act, 1914."

Those words agree closely with the words in s. 276 (3) of the Act, where I find the sentence:

> "Where in the case of a winding-up in England an order for payment of money is made under this section, the order shall be deemed to be a final judgment within the meaning of s. 1 (1) (g) of the Bankruptcy Act, 1914."

The opening words of s. 1 (1) of the Bankruptcy Act, 1914, are: "A debtor commits an act of bankruptcy in each of the following cases," and by para. (g) of that subsection, a debtor commits an act of bankruptcy

> "if a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter-claim set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained. . . ."

That clearly contemplates a judgment or an order for an ascertained sum, and, to my mind, the legislature, under s. 275, must be contemplating also that there shall be a declaration against the guilty director for a definite amount.

I do not think that it is open to me now to decide whether the amount of so many pounds, if recovered from the respondent, must be distributed by the liquidator among the creditors who have been defrauded, or whether it goes into the general assets in the liquidation, but, as I have indicated, I must, I think, fix an amount for which, under the declaration, the respondent is personally liable. Section 275 (2) of the Companies Act, 1929, is as follows:

> "Where the court makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any such director under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any company or person on his behalf, or any person claiming as assignee from or through the director, company or person, and may from time to time make such further order as may be necessary for the purpose of enforcing any charge imposed under this subsection. For the purpose of this subsection, the expression 'assignee' includes any person to whom or in whose favour, by the directions of the director, the debt, obligation, mortgage or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration (not including consideration by way of marriage) given in good faith and without notice of any of the matters on the ground of which the declaration is made."

That is an elaborate provision, and the definition of "assignee" is curious. I am inclined to the view that s. 275 is in the nature of a punitive provision, and that where the court makes such a declaration in relation to "all or any of the debts or other liabilities of the company," it is in the discretion of the court to make an order without limiting the order to the amount of the debts of those creditors proved to have been defrauded by those acts of the director in question, though, no doubt, the order would in general be so limited.

On the whole, in the circumstances of the present case, I think that I shall be doing justice by making a declaration that the respondent is personally liable (without any limitation of liability) in respect of the sum of £6,000, being a part of the debts or other liabilities of the company, and I shall leave it to some further application to determine the persons who are to have the benefit of anything that may be recovered as a result of that declaration. I shall also make a declaration that the respondent's liability as a director under that declaration is to be a charge upon the debenture which, I understand, is still held by him. As to the claims for misfeasance an order was made that the respondent should pay to the liquidator £260, the amount of the goods which he removed while acting as manager for the receiver; £1,300, the amount which he received while so acting; also the sums of £500, £300, £684 6s. 8d., and £154 respectively, with interest thereon, as claimed by the summons.

Solicitors: *Bernard Kuit & Co.*, Manchester; *Harry Finklestone*, Manchester.

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

Re WILLIAM C. LEITCH BROS., LTD. (No. 2)

[Chancery Division (Eve, J.), November 24, 1932]

[Reported [1933] Ch. 261; 102 L.J.Ch. 81; 148 L.T. 108;
49 T.L.R. 74; 76 Sol. Jo. 888; [1933] B. & C.R. 31]

Company—Fraudulent trading—Declaration against director of personal liability—Application of moneys resulting in hands of liquidator—Distribution pari passu among creditors generally—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 275 (1).

On April 8, 1932, Maugham, J., made a declaration under s. 275 (1) of the Companies Act, 1929 (now s. 332 (1) of the Companies Act, 1948), that a director of a company was personally liable in respect of the sum of £6,000, a part of the debts or other liabilities of the company, on the ground that, to his knowledge, the business of the company had been carried on with intent to defraud creditors of the company. On a summons by the liquidator for directions as to the application of any moneys coming to his hands in respect of this £6,000,

Held: s. 275 (1) of the Act of 1929 did not regulate the procedure of a winding-up or the administration of the assets of a company, but was directed solely to the offence of fraudulent trading and to attaching personal responsibility therefor to directors who knowingly had been parties thereto; it imposed a liability on such a director, but it did not purport to create any new rights for the creditors; and, therefore, it could not be regarded as involving any departure from the general scheme of all modes of winding-up, i.e., a pari passu distribution of the assets, and all moneys received by the liquidator under the declaration of April 8 must be dealt with by him as general assets and applied accordingly and not applied exclusively for creditors with whom debts were contracted during the period when the business was being carried on with intent to defraud.

Notes. See notes ante, p. 892.

Referred to: *Re Patrick and Lyon, Ltd.*, [1933] All E.R.Rep. 590.

Case referred to:

(1) *Webb* v. *Whiffin* (1872] L.R. 5 H.L. 711; 42 L.J.Ch. 161, H.L.; 10 Digest (Repl.) 930, *6367*.

Summons for directions by the liquidator.

J. Bennett for the liquidator.

R. A. Forrester and *A. Walmsley* for different classes of creditors.

EVE, J.—This is an application by the liquidator of William C. Leitch, Bros., Ltd., for directions as to the application of any moneys coming to his hands in respect of a sum of £6,000, for which he recovered judgment against the respondent, William Cleghorn Leitch, on April 8, 1932. See ante, p. 896. The judgment was founded on a declaration made under s. 275 of the Companies Act, 1929, that the respondent, a director of the company, having been knowingly a party to the carrying on of the business of the company with intent to defraud the creditors of the company, was personally liable, without any limitation of liability in respect of the sum of £6,000, being a part of the debts or other liabilities of the company, and it was thereby ordered that the respondent should, within four days' service upon him of that order pay to the applicant as liquidator of the company the sum of £6,000. It was further declared that the liability of the respondent for the said sum of £6,000 under the declaration therein contained was a charge upon a debenture of £4,000 and interest at 6 per cent. per annum given by the company to the respondent on Jan. 15, 1927, and upon all principal moneys due and owing upon the security of the said debenture, but such charge was to be without prejudice to the rights of creditors or classes of creditors inter se in the division of the moneys recovered under that order from the respondent or from the said charge upon the said debenture. And it was ordered that the applicant as such liquidator should deal with the said sum of £6,000 or such part thereof as he might recover in such manner as he might be ordered by the court. The company was incorporated in

December, 1926, and in June, 1930, it was ordered to be wound-up compulsorily on A
a petition presented on May 21, 1930. The respondent was a director of the company
throughout, and, after a trial which lasted the greater part of four days, my brother
Maugham found as a fact that during the months from March 1, 1930, the
company was carrying on business with intent to defraud the creditors, and that it
was so carrying on that business to the knowledge, and, indeed, under the direction of,
the respondent. He, accordingly, made the order I have stated, and the liquidator, B
having recovered some £3,356 on account of the £6,000, now requires directions as to
how he ought to deal with the moneys in hand and anything further he may recover.

The substantial question is whether they form part of the general assets of the company
available for all the creditors, or whether they ought to be exclusively applied for
any restricted class of creditors, and in particular for creditors with whom debts were
contracted during the period when the business was being carried on with intent to C
defraud. Representative creditors with whom debts were contracted before and after
March 1, 1930, have been made respondents to this application, and have appeared
and supported their respective contentions. On behalf of the latter, it has been urged
that, whereas the creditors prior to the fraudulent trading took a fair commercial risk
in giving credit to the company, those who executed orders after March 1, 1930, were
ex hypothesi defrauded of their money, and that, according to its true construction, D
this order ought to be treated as one adjusting the rights of these two classes of creditors
inter se; that the effect of the declaration is to make the fraudulent director indemnify
the company against an indebtedness to the amount of the declaration and to create a
direct liability for a similar amount between him and the defrauded creditors. In
support of this contention reliance is placed on the fact that any creditor of the company
may apply for the declaration, but there is nothing in this, for a contributory may E
also apply; but in both cases the making of any declaration would leave the applicant
a trustee for the company, or for an unascertained body of creditors. I do not think
the section can properly be construed as one for adjusting the rights of creditors inter se.
Such a construction involves too many difficulties, more particularly under sub-s. (2).

The section, no doubt, presents difficulties, but, in approaching its construction, it
is to be noted that it is one of a group of sections—271 to 277—dealing with offences F
antecedent to or in the course of winding-up. It can only be brought into operation
in the course of a winding-up, and in cases where there is primâ facie evidence of the
company's business having been carried on for fraudulent purposes. It is not a section
which regulates the procedure of an ordinary winding-up or controls the administration
of the assets of the company. It is directed solely to the particular offence of fraudulent
trading and to attaching personal responsibility therefor to directors who knowingly G
have been parties thereto. It imposes a liability, but does not purport to create any new
rights for the creditors. It cannot, in my opinion, be regarded as a section involving
any departure from the general scheme of all modes of winding-up (s. 156), that is to
say, a pari passu distribution of the assets. It may well be that the liability it imposes is
measured by the debts of the defrauded creditors. But this is not of itself a ground for
holding that the ordinary rules of equality are to be disregarded and a preference H
created in favour of the defrauded class. The position is, in my opinion, in all respects
analagous to that of the "B" contributories. Their liability to contribute is fixed by
the amount of indebtedness existing at the time when they respectively ceased to be
members, but their contributions are not applicable to the discharge of that indebtedness,
but form part of the general assets of the company for the payment of all the creditors:
Webb v. *Whiffin* (1). I

The conclusion I arrive at is that all moneys recovered by the liquidator under the
declaration of April 8 ought to be dealt with by the applicant as general assets and
applied accordingly.

Solicitors: *Bernard Kuit & Co.*, Manchester.

[*Reported by* A. W. Chaster, Esq., *Barrister-at-Law.*]

PROVINCIAL INSURANCE CO., LTD. *v.* MORGAN

[HOUSE OF LORDS (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Russell and Lord Wright), November 14, December 8, 1932]

[Reported [1933] A.C. 240; 102 L.J.K.B. 164; 148 L.T. 385; 49 T.L.R. 179; 38 Com. Cas. 92]

Insurance—Motor insurance—Proposal—Statement in proposal form that vehicle to be used for carriage of insured's coal—Vehicle also used to haul other person's timber—Condition of policy that statement "true, correct and complete"—Effect—Accident while carrying insured's coal—Liability of insurers.

A proposal form for the insurance of a motor lorry, contained the following requests: "State (a) the purposes (in full) for which the vehicle will be used; and (b) the nature of the goods to be carried." The applicants answered (a) "Delivery of coal"; (b) "coal." The insurers accepted the proposal, and issued a policy containing the following clause: "It is a condition precedent to any liability on the part of the company under this policy (i) that the terms, provisions, conditions, and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the proposal form are true, correct, and complete." One of the endorsements was under the heading "Endorsements and Use Clauses," "Transportation of own goods in connection with the insured's business." During the currency of the policy the motor lorry was used for the haulage of timber for the Forestry Commission. A collision occurred between the motor lorry and a motor car, resulting in damage covered by the risks insured against under the policy. At the time of the collision the lorry was carrying coal only, for delivery to the insured's customers, but earlier in the day, it had carried timber for the Forestry Commissioners. The company refused a claim under the policy on the ground that the use of the lorry for a purpose other than that of carrying the insured's coal was a breach of the above statement as to the purpose for which the lorry was to be used, and that, as these statements were made the basis of the contract, the risk had never attached.

Held: the insurers were liable to meet the claim because the statements in the proposal form as to the purposes for which the lorry was to be used, and the nature of the goods to be carried, were not warranties, but merely a description of the risk, and, therefore, there was no bargain so to confine the use of the vehicle to the cartage of goods as to make any occasional use that did not destroy the general purpose of its user a breach of the condition upon which the policy was based.

Dawsons, Ltd. v. *Bonnin* (1), [1922] A.C. 413, distinguished.

Per LORD BUCKMASTER (LORD BLANESBURGH and LORD WARRINGTON OF CLYFFE concurring): Neither the antecedent case of *Farr* v. *Motor Traders' Mutual Insurance Society, Ltd.* (2), [1920] 3 K.B. 669, nor the subsequent case of *Roberts* v. *Anglo-Saxon Insurance Association* (3) (1927), 96 L.J.K.B. 590, is affected by the decision in *Dawsons, Ltd.* v. *Bonnin* (1), [1922] 2 A.C. 413.

Per LORD WRIGHT (LORD WARRINGTON OF CLYFFE concurring): It would have been easy for the insurers to set out in plain terms in their policy that it was a condition of the insurance that the user of the vehicle should be restricted to delivery of coal in the insured's business of a coal merchant: they have not done so.

Notes. Considered: *Izzard* v. *Universal Insurance Co.*, [1936] 2 All E.R. 1565; *Beauchamp* v. *National Mutual Indemnity Insurance Co.*, [1937] 3 All E.R. 19. Referred to: *Piddington* v. *Co-operative Insurance Society*, [1934] All E.R. Rep. 773; *Bonham* v. *Zurich General Accident and Liability Insurance Co.*, [1944] 2 All E.R. 573.

As to the effect of answers in an insurance proposal form, see 22 HALSBURY'S LAWS (3rd Edn.) 200–201, and for cases on the subject, see 29 DIGEST 393–395, *3135–3142*; as to the construction of policies against the insurers, see 22 HALSBURY'S LAWS (3rd

Edn.) 214; as to when the description in the policy defines or limits the risk insured, A see ibid. 230; as to the effect of a temporary departure from the user described in the policy, see ibid. 234, and as to limitations as to use in policies of motor insurance, see ibid. 356, 357. For cases on these subjects, see 29 DIGEST 395 et seq., *3147* et seq.

Cases referred to:

(1) *Dawsons, Ltd.* v. *Bonnin*, [1922] 2 A.C. 413; 91 L.J.P.C. 210; 128 L.T. 1; 38 T.L.R. 836, H.L.; 29 Digest 309, *2553*. B

(2) *Farr* v. *Motor Traders' Mutual Insurance Society, Ltd.*, [1920] 3 K.B. 669; 90 L.J.K.B. 215; 123 L.T. 765; 36 T.L.R. 711, C.A.; 29 Digest 394, *3141*.

(3) *Roberts* v. *Anglo-Saxon Insurance Association* (1927), 96 L.J.K.B. 590; 137 L.T. 243; 43 T.L.R. 359, C.A.; Digest Supp.

(4) *Thomson* v. *Weems* (1884), 9 App. Cas. 671, H.L.; 29 Digest 36, *1*. C

(5) *Shaw* v. *Robberds* (1837), 6 Ad. & El. 75; 1 Nev. & P.K.B. 279; Will. Woll. & Dav. 94; 6 L.J.K.B. 106; 1 Jur. 6; 112 E.R. 29; 29 Digest 327, *2670*.

(6) *Anderson* v. *Fitzgerald* (1853), 4 H.L.Cas. 484; 21 L.T.O.S. 245; 17 Jur. 995; 10 E.R. 551, H.L.; 29 Digest 354, *2859*.

Appeal from an order of the Court of Appeal (SCRUTTON, LAWRENCE and SLESSER, L.JJ.), on a Special Case stated by an arbitrator. D

The claimants insured their motor lorry as a commercial vehicle with an insurance company. The proposal form contained the following questions and answers:

> "State (a) the purposes (in full) for which the vehicle will be used; and (b) the nature of the goods to be carried."

Answer (a) "Delivery of coal"; (b) "coal." Clause 6 of the policy issued by the insurers E provided:

> "It is a condition precedent to any liability on the part of the company under this policy (i) that the terms, provisions, conditions and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the proposal form are true, correct, and complete." F

One of the endorsements was under the heading "Endorsement and Use Clauses," "Transport of own goods." At a date subsequent to the issue of the policy the insured entered into a verbal contract with the Forestry Commissioners to haul timber, and the above-mentioned motor lorry was used for the purpose. This contract did not prevent the insured from using the lorry for delivery of coal. On Aug. 25, 1930, the lorry was G used till noon for delivery of coal. In the afternoon the insured had arranged to haul two loads of timber. At the time of hauling the second load of timber the insured had 5 cwt. of coal which they were going to deliver after delivering the timber. They were requested, however, to haul a third load. This they did, and having completed this task, proceeded to deliver the 5 cwt. of coal. The insured had delivered the 1 cwt. to one customer and 2 cwt. to another customer, and were on their way to deliver the H remainder to another customer, when the motor lorry came into collision with a motor car belonging to a third party, whereby both vehicles were damaged and certain persons were injured. The insurers denied liability on the ground that by cl. 6 of the policy the questions and answers in the proposal form amounted to a warranty that the motor lorry would be used for the carriage and delivery of coal and no other purpose. The arbitrator found that the collision occurred when coal was being delivered, and held I that the insured were entitled to be indemnified under the policy, but stated a Case for the opinion of the court.

The Court of Appeal held, affirming the decision of ROWLATT, J., that the statements in the proposal form as to the purposes for which the lorry was to be used, and the nature of the goods to be carried, were not warranties, but merely a description of the risk, and, therefore, the claim succeeded. In giving judgment, SCRUTTON, L.J., said: In many cases a question has arisen whether a particular answer made in a proposal form for a policy of insurance constituted a warranty that some act should or should not be performed during the whole period covered by the policy, so that if that promise or warranty were not kept, the policy should be void, or whether it was merely a description of the risk, so that if an accident happened within the risk so defined there was a valid claim and if an accident happened outside the risk so defined, there was no valid claim, the policy not being invalidated by the fact that during part of the period of its currency, something had occurred which was not within this description of risk. That is a well-defined species of dispute, and ROWLATT, J., has held in this case that he is bound by the decision in *Farr's Case* (2) by the Court of Appeal, affirming one of his own decisions, that the answers in the proposal form that the purposes for which the vehicle would be used were "the delivery of coal" and the nature of the goods to be carried was "coal" were merely a description of the risk, or that, as it appeared from the facts of this case that at the time of the accident the lorry was carrying coal, within the risk, the insurance company were liable. Much turns on the language used in each policy, and it is clear that the word "warranty" used by itself does not necessarily mean a promise, the breach of which avoids the policy. The case that is the most simple and obvious is that of a warranty free of particular average: that does not mean that if there is any partial loss to the ship, the whole policy is avoided. It merely describes the risk, in effect saying: "The only risk I am insuring is the risk of total loss, and I am not insuring the risk of partial loss." That is the most obvious example of a case where the word "warranty" does not mean a promise, the breach of which invalidates the contract. There are numerous cases in which this question may arise—for instance: "Warranted no St. Lawrence between Oct. 1 and March 25." If the ship is in the St. Lawrence on Oct. 2, but merges with no loss, and during the year's period of the time policy in July a loss happens, can the underwriters say: "You promised not to be in the St. Lawrence between Oct. 1 and March 25; you were within the St. Lawrence on Oct. 2. It is true that nothing then happened, and the fact of your then being in the St. Lawrence has had nothing to do with the loss, but we are entitled to say that the loss which happened to you outside the St. Lawrence in July on another voyage does not come within the policy."

The insurers appealed.

R. P. Croom-Johnson, K.C., and *H. J. Wallington* for the insurers.
W. Matabele Davies, for the insured, was not called on.

The House took time for consideration.

Dec. 8. The following opinions were read.

LORD BUCKMASTER.—The question on this appeal depends upon the true construction of a policy of insurance issued by the appellant insurers in favour of the respondent insured, insuring them against liability to the public for damage caused by the use of a motor vehicle. The insurance was consequent upon a proposal form which was signed by the insured in March, 1931. In that form there was a statement in the following words: State (a) the purposes in full for which the vehicle will be used, and (b) the nature of the goods to be carried. The answer was: (a) Delivery of coal; (b) coal. At the foot of the proposal form and above the insured's signature was a statement in the following words:

> "I hereby declare and warrant that the above questions are fully and truthfully answered, that I have not withheld or concealed any circumstance affecting in any way the proposed insurance, and that the vehicles described are in good condition. I agree that this declaration and the answers above given shall be the basis of the contract between me and the Provincial Insurance Co., Ltd., and I agree to accept a policy subject to the conditions prescribed by the company and expressed in the policy."

The policy which was subsequently issued referred to the proposal and declaration, which it was agreed should be deemed to be of a promissory nature and effect and should be the basis of the contract for the insurance thereby intended. The policy itself provided

that the indemnity should be subject to the exclusions and conditions therein set out, A
and one of those conditions was condition 6:

> "It is a condition precedent to any liability on the part of the company under this policy (i) that the terms, provisions, conditions and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the B
> proposal hereinbefore referred to are true, correct, and complete."

And one of the endorsements was, under the head "Endorsements and Use Clauses," "Transportation of own goods in connection with the insured business."

The insured in fact did use their car for hauling timber for the Forestry Commission in pursuance of a verbal contract to that effect, and had so used it on the day when C
an accident occurred. But the finding of fact is clear that the insured were engaged in the business of delivering coal when the accident arose, and it is not suggested that this was not in general terms the use to which the vehicle was put. The insurers have repudiated liability under the contract upon the ground that the use of the lorry for a purpose other than that of carrying coal was a breach of the statement as to the purpose for which the vehicle was to be used, and that as this was made the basis of the D
contract the risk has never attached.

Now it is old and well-known law that parties to an insurance contract are at liberty to contract upon the footing that any statement can be made the basis of the contract, and if the statement be inaccurate its materiality does not arise. In *Dawsons, Ltd.* v. *Bonnin* (1) ([1922] 2 A.C. at p. 421), LORD HALDANE said:

E

> "If the respondents can show that they contracted to get an accurate answer to the question, and to make the validity of the policy conditional on that answer being accurate, whether the answer was of material importance or not, the fulfilment of this contract is a condition of the appellants being able to recover."

He then continues in words which I think must have been overlooked in some of the F
other cases, for he says that the question which lies at the root of the matter is simply one of construction. From that it follows that, unless some other contract of insurance is couched either in identical terms or in terms the effect of which cannot be distinguished from those which were there considered, this authority, except so far as it shows that a contract as to future conduct can equally be made the basis of a contract with a statement of existing fact, does no more than apply well-established principles to a G
special state of facts. It is for that reason that I cannot see that either the antecedent case of *Farr* v. *Motor Traders' Mutual Insurance Society, Ltd.* (2) or the subsequent case of *Roberts* v. *Anglo-Saxon Insurance Association, Ltd.* (3), is affected by the decision. In each of those cases it was held that a description as to the use to which a vehicle was to be put was descriptive of the character of the risk rather than a warranty that that particular use and no other was the one to which the vehicle was confined, and this H
depended upon the meaning of the words in a particular document.

I entirely agree with SCRUTTON, L.J., when he says that neither the question in this case nor in the other cases arises in such a manner that it can be said that this House has decided it. Turning, therefore, back to the words in the present case, the question that arises is: Were these words intended to mean that the use of the vehicle was to be exclusively confined to that of carrying coal so that any temporary, trivial, and I
incidental use would completely defeat the policy, or was it not? I wish again to repeat that it is perfectly open to people to make such a bargain, and that when made it is useless to complain that the bargain is harsh. However, it is at least essential that the bargain should be plain in order that it may be clear that a man has contracted on the faith of something which may rob the insurance of the greater part of its value. It is said here that the insurance was at a lower rate because it was a coal cart, and that may be so, but that does not help the question on the one side or the other. To state in full the purposes for which the vehicle is to be used is not the same thing as to state

in full the purposes for which the vehicle will be exclusively used, and as a general description of the use of the vehicle it is not suggested that the answer was inaccurate.

I am therefore of opinion that there was no bargain here so to confine the use of the vehicle to the cartage of coals as to make any occasional use that did not destroy the general purpose of its user a breach of the condition on which the policy was based.

I think the judgment of the Court of Appeal was right, and the full explanation given by Scrutton, L.J., renders further elaboration unnecessary.

LORD BLANESBURGH.—My Lords, I am of the same opinion.

LORD WARRINGTON OF CLYFFE stated that he had read the opinions of Lord Buckmaster and Lord Wright and continued: I entirely concur with those opinions, and have nothing to add.

LORD RUSSELL.—It appears to me that the result of this appeal depends solely on the true construction of the documents.

There is no need for me to recapitulate the facts. It is sufficient to say that the appellant insurance company claim that the policy by its terms provides that if at any time during its currency the assured used the vehicle in question for any purpose other than the delivery of coal, or carried in it goods other than coal, no liability on the part of the insurance company would arise thereunder.

The foundation of this contention is as follows: The proposal form requires the proposer (among other things) to state (a) the purposes (in full) for which the vehicle will be used, and (b) the nature of the goods to be carried. The proposers stated (a) delivery of coal, (b) coal; and they signed a declaration that the questions were fully and truthfully answered. The policy refers to the proposal and declaration, which (it provides) shall be deemed to be of a promissory nature and effect and shall be the basis of the contract as if incorporated in the policy. One of the conditions endorsed on the policy runs thus:

> "6. It is a condition precedent to any liability on the part of the company under this policy: (i) that the terms, provisions, conditions, and endorsements hereof, so far as they relate to anything to be done or complied with by the insured, are duly and faithfully observed; and (ii) that the statements made and the answers given in the proposal hereinbefore referred to are true, correct, and complete."

It is contended by the insurers that the statement above referred to constituted a statement (a) that during the currency of the policy the vehicle would never be used for any purpose other than the delivery of coal, and (b) that during the currency of the policy coals, and coals only, would be carried in the vehicle. They then say that these statements are incorporated into the policy as contractual provisions relating to something to be done or complied with by the insured, the due and faithful observance of which is, under condition 6, a condition precedent to any liability on their part, and that the vehicle having in fact been used during the currency of the policy for the purpose of carrying timber no liability can attach to them. Alternatively, it was said that the answer given in the statement was not true, correct, or complete, because the vehicle had in fact subsequently carried timber, with the result of freedom from liability to the appellant insurance company under the second part of condition 6.

This argument, in my opinion, breaks down at the outset. I cannot read the above statements in the proposal form as being more than statements by the proposers of their intentions as to the user of the vehicle and the goods to be carried in it, and so as descriptive of the risk. If it had really been the intention of the insurers that the carrying of goods other than coal at any time should free them from liability in respect of an accident happening subsequently, it was incumbent on them to make that abundantly clear to the proposers. On the construction which I give to the statements there is no scope for the operation of condition 6 in favour of the insurers. It is not shown that there has been any failure of the insured to observe any provision relating to anything to be done or complied with by them, or that their answers were not true, correct, and complete.

A further point was raised, namely, that condition 6 freed the insurers from liability by reason of the presence in the policy immediately after the schedule of the following words: A

> "Endorsements and Use Clauses. Transportion of own goods in connection with insured's own business within stated."

It was said that this was an endorsement by which the insured contracted that only their "own goods" in connection with their coal business should be carried in the vehicle, and that the carriage of the timber was (within condition 6) a failure duly and faithfully to observe that endorsement, meaning, no doubt, a failure to comply with some obligation imposed by the endorsement. B

I have read the policy with this in view, but I have been unable to discover how or where any obligation is imposed on the insured by this endorsement. It may be that we have here some form of commercial shorthand which an expert could transcribe into a contractual obligation. I am unequal to the task. C

For myself, I think it is a matter of great regret that the printed forms which insurance companies prepare, and offer for acceptance and signature by the insuring public, should not state in clear and unambiguous terms the events upon the happening of which the insuring company will escape liability under the policy. The present case is a conspicuous example of an attempt to escape liability by placing upon words a meaning which, if intended by the insurance company, should have been put before the proposers in words admitting of no possible doubt. D

In the view which I take of this case it is unnecessary to refer to any of the authorities which were cited. I would dismiss this appeal, with costs.

LORD WRIGHT.—This appeal raises a question as to the true construction of a policy, dated April 8, 1931, issued by the insurers insuring the insured, as owners of a commercial motor vehicle, against loss of or damage to the vehicle, and also against third-party risks, for the period from April 4, 1930, to April 4, 1931. On Aug. 25, 1930, a collision occurred between the insured vehicle and a motor car belonging to third parties, in which both vehicles were damaged and certain persons sustained injuries. The insurers contested their liability and the dispute was referred to arbitration. The arbitrator found that the insured, who were coal merchants and who used the vehicle for the delivering of their coal, had, at a date subsequent to the issue of the policy, made occasional use of it to haul timber under a verbal contract made between them and the Forestry Commissioners, but not so as to prevent them from using the vehicle for the delivery of coal. On the day of the accident the insured were at the time of the accident actually engaged in the delivery of coal, though earlier that afternoon they had been hauling timber for the Forestry Commissioners; they had, however, ceased doing so before the accident. The insurers contended that before the accident the policy had been avoided by reason of the haulage of timber mentioned above. The arbitrator decided against that contention; his award in the form of a Special Case was upheld by ROWLATT, J., whose judgment was unanimously affirmed by the Court of Appeal; from their decision this appeal comes before your Lordships. E F G

The question turns entirely on the construction of the contract. The narrow issue is whether there was a warranty or condition of the policy that the vehicle should exclusively be used for delivery of coal by the insured and, as a minor issue, for delivery of the insured's own coal in connection with their business as coal merchants. The policy is in a form which has in its general scheme long been in use by insurance companies, though the general scheme has exhibited many variations, some major and some minor, in detail. In that scheme there is a proposal form, signed by the assured, containing various particulars and answers to various questions, and a declaration that the answers are to be the basis of the contract and an agreement to accept the company's policy. The policy itself contains a recital incorporating the proposal and declaration, and it sets out the risk insured, certain exceptions and conditions, and a schedule embodying various particulars. Though this general scheme of policy has been, as it were, sanctified by long usage, it has often been pointed out by judges that it must be very puzzling to the assured, who may find it difficult to fit the disjointed parts together in such a way as to get a true and complete conspectus of what their rights and duties are and H I what acts on their part may involve a forfeiture of the insurance. An assured may easily find himself deprived of the benefits of the policy because he has done something quite innocently but in breach of a condition, ascertainable only by the dovetailing of scattered portions. In the present policy the conditions which the insurers claim as limiting the user of the vehicle under the policy to the delivery of the insured's own coal in the course of their business are to be ascertained from the following matters:

1. An answer in the proposal to the following question:

> "(1) State (a) the purposes (in full) for which the vehicle will be used, and (b) the nature of the goods to be carried."

The answers were "(a) Delivery of coal; (b) coal."

2. The declaration signed by the insured in the following terms:

> "I hereby declare and warrant that the above questions are fully and truthfully answered. . . . I agree that this declaration and the answers given above shall be the basis of the contract between me and the company, and I agree to accept a policy, subject to the conditions prescribed by the company and expressed in the policy."

3. The recital in the policy incorporating the proposal and declaration "which it is agreed shall be of a promissory nature and effect and shall be the basis of the contract."

4. Condition 6, which is in the following terms:

> "It is a condition precedent to any liability on the part of the company under this policy (i) that the terms, conditions, and endorsements hereof so far as they relate to anything to be done or complied with by the insured are duly and faithfully observed; and (ii) that the statements made and answers given in the proposal hereinbefore referred to are true, correct, and complete."

5. The description of the insured's business in the schedule as coal merchants, read with the terms of the recital describing them as carrying on the business therein defined and no other, for the purpose of this insurance.

6. The words under a heading "Endorsements and Use Clauses." "Transportation of own goods in connection with the insured's business within stated."

Before examining these provisions in detail, certain principles laid down in the authorities may be referred to. It was decided by this House in *Dawsons, Ltd.* v. *Bonnin* (1) that words in a policy analogous to those in the present policy, stating that "the proposal shall be the basis of the contract and be held as incorporated therein," are words apt to convert answers to questions into conditions of the policy. The answer there in question was to the question, "State full address at which the vehicle will usually be garaged"; by a pure inadvertence a wrong address was given. Neither at the inception of the policy period, nor at any subsequent date, nor at the time of the loss, had the vehicle been garaged at that address. It was held by this House that the assured could not recover because the assured had broken the condition in the policy as to the usual place where the car was garaged. It was held that the incorporation of the answer into the contract as its basis constituted it a condition; it was not relevant to consider whether the matter of question and answer was or was not material. That decision involved an extension of the earlier judgment of this House in *Thomson* v. *Weems* (4), where the policy expressly provided that

> "if anything averred in the declaration . . . shall be untrue this policy shall be void. and all moneys received by the said company in respect thereof shall belong to the said company for their own benefit."

The later case held that the same effect resulted from the word "basis." On the other hand, it is clear law that in insurance a warranty or condition (because these words are used as equivalent in insurance law, which in that respect differs in its use of the terms from the law of sale of goods), though it must be strictly complied with, must be strictly, though reasonably, construed.

In the present case the insurers do not allege that there was any concealment or misrepresentation, nor do they complain of any of the other answers. The relevant answer, which I have quoted above, does, I think, refer to the future and is, in my opinion, of a promissory nature and is apt to create a warranty or condition. That leaves the essential problem as to what is the exact scope of this condition. The breach of condition alleged is not that the normal use of the vehicle was other than delivery of coal in the course of the insured business, but its occasional use for hauling the timber, as found by the arbitrator. There can, therefore, be no breach involved unless the relevant warranty or condition imports that the vehicle is to be used for delivery of coal and no other purpose; that is, that the vehicle during the currency of the policy is to be exclusively so used. In my judgment, on a fair construction of the material question and answer, this is not the true construction; accordingly, in my judgment, the insurers fail in their contention that a condition was broken so that the policy was not in force at the time of the accident. The position is not affected, as I think, by condition 6. The relevant answer is, according to my construction, true, correct, and complete: the vehicle was in fact used for the carriage of the insured's coal, whether the matter is regarded as at the date of the contract, at the date of the accident, or at the intervening dates; it is not suggested that the insured did not intend so to use it; hence the answer was true and correct, and complete because it gave all the information asked for; there was no question as to exclusive use; the words "in full" in the question, which the insurers rely on, are not sufficiently clear to carry the meaning of exclusive user. A B C D

The insurers further say that within condition 6 (1) there was a failure by the assured duly and faithfully to observe "the endorsements," which is said to be "Transportation of own goods." I should read these words as coming not under "Endorsements" but under "Use Clauses." But on any view the insurers' case breaks down there exactly for the same reason as on the material answer. In my judgment, this case is to be distinguished from *Dawsons, Ltd.* v. *Bonnin* (1) on the ground that in that case the condition was expressed in clear and unambiguous terms and was clearly broken, whereas the contrary is the fact here. The old authority of *Shaw* v. *Robberds* (5) affords some parallel to the present; in that case there was a fire policy insuring "a kiln for drying corn in use"; the kiln was used for drying corn, till one day during the policy period it was used, no doubt as a friendly act and not in the course of business, to dry bark from a vessel which had sunk near the kiln; in the process a fire occurred and the premises were burnt down; though the jury found that drying bark was a different business, more dangerous, and involving a higher premium of insurance than drying corn, the plaintiff succeeded. LORD DENMAN, C.J., said (6 Ad. & El. at p. 83): E F G

> "No clause in this policy amounts to an express warranty that nothing but corn should ever be dried in the kiln; and there are no facts, or rule of legal construction, from which an implied warranty can be raised."

These words seem to me mutatis mutandis to apply to the present case. H

The insurers could certainly, if they wished, have taken the right to treat the policy as avoided for any breach of warranty or condition, however trivial or immaterial, but to do so they must have used clear words. As LORD ST. LEONARDS said in *Anderson* v. *Fitzgerald* (6) (4 H.L.Cas. at p. 510):

> "A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which on the one hand the party assured can be caught or by which on the other the company can be cheated shall be found upon the face of it." I

If this policy were construed as involving that the insured could not enforce it because of what they did in hauling timber, I think they would be "caught." It would have been easy for the insurers to set out in plain terms on their policy that it was a condition of the insurance that the user of the vehicle should be restricted to delivery of coal in the assured's business of coal merchants; they have not done so.

This conclusion is sufficient to dispose of the appeal. But I must not be taken to dissent from the opinion of SCRUTTON, L.J., that the relevant question and answer are to be construed as defining or describing the risk covered by the policy.

Appeal dismissed.

Solicitors: *J. Murray Napier*, for *C. James Hardwicke & Co.*, Cardiff; *Collyer, Bristow & Co.*, for *D. Granville West*, Newbridge.

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WILLIAMS *v.* WILLIAMS

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merrivale, P., and Langton, J.), May 24, 1932]

Reported 147 L.T. 219; 96 J.P. 267; 76 Sol. Jo. 461; 30 L.G.R. 362; 29 Cox, C.C. 499]

Justices—Husband and wife—Desertion—Need of corroboration of complainant's evidence.

On an appeal against a maintenance order made by a metropolitan magistrate on the ground that the husband had deserted his wife, under which he was directed to pay her £2 a week, it was submitted that there was no corroboration of the wife's evidence as to desertion.

Held: the strict law of corroboration by independent evidence required under the ecclesiastical procedure in proceedings for desertion was not necessarily applicable in cases dealt with under the Summary Jurisdiction (Separation and Maintenance) Acts; nevertheless, to act on evidence unsupported by a body of facts would be dangerous in matters of the greatest consequence between man and wife; when one found that for seventeen years the husband had not lived with his wife, and had not maintained her, there were facts which, unless satisfactorily explained by the husband, established the wife's case.

Notes. As to the need of corroboration in matrimonial cases, see 12 HALSBURY'S LAWS (3rd Edn.) 246, 486, and cases there cited.

Cases referred to:

(1) *Lodge* v. *Lodge* (1890), 15 P.D. 159; 59 L.J.P. 84; 63 L.T. 467; 27 Digest (Repl.) 349, *2889.*

(2) *Forster* v. *Forster* (1910), 54 Sol. Jo. 403, D.C.; 27 Digest (Repl.) 733, *6998.*

(3) *Joseph* v. *Joseph*, [1915] P. 122; 84 L.J.P. 104; 112 L.T. 170; 78 J.P. 520, D.C.; 27 Digest (Repl.) 715, *6816.*

Appeal by the husband, John Williams, against a maintenance order made at West London police court on the ground of desertion.

The parties were married at Bangor in September, 1909. They separated in 1914 or 1915. In December, 1931, the husband, who had been a pedlar earning about £1 a week, came into some £6,000 on his father's death. Hearing of his inheritance in 1932, the wife took out a summons against him, alleging that he had deserted her in January, 1915. At the hearing the wife, in her evidence, said that it was a happy marriage till May, 1914. In that year her husband suggested that he could not keep her, and that she should seek work, and she obtained employment at Eastbourne, where she was living with her husband. On her mother's death in September, 1914, she went to Wales. Before she left her husband said that she was not to return. He himself went to his parents at Llandudno. She saw him there, and, in reply to her inquiry, he said he was not going to do anything for her. She had not seen nor heard from him since.

His father's estate was worth £14,000, and he was to receive half of it. Cross-examined, she admitted receiving a letter from her husband on March 8, 1932, saying that he wanted her to return to him, and to provide her with a home. She was not willing to return to him now. She denied that she stayed with him from January to March, 1915. The husband, in his evidence, said that he was willing to make a home for his wife. He had never been asked to do so and had never refused. His wife had stayed with him at his father's house in Wales between Christmas, 1914, and the middle of March, 1915. She then had a quarrel with his sister, and said to him: "You can stick to your people, and I'll stick to mine." Then she went away and he had not seen her since. He had not deserted her. On the contrary, she never showed any desire to go back to him. He had no occupation. Cross-examined, he said that he would receive in all about £6,000 under his father's will. He had not communicated with his wife during the previous sixteen years. He was under the impression that he was not wanted. At Eastbourne she worked as a waitress. He had no money and was ill at the time. He did not tell her, when she went to Wales, that she was not to return, as he could not keep her. Later, he did not tell her he would not keep her but her sisters could. The magistrate held that he had deserted his wife, and had not made a bona fide offer to take her back, and ordered him to pay her £2 a week.

The husband appealed against the order, on the grounds that the decision was against the weight of the evidence, there being no corroboration, and that the amount ordered was excessive.

Willis, K.C. (with him *G. Tyndale*), for the husband referred to *Lodge* v. *Lodge* (1); *Forster* v. *Forster* (2); and *Joseph* v. *Joseph* (3).

H. Durley Grazebrook for the wife.

LORD MERRIVALE, P.—Eighteen months ago the husband was travelling the country as a pedlar, and in the course of last year he succeeded to a substantial property under his father's will, worth several thousands of pounds. After he had entered into the partial enjoyment of his inheritance he was accused of desertion. His wife had got wind of his fortune through the newspapers, and by that means she became aware of his address, and she summoned him for desertion seventeen years ago. The magistrate found that there had been desertion, and it must be determined whether there was material on which he could properly come to the conclusion that the husband had deserted his wife in 1915. Counsel says that the only evidence of desertion is the uncorroborated evidence of the wife, which is seldom accepted. But is there such a strict rule of law? In that part of the divorce jurisdiction which is governed by s. 22 of the Matrimonial Causes Act, 1857, as reproduced in the Supreme Court of Judicature (Consolidation) Act, 1925 [see s. 32], relating to proceedings other than those for dissolution of marriage, the court must act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the ecclesiastical courts acted. That introduces into the divorce procedure the rules of the ecclesiastical law in regard to evidence in certain classes of cases. If this were a case within the ambit of that provision, the rule must be applied. But this case is under the Separation and Maintenance Acts, which (by s. 8 of the principal Act of 1895) apply the procedure of the Summary Jurisdiction Acts. The common law is the governing principle as to the relations of husband and wife.

In a variety of cases falling within the summary jurisdiction, however, this court has laid down the necessity of looking for corroboration, and the matter was considered by SIR SAMUEL EVANS, P., and BARGRAVE DEANE, J., in *Joseph* v. *Joseph* (3), in which a finding of desertion was discharged where the wife was the only witness in support of her complaint and her husband denied the charge. SIR S. EVANS said: "This court is very loath to act upon uncorroborated evidence of that kind." It is obvious that in matters of the greatest consequence between man and wife it would be a dangerous thing to act upon the evidence of one party unsupported by a body of facts. Beyond that I cannot find any foundation in strict law for a restriction of the general principle. In the present case, beyond mere assertions by the wife, is there a body of evidence which establishes, or can properly and reasonably be held to establish, that the husband deserted her seventeen years ago in Wales? In a general way, the husband contradicts her and denies her assertions. The home of the parties was in North Wales. The wife remained there. The husband since that time has not lived there, but has gone about the country as a pedlar. When I find that during seventeen years he has not lived with his wife, has not lived where she was, and has not provided her with maintenance, those are a body of facts which, unless they are satisfactorily explained by the husband, establish the wife's case.

The magistrate came to his decision on two matters of fact as to which the appellant gave evidence: (i) that he did not desert his wife, but she went to her family and he to his by their mutual agreement; (ii) on coming into a fortune he wrote offering to make a home for her at Llandudno. Early in March, 1932, in North Wales, he had been served with the summons. On March 8 he wrote to the magistrate enclosing a copy of a letter which he had written to his wife. He had the assistance of a solicitor, and gave his evidence, and proved that he had written the letter, a remarkable one for a travelling pedlar. His wife said, in effect, in regard to the offer of a home: "No, he deserted me seventeen years ago and has done nothing for me since, and he has destroyed any confidence I had in him." The magistrate came to the conclusion that there had been desertion. There was abundant matter of corroboration. The wife's case did not rest on her mere assertion. There was an assertion by the husband as to resumption of cohabitation within the seventeen years. The magistrate took the right view. He was not satisfied that the husband's offer was made in good faith. The appeal must be dismissed with costs.

LANGTON, J.—I agree.

Appeal dismissed.

Solicitors: *Oswald Hanson & Smith*; *Pierron & Morley*.

[*Reported by* William Latey, Esq., *Barrister-at-Law.*]

Re HIND. BERNSTONE *v.* MONTGOMERY

[Chancery Division (Maugham, J.), July 20, 21, 29, 1932]

[Reported [1933] Ch. 208; 102 L.J.Ch. 91; 148 L.T. 281]

Settlement—Name and arms clause—Settled land subject to name and arms clause—Mortgage by tenant in tail subject to redemption without consent of tenant for life—Mortgagee made attorney to disentail and convey to himself—Subsequent conveyance of a moiety free from redemption—Death of tenant for life and cesser by mortgagor to use the name—Conveyance by mortgagee to himself— Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 36 (1) *&* (6); *s.* 117 (1) (*xxxi*); *Sched. II, para.* 1 (1)—*Law of Property Act,* 1925 (15 *Geo.* 5, *c.* 20), *Sched. I, Part IV, paras.* 1, 2—*Law of Property (Amendment) Act,* 1926 (16 *&* 17 *Geo.* 5, *c.* 11), *Schedule—Law of Property (Entailed Interests) Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 27), *s.* 1.

The above-named testator in his will made in 1863, after settling certain estates on S. for life with remainder to his son in tail with remainders over, inserted the usual name and arms clause whereby in case of neglect or refusal within a certain time to assume his name and arms a tenant for life in possession or in tail should forfeit his interest therein. In 1906 the son of S., without the father's consent, mortgaged the estate to the plaintiff, discharged from all estates and interests so far as he was able, and irrevocably appointed him attorney to disentail and convey to himself subject to redemption. In 1914, the son having by this means created a base fee, conveyed to the plaintiff an undivided moiety of the property free from A redemption and covenanted to complete the disentail on the decease of his father, S. S. died in 1929, and the son thereupon ceased to use the testator's name. The plaintiff thereafter conveyed to himself as already provided.

Held: the name and arms clause had become wholly inoperative before the son ceased to use the testator's name, and the plaintiff was absolutely entitled to the proceeds of sale of the property, subject to the son's right of redemption of a moiety, B because (i) under the 1925 legislation settled land may be held in trust for persons entitled in possession in undivided shares under a trust instrument, even though the division was caused, not by the trust instrument itself, but by a subsequent deed or event; and in such a case the trust instrument is the will or other instrument creating the trust;

(ii) the 1914 conveyance was such a trust instrument, and the estates were, C therefore, "settled land held in trust for persons entitled in possession under a trust instrument in undivided shares" within the meaning of s. 36 (1) of the Settled Land Act, 1925, and so by s. 36 (2) and (6) the estates were held, after the coming into operation of the Act, on trust to sell and to stand possessed of the net proceeds of sale "upon such trusts and subject to such provisions as may be requisite for giving effect to the rights of the persons interested"; D

(iii) a settlement of the net proceeds of sale following the name and arms clause of the will, being a settlement of personalty and not of realty, would be void for perpetuity: *Portman* v. *Portman* (1), [1922] 2 A.C. 473 applied.

(iv) section 36 (6) did not empower the court to alter the trusts declared by the will so as to comply with the rule against perpetuities, and the name and arms clause, therefore, became wholly inoperative when the son's interest became an interest in E personalty, not realty;

(v) a base fee was not an entailed interest for the purposes of the Law of Property (Entailed Interests) Act, 1932, s. 1, and therefore s. 35 of the Law of Property Act, 1925, as amended by the 1932 Act, did not make the son's interest "a right to a corresponding entailed interest in the net proceeds of sale," and so save the name and arms clause. F

Per CURIAM.—The words "when the shares fall into possession" (in the Law of Property Act, 1925, Sched. 1, Part 4, para. 2) must mean immediately before the shares fall into possession.

Notes. Referred to: *Re Jones, Public Trustee* v. *Jones*, [1934] Ch. 315.

As to the attempted entail of a chattel made before 1926, see 25 HALSBURY'S LAWS G (2nd Edn.) 82–83, para. 171, text and note (q), and as to chattels settled as realty, see ibid. 239, text and note (h), and for cases on the subject see 44 DIGEST 947–950, *8016–8034*. As to settled land held on trust for persons in undivided shares, see 29 HALSBURY'S LAWS (2nd Edn.) 547, para. 501, as to the meaning of the statutory trusts, see ibid. 549, para. 802, as to termination of a settlement by an assignment of his life interest by the tenant for life, see ibid. 695, para. 972, text and note (i), as to when a H disentailing deed puts an end to a name and arms condition, see ibid. 791–792, para. 1098, text and notes (n)–(q), and as to provisions by a settlor to defeat a tenant in tail by purchase, see ibid. 798, para. 1106, text and note (q).

For the Settled Land Act, 1925, see 23 HALSBURY'S STATUTES (2nd Edn.) 12.

For the Law of Property Act, 1925, see ibid. vol. 20, 427.

For the Law of Property (Entailed Interests) Act, 1932, s. 1, see ibid. 904. I

Cases referred to:

(1) *Portman* v. *Viscount Portman*, [1922] 2 A.C. 473; 91 L.J.Ch. 708; 128 L.T. 129; 38 T.L.R. 887, H.L.; 44 Digest 949, *8032*.

(2) *Re Price*, [1928] 1 Ch. 579; 97 L.J.Ch. 423; 139 L.T. 339; Digest Supp.

(3) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; 46 T.L.R. 15, C.A.; 23 Digest (Repl.) 545, *6074*.

(4) *Re Cornwallis, Cornwallis* v. *Wykeham-Martin* (1886), 32 Ch.D. 388; 55 L.J.Ch. 716; 54 L.T. 844; 35 Digest 705, *61*.

(5) *Re Cugny's Will Trusts, Smith* v. *Freeman,* [1931] 1 Ch. 305; 100 L.J.Ch. 145; 144 L.T. 525; Digest Supp.

(6) *Doe d. Lumley* v. *Earl of Scarborough* (1835), 3 Ad. & El. 2; 4 Nev. & M.K.B. 724; 4 L.J.K.B. 172; 111 E.R. 313; on appeal sub nom. *Earl of Scarborough* v. *Doe d. Savile* (1836), 3 Ad. & El. 897; 6 Nev. & M.K.B. 884; 6 L.J.Ex. 270; 111 E.R. 653, Ex. Ch.; 44 Digest 543, *3608.*

(7) *Milbank* v. *Vane,* [1893] 3 Ch. 79; 62 L.J.Ch. 629; 68 L.T. 735; 9 T.L.R. 362; 2 R. 443, C.A.; 38 Digest 725, *696.*

(8) *Lord Scarsdale* v. *Curzon* (1860), 1 John. & H. 40; 29 L.J.Ch. 249; 3 L.T. 29; 6 Jur. N.S. 209; 70 E.R. 653; 40 Digest 794, *3236.*

Adjourned summons for declarations as to the entitlement to certain estates settled by a will.

The following facts are taken substantially from the judgment:

The history begins with the will of Henry Hind dated Feb. 14, 1863. He died on Nov. 18, 1863. Under his will, which I do not propose to state in full, and in the events which happened, William Hind Smithard Hind, then William Hind Smithard, on Dec. 14, 1893, became tenant for life in possession of certain real estates of considerable value, which I shall describe as the Northumberland estates, and his only son, Henry Cram Smithard Hind, who was born on Sept. 14, 1885, became tenant in tail general, subject to the life estate of his father. This gentleman is a defendant to the present summons, and I propose to refer to him as Mr. Smithard Hind, although it is said that his present name is Henry Gibson-Craig. The limitations in the will were the usual ones common at any rate before the year 1925, and there was contained in the will a provision of the nature usually described as a name and arms clause which it is necessary to read. It is in these terms:

> "Provided always and I do hereby direct that the said Joseph Smithard [one of the persons entitled under the earlier series of limitations] and every other person having a surname or arms different from the surname or arms hereinafter required to be used who shall become entitled in possession to my Northumberland properties or any of them as beneficial tenant for life or in tail under the limitations hereinbefore contained and not be a married woman or who shall be the husband of any female becoming so entitled shall as to every such tenant within eighteen calendar months after he or she shall become entitled in possession if of the age of twenty-one years or if not within eighteen calendar months after attaining that age and as to every such husband within eighteen calendar months after his wife shall become entitled in possession or shall be or shall have been married to him whichever shall last happen assume and use my surname of 'Hind' either alone or in addition to his or her usual surname (but so that the name of 'Hind' shall be the last and principal name) also the arms of 'Hind' quartered with his or her family arms and shall thenceforth use the same surname and arms accordingly. And that every person excluded by reason of his or her already bearing the surname and arms aforesaid from the operation of the requisitions aforesaid shall continue the use of such surname and arms. And that in case of neglect or refusal to comply with all or any of the requisitions of this proviso the estate or estates hereinbefore limited for the life of the person or as the case may be the estate tail hereinbefore limited to the person or ancestor of the person who or whose husband shall be guilty of such neglect or refusal shall cease and the subsequent limitations [to certain uses] for the life of such tenant shall spring up and immediately precede the use or uses from time to time in contingency upon trust to preserve the same but to permit the rents and profits to be received and enjoyed by the person or persons from time to time entitled to the first vested remainder for the time being therein."

That, I may observe, is a clause drawn by a very competent draftsman and in relation to the Northumberland estates is perfectly legal.

Mr. William Hind Smithard Hind lived until Feb. 18, 1929, and during his lifetime no valid disentailing deed could be made without his consent. Mr. Smithard Hind, however, the tenant in tail in remainder, executed a mortgage to the plaintiff on Nov. 21, 1906, in consideration of the advance to him of a sum of £1,500. There was provision for a policy in the usual way, and the Northumberland estates, subject, of course, to the interest of the tenant for life, were conveyed to the mortgagee Jacob Hyman Bernstone, the plaintiff, to hold to his use and to the use of his heirs, executors, administrators and assigns, subject to the life estate of the tenant for life, and to any prior charges or powers overreaching the estate tail of Mr. Smithard Hind, but discharged so far as might be from the estate in tail of Mr. Smithard Hind and all other estates and interest to take effect after the determination or in defeasance thereof. There was then a proviso for redemption, and by another clause Mr. Smithard Hind irrevocably appointed the plaintiff to be his attorney in the name of Mr. Smithard Hind and on his behalf to sign, seal and deliver any deed by way of disentail, for the purpose of conveying the premises to the plaintiff for an estate in fee simple, subject to the prior charges but discharged from the estate tail of Mr. Smithard Hind and all estates and interests to take effect after the determination or in defeasance of his estate tail, but subject to the right of redemption for the time being subsisting under the mortgage.

On April 3, 1914, Mr. Smithard Hind seems again to have required pecuniary assistance, and by a conveyance of that date made between him and the plaintiff, in consideration of £147 10s. then paid to Mr. Smithard Hind and of the covenant on the part of the plaintiff for payment to him of the annual sum of £160 during the joint lives of the then tenant for life and Mr. Smithard Hind, the latter granted and released to the plaintiff one undivided moiety of the Northumberland estates to hold unto and to the use of the plaintiff, his heirs, executors, administrators and assigns subject, in common with the other moiety, to the estate for life of the tenant for life, and also to prior charges overreaching the powers, but discharged as far as might be from the estate tail of Mr. Smithard Hind and all other estates and interests to take effect after the determination or in defeasance thereof, and free from all right of redemption under but subject in common with the other undivided moiety of the premises to all moneys due or to become due on the security of the mortgage and all death duties which would be payable on the death of the tenant for life in respect of the premises, one moiety of which was thereby assured; and there follow the usual covenants appropriate in such a case, including a covenant on the part of Mr. Smithard Hind to perfect the disentailment of the hereditaments and premises within seven days of the death of the tenant for life in the lifetime of Mr. Smithard Hind, the appointment of the plaintiff as attorney for Mr. Smithard Hind for the purpose of the disentailment, and a proviso which I do not think I need read. The tenant for life, as I have said, died on Feb. 18, 1929, and it appears that there was no jointure subsisting in favour of a second wife of the tenant for life. When, therefore, the new legislation came into force, namely on Jan. 1, 1926, the legal estate became vested in one Henry Montgomery, the first of the defendants on the record, as from the death of the tenant for life as an executor of his will. Mr. Smithard Hind did not within seven days after the death of the tenant for life execute a deed perfecting the disentail of the Northumberland estates according to his covenant, and therefore the position, subject to the mortgage and to the conveyance of 1914, was that one moiety of the base fee was vested in the plaintiff and the whole of the base fee subsisting in the Northumberland estates was subject to the mortgage. The rate of interest payable under the mortgage was compound interest at the rate of 10 per cent., and accordingly by Feb. 18, 1929, some twenty-three years after the date of the loan, the amount due was a very considerable sum. The conveyance of 1914 and the mortgage were enrolled in the Central Office in due course, but it was necessary, in order that the plaintiff should receive the rights or interests to which he was entitled by deed or covenant, that there should be a disentail promptly executed, and, travelling a little out of the order in date of the events, I will now state that the plaintiff, acting as attorney for Mr. Smithard Hind, executed on April 8, 1929, a deed of confirmation for the purpose of effecting the previous disentail. It was expressed to be supplemental first to the mortgage and secondly to the conveyance of 1914, and by it Mr. Smithard Hind purported to convey and confirm to the plaintiff all the hereditaments, moneys and investments described or referred to and assured by the mortgage to hold the same unto the plaintiff in equitable fee simple or absolutely, subject to the charges (if any) prior to and all powers overreaching the estate in tail of Mr. Smithard Hind under the said will of Henry Hind, but freed and discharged from all entailed interests of the mortgagor—that is, Mr. Smithard Hind—and also free from all remainders and interests to take effect after the determination or in defeasance of such entailed interests or the base fee into which the estate in tail of Mr. Smithard Hind was converted by the mortgage, to the intent that the base fee or other estate created by the mortgage and thus subsisting by virtue thereof should be enlarged into an equitable fee simple, and to the further intent that the mortgage should take effect out of the enlarged interest, and that the base fee should be enlarged for all purposes; and by the deed of confirmation Mr. Smithard Hind, as beneficial owner, purported to convey to the plaintiff one undivided moiety of the hereditaments or proceeds of sale thereof to hold to the plaintiff in equitable fee simple or absolutely according to the nature thereof to the intent that, subject to the mortgage on the entirety, one undivided moiety of the premises should belong to the plaintiff in equitable fee simple or absolutely, and one undivided moiety thereof should belong to Mr. Smithard Hind in equitable fee simple or absolutely.

It is the fact, however, that, just before the execution of the deed of confirmation, Mr. Smithard Hind, acting on motives which may be left to conjecture, took steps to forfeit all his interests under the will. On March 23, 1929, he wrote a letter to Mr. Montgomery, the defendant, one of the trustees of the will, in the following terms:

> "Considering the circumstances which have arisen in connection with my inheritance of the Ovington Estate, I have decided to cease using the name of Hind, and will from now on be known by the name of Henry Gibson-Craig. Will you kindly inform your co-trustee of my decision? I am, yours sincerely, Henry Gibson-Craig lately known by the name of Henry C. Smithard Hind."

On April 8, 1929, but, as I understand it to be admitted, before the deed of confirmation was executed by the plaintiff as attorney for Mr. Smithard Hind, the latter wrote the following letter to the trustees:

> "I hereby confirm my previous letter to you relative to my stated refusal to comply to (sic) the conditions of the will of the late Henry Hind, Esq., and in consequence renounce my personal right to benefit under same. I presume you will notify your co-trustee and solicitors to the estate of my decision. Henry Gibson-Craig."

It will be noted that in each of these cases Mr. Smithard Hind thought fit to sign his name as Henry Gibson-Craig. By a deed poll dated Sept. 8, 1930, Mr. Smithard Hind, under the name of Henry Gibson-Craig, purported to record the fact that he had on March 23, 1929, assumed the name of Henry Gibson-Craig, and for the purposes of enrolment in the Enrolment Department of the Central Office of the Royal Courts of Justice he recorded the change of name to Henry Gibson-Craig. This deed poll was of course executed after the date of the deed of confirmation, and for the present purpose it is important, if at all, only as evidence that he did assume his new name on March 23, 1929.

By this summons, issued on May 9, 1929, amended on Aug. 1, 1929, and re-amended on May 2, 1930, and April 15, 1932, the plaintiff asked (inter alia) for a declaration that the whole of the Northumberland estates were vested in the defendant Montgomery as personal representative of William Hind Smithard Hind, or alternatively in him and another as trustees of the will upon the statutory trusts, and that, despite Henry Cram Smithard Hind's purported discontinuance of the use of the surname "Hind," the plaintiff was absolutely entitled to one moiety of the proceeds of sale thereof and of the net rents and profits until sale, and was entitled to claim as mortgagee of the remaining moiety, under and by virtue of the mortgage.

The defendants to the summons were the trustees of the will, Reginald Frederick Sturdy, who was interested as equitable tenant in tail in the event of its being determined that the estate tail of Henry Cram Smithard Hind was forfeited without having become effectually barred, and Henry Cram Smithard Hind.

Evershed, for the plaintiff, cited *Re Price* (2) and *Re Kempthorne, Charles* v. *Kempthorne* (3).

Daynes, K.C., and *J. A. Mackintosh* for the trustees of the settlement. A

C. W. Turner, for the defendant Reginald Frederick Sturdy, referred to *Re Cornwallis, Cornwallis* v. *Wykeham-Martin* (4); *Re Cugny's Will Trusts, Smith* v. *Freeman* (5), and *Re Price* (2).

Cur. adv. vult.

MAUGHAM, J., read a judgment in which he stated the facts and continued: It is clear B that after the deed of confirmation there could be no effective forfeiture, since the base fee of Mr. Smithard Hind, if still existing, was thereby converted into an absolute interest, all the estates which were limited to take effect in defeasance of the estate tail being barred (*Doe d. Lumley* v. *Earl of Scarborough* (6) and *Milbank* v. *Vane* (7)).

The question arises whether between March 23, 1929, and April 8, 1929, Mr. Smithard Hind had neglected or refused to continue the name of Hind so as to occasion a forfeiture C under the name and arms clause. Evidence might have been adduced to show that the letters were not in some respects genuine; for example, that they were intended merely as a threat with the object of obtaining further sums of money from the plaintiff, and were not in fact acted upon. There is no doubt evidence to show that other persons have referred to Mr. Smithard Hind by that name since March 23, 1929. On the other hand, the letters which I have read seem to me to show that he has refused to continue D the use of the name; and I am unable to come to the conclusion that the letters, unexplained as they are, do not indicate a definite refusal to continue the use of the name; and the recital in the deed poll seems to me to show that the letters were not written merely as a threat. The condition in the name and arms clause is a legal condition which must be strictly construed, and there being no sufficient evidence to displace the effect of the letters I must come to the conclusion that, apart from the result, if any, E of the legislation of 1925, the interests of the plaintiff would have been forfeited by reason of the act of Mr. Smithard Hind.

Turning now to the legislation of 1925, it will be observed, first, that legal estates in undivided shares in land are no longer capable of subsisting or of being created—see s. 1 (6) of the Law of Property Act, 1925; and, secondly, that land held in undivided shares in possession must be held by trustees for sale, the beneficial interests in the land F being made to attach to the proceeds of sale and to the rents and profits before sale. Section 34 of the Act, which deals with the effect of dispositions after the date of the Act to tenants in common, appears not to extend to dispositions made before the date of the coming into force of the Act. By Part I of the First Schedule to the Act (Transitional Provisions) legal estates in land were converted into equitable interests. Paragraph 1 of Part IV of the same schedule—the part which contains provisions subjecting G land held in undivided shares to a trust for sale—clearly does not apply in the present case, because immediately before the commencement of the Act the land was not held in undivided shares vested in possession. Paragraph 2 of Part IV of the same schedule does not, in my opinion, apply, since that paragraph is confined to cases where the undivided shares in land created before the commencement of the Act -

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> "fall into possession after such commencement, and the land is not settled land when the shares fall into possession."

The words "when the shares fall into possession" must mean immediately before the shares fall into possession; since after the shares have fallen into possession a trust for sale is immediately imposed. In the present case, as I have pointed out, the land was settled land at the instant before the undivided shares fell into possession. The result, I I think, is that unless s. 36 of the Settled Land Act, 1925, is held to apply there is a lacuna in the Act and no provision for dealing with undivided shares in such a case as I have to deal with, and that although the Partition Acts are wholly repealed except as far as pending litigation is concerned. The difficulty of making s. 36 (1) applicable lies in the words:

> "If . . . settled land is held in trust for persons entitled in possession under a trust instrument in undivided shares . . ."

The words "trust instrument" are defined in s. 117 (1) (xxxi), to this extent, that we are told that a trust instrument means the instrument whereby the trusts of the settled land are declared, and includes any two or more such instruments and a settlement or instrument which is deemed to be a trust instrument.

To ascertain the persons entitled to the Northumberland estates in the present case we have to look at the will and at the conveyance of 1914, and it is true that that conveyance can only with difficulty be described as an instrument declaring the trusts of the settled land. On the whole, however, I think I am justified in giving a beneficial construction to the Act and thus avoiding what would otherwise be a somewhat serious omission. It may be observed that the difficulty may arise otherwise than by a conveyance. For instance, if land is settled upon A for life with remainder to B, it might well be that, on the intestacy of B, two or more persons, for instance, his daughters, might become entitled in remainder to the estate in undivided shares. A position would then have arisen very similar to that which exists in the present case. I have come to the conclusion that settled land may be held in trust for persons entitled in possession in undivided shares under a trust instrument, although the trust instrument itself does not cause the division, but the division into shares is effected by a subsequent deed or event, and that in such a case the trust instrument should be regarded as the will or other instrument creating the trust. Accordingly, in the present case, I am of opinion that s. 36 (1) of the Settled Land Act, 1925, applies as from the coming into force of the Act, and that the trustees of the will might have required the estate owner in whom the settled land was vested to convey the land to them, or to assent to the land vesting in them as joint tenants, and that under sub-s. (2) the settled land so held in trust became subject to the statutory trusts.

The next question that arises is as to the true construction to be placed on sub-s. (6) of s. 36 of the same Act, whereby the land is held on trust to sell and to stand possessed of the net proceeds of sale

> "upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested."

Can these trusts properly be worded so as to give effect to the name and arms clause contained in the will? In *Re Price* (2) the effect of the statutory conversion caused by s. 35 of the Law of Property Act, 1925, as regards undivided shares in land, was most carefully considered, and the decision of CLAUSON, J., was followed by the Court of Appeal in *Re Kempthorne* (3). In particular it was held that s. 130 of the Law of Property Act, 1925, had not the effect of causing an entailed interest in an undivided share of land to become an entailed interest in personalty within the meaning of the Act. It accordingly followed that the tenant in tail of an undivided share in the land prior to the Act became absolutely entitled to his appropriate share in the proceeds of sale of the land, the conversion of which was effected by s. 35.

It has been argued that an amending Act which last month received the Royal Assent—namely, the Law of Property (Entailed Interests) Act, 1932—applies, with the result that s. 35 of the Law of Property Act, 1925, has to be read as if the following provision were added to that section, namely,

> "and the right of a person who, if the land had not been made subject to a trust for sale by virtue of this Act, would have been entitled to an entailed interest in an undivided share in the land, shall be deemed to be a right to a corresponding entailed interest in the net proceeds of sale attributable to that share."

On consideration I do not think that the words "entailed interest" in this amendment can be treated as extending to a base fee. A reference to s. 1 (1), para. (ii), of the Settled Land Act, 1925, shows that the legislature from the very beginning of the Act distinguished between an entailed interest and a base fee; and a similar distinction is to be found in several other places in the Act, and in particular in s. 1 (5), para. (a), and in s. 9 (1), para. (iv) (b) and (c). All these are provisions which make a clear distinction between an "entailed interest" and "a base or determinable fee," showing that the legislature regards them as two different things. Apart, therefore, from s. 1 (2) of the Law of Property (Entailed Interests) Act, 1932, which may well have had the effect of saving the title, if any, acquired by the plaintiff in the present case, I am of opinion that the position is not altered by that Act, and I must, therefore, proceed to consider the matter apart from those amendments.

It is urged on behalf of the plaintiff that as the result of the legislation of 1925, and bearing in mind *Re Price* (2), the plaintiff became, on the death of the tenant for life on Feb. 18, 1929, absolutely entitled to the whole of the net proceeds of sale of the Northumberland estates, subject to redemption, and that no trust can properly be framed, following the words of the will, which would have the effect of destroying this interest by reason of a subsequent failure by Mr. Smithard Hind to comply with the name and arms clause. I have carefully considered the effect of the words with which sub-s. (6) concludes, in so far as they direct that the proceeds of sale shall be held upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of persons interested in the settled land. It is to be observed that there is no reference whatever to the rule against perpetuities. The name and arms clause as contained in the will was not void for perpetuity, for the reason that conditional limitations which must take effect, if at all, during the continuance of an estate tail are never too remote: (see GRAY ON PERPETUITIES (3rd Edn.), para. 449). Apart from s. 130 of the Law of Property Act, 1925, which, as I have pointed out, cannot be made applicable to the present case, a settlement of proceeds of sale of land following the trusts and provisions of the will as far as possible would be void for perpetuity: (see *Lord Scarsdale* v. *Curzon* (8) and *Portman* v. *Viscount Portman* (1). The last-named case shows that where chattels are settled to go and be held, so far as the rule of law and equity will permit, with a mansion house strictly entailed by will or settlement with the addition of a shifting clause not widely differing in its effect from the ordinary name and arms clause, the shifting clause is void as regards the chattels by reason of its transgressing the rule against perpetuities; and even the words "so far as the rules of law and equity will permit" do not avail to prevent this result. I do not conceive that the court is justified in putting a construction on the subsection in question which will authorise the insertion in the trusts of a clause limiting the operation of the name and arms clause to the permitted period. The subsection does not, I think, warrant the introduction into the trusts, powers and provisions of any direct reference to the period allowed by the rule against perpetuities, no such reference being contained in the will, or the selection of the interests of persons born within the legal limits after the death of the testator for the purpose of imposing on those interests conditions specially designed to carry out as far as practicable the intention of the testator. The framing of trusts, which would be at once artificial and imperfect as regards the end in view, is not, in my judgment, a thing pointed out or permitted by the words of the subsection.

I hold, therefore, that in the events which have happened the name and arms clause became wholly inoperative.

The plaintiff was therefore absolutely entitled to the proceeds of the sale of the property, subject to the mortgagor's right of redemption of a moiety.

Declaration accordingly.

Solicitors: *King, Wigg, & Brightman,* for *Keenlyside & Forster,* Newcastle-upon-Tyne, *Field, Roscoe & Co.,* for *Wilkinson & Marshall,* Newcastle-upon-Tyne; *Hammond & Richards.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

WESTMINSTER BANK, LTD. *v.* OSLER (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Buckmaster, Lord Blanesburgh, Lord Warrington, Lord Russell, and Lord Wright), November 4, 7, 15, 1932]

[Reported [1933] A.C. 139; 102 L.J.K.B. 110; 148 L.T. 41; 49 T.L.R. 43; 76 Sol. Jo. 831; 17 Tax Cas. 381]

Income Tax—Profits—Investments—Surrender of investments in exchange for other securities—New securities of greater value than cost of original investments—Liability of profit to tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case* 1.

During 1917 and 1918 a bank obtained large holdings of 5 per cent. National War Bonds. By virtue of the terms on which the bonds were issued, the bank was entitled to convert them into 5 per cent. War Loan 1929/47 at the rate of £100 of such loan for every £95 nominal of the surrendered National War Bonds. In 1922 the Treasury made an offer to all holders of the bonds entitling them to surrender their holdings in exchange for 3½ per cent. Conversion Loan at the rate of £134 3½ per cent. Conversion Loan for every £100 National War Bonds. The bank surrendered part of their holding of National War Bonds in exchange for War Loan (under the terms of the original offer) and part of their holding for 3½ per cent. Conversion Loan pursuant to the offer of 1922. The value of the securities so received by the bank exceeded the cost to the bank of the National War Bonds. The Crown claimed that the excess should be included in estimating the profits of the bank liable to be assessed to income tax under the Income Tax Act, 1918, Sched. D, Case I. It was agreed that the excess amounted to £141,750.

Held: the transactions were equivalent to the realisation of the original securities and the investment of the proceeds, and it followed that the profit or excess value so realised was taxable as claimed.

Brown v. *National Provident Institution* (1), [1921] 2 A.C. 222, applied.

Royal Insurance Co., Ltd. v. *Stephen* (2) (1928), 14 Tax Cas. 22, approved.

Notes. The Income Tax Act, 1918, Sched. D, was replaced by the Income Tax Act, 1952, Part 5, s. 122.

Referred to: *Cross* v. *London and Provincial Trust, Ltd.*, [1938] 1 All E.R. 428; *Gold Coast Selection Trust, Ltd.* v. *Humphrey*, [1948] 2 All E.R. 379.

As to income tax on profit on realisation of securities, see 20 HALSBURY'S LAWS (3rd Edn.) 198, para. 349. For the Income Tax Act, 1952, s. 122, see 31 HALSBURY'S STATUTES (2nd Edn.) 112.

Cases referred to:

(1) *Brown* v. *National Provident Institution, Ogston* v. *Provident Mutual Life Association*, [1921] 2 A.C. 222; 90 L.J.K.B. 1009; 125 L.T. 417; 37 T.L.R. 804; sub nom. *National Provident Institution* v. *Brown, Brown* v. *National Provident Institution, Provident Mutual Life Assurance Association* v. *Ogston, Ogston* v. *Provident Mutual Life Assurance Association*, 8 Tax Cas. 57, H.L.; 28 Digest 62, *316*.

(2) *Royal Insurance Co., Ltd.* v. *Stephen* (1928), 44 T.L.R. 630; 14 Tax Cas. 22; Digest Supp.

(3) *Taxes Comrs.* v. *Melbourne Trusts, Ltd.*, [1914] A.C. 1001; 84 L.J.P.C. 21; 111 L.T. 1040; 28 Digest 18, *92 i*.

(4) *Californian Copper Syndicate, Ltd.* v. *Harris* (*Surveyor of Taxes*) (1904), 5 Tax Cas. 159; 41 S.L.R. 691; 12 S.L.T. 196; 6 F. 894; 28 Digest 23, *118 i, b*.

Appeal by the taxpayers from a decision of the Court of Appeal (LORD HANWORTH, M.R., GREER and ROMER, L.JJ.), reported [1932] 1 K.B. 668, on a Case stated by the Commissioners for the Special Purposes of the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. The Case Stated was as follows: At a meeting of the Commissioners for the Special Purposes of the

Income Tax Acts held at York House, Kingsway, London, on Oct. 23, 1929, for the purpose of hearing appeals, the Westminster Bank, Ltd., hereinafter called the bank, appealed against assessments to income tax under Sched. D made upon it for the three years ended April 5, 1924, April 5, 1925, and April 5, 1926, respectively. The question at issue is whether the sum of £141,750 hereinafter mentioned should be included in estimating the profits of the bank liable to assessment under Case I of Sched. D. The facts are as follows:

In the course of its business the bank has occasion to make large investments which are varied from time to time. For the purposes of income tax any profit made by the bank on the realisation of an investment is admitted by the bank to be part of its profits and similarly, any loss made by the bank on the realisation of an investment is admitted by the respondent to be a deduction in arriving at the profits of the bank.

During the war the bank acquired the following National War Bonds:

(a) £4,000,000 5 per cent. National War Bonds (first series, October, 1917). These bonds were repayable by the government on Oct. 1, 1922, at a price of £102.

(b) £250,000 5 per cent. National War Bonds (second series, April, 1918). These bonds were repayable by the government on April 1, 1923, at a price of £102.

(c) £2,205,000 5 per cent. National War Bonds (second series, April, 1918). These bonds were repayable by the government on April 1, 1923, at a price of £102.

(d) £1,050,000 5 per cent. National War Bonds (third series, September, 1918). These bonds were repayable by the government on September, 1923, at a price of £102.

In the events which happened as hereinafter set out, none of the said bonds were repaid by the government, but they were, as it is termed, "converted" into 3½ per cent. Conversion Loan Stock or into 5 per cent. War Loan 1929–47. The question in this case is whether, in arriving at the profits of the bank for the purposes of the said assessments, there should be included any sum as representing profit resulting from such conversions.

(a) On April 21, 1922, an offer was brought to the notice of the bank, of which the following are the material terms: Offer of conversion to holders of 5 per cent. National War Bonds, due Oct. 1, 1922, and April 1, 1923.—Holders of the above bonds may surrender their holdings in whole or in part, and receive in exchange therefor either 4½ per cent. Treasury Bonds, repayable at par on April 15, 1932, at the rate of £100 4½ per cent. Treasury Bonds, with a cash payment of £4 (payable on completion of conversion), for each £100 nominal of 5 per cent. National War Bonds surrendered. The Governor and Company of the Bank of England are authorised to receive from holders of 5 per cent. National War Bonds, due Oct. 1, 1922, and/or April 1, 1923, application for the conversion of their holdings as above. Conversions will be effected as on April 1, 1922.

3½ per cent. Conversion Loan.—Stock issued in exchange for converted holdings of 5 per cent. National War Bonds will rank pari passu and be consolidated with the existing 3½ per cent. Conversion Loan. A full half-year's dividend will be payable on the stock on Oct. 1, 1922.

The latest date for the receipt of applications by the Bank of England will be Monday, May 15, 1922.

(b) In response to the last-named offer the bank, on May 6, 1922, surrendered its holdings of £4,000,000 first series bonds and £2,205,000 second series bonds in exchange for £8,314,700 (nominal) 3½ per cent. Conversion Loan, the conversion being effected at the stipulated rate of conversion, namely, £134 (nominal) of 3½ per cent. Conversion Loan for £100 (nominal) of National War Bonds. Subsequently in exercise of its rights under the terms of the original issue of the National War Bonds the bank, on Oct. 6, 1922, exchanged its holding of £250,000 second series National War Bonds for 5 per cent. War Loan 1929–47 at the rate of £100 (nominal) of War Loan for £95 (nominal) of bonds. Similarly, in June, 1922, it had already exchanged its holding of £1,050,000 third series bonds into 5 per cent. War Loan on the same terms. The bank thus received £1,368,421 (nominal) 5 per cent. War Loan for £1,300,000 National War Bonds.

The bank in its own books of account carried forward the new stocks at the same price as the National War Bonds appeared in those books at the time of the respective conversions, that is, at the original cost of the National War Bonds to the bank, either

A making a new entry at the old price or merely altering the name at the top of the old entry. No profit was thus shown in the bank's books or accounts as arising from the conversion. It was admitted, however, that the value of the new stocks received in exchange for the bonds was greater than the original cost of the bonds to the bank, and the assessments appealed against were made to include such excess value.

For the purposes of computing its profits liable to income tax the bank does not B make any charge for the depreciation of its securities. It is, however, the custom of the bank to provide in its accounts for its own purposes for depreciation of its securities, but not to bring into account as a profit any appreciation, except upon an actual sale of the security which has appreciated.

It was contended on behalf of the bank that no taxable profit had been realised by the conversion of the National War Bonds into 3½ per cent. Conversion Loan and 5 per C cent. War Loan.

It was contended on behalf of the inspector (inter alia)—

(a) that on the occasion of each conversion the bank had realised the National War Bonds, and by receiving in exchange investments of greater value had thereby made a profit; (b) that accordingly such profit should be taken into consideration in arriving at the said assessments; (c) that the assessments had in principle been rightly made.

D The following cases were referred to: *Royal Insurance Co., Ltd.* v. *Stephen* (2), *Taxes Comrs.* v. *Melbourne Trust Co.* (3), and *National Provident Institution* v. *Brown* (1).

The commissioners who heard the appeal, decided that the conversion of the National War Bonds into 3½ per cent. Conversion Loan must be regarded as the making of a new bargain, and that following the decision in the *Royal Insurance Co. Case* (2) income tax was chargeable upon the excess value which had accrued therefrom to the bank. E They also held that while the exercise of an existing right of conversion might be somewhat different, yet they could not distinguish for taxation purposes the conversion of National Bonds into 5 per cent. War Loan from the conversion into 3½ per cent. Conversion Loan. They adjourned the appeal accordingly for the settlement of the figures of the assessments.

On July 25, 1930, the parties to the appeal appeared before the commissioners, and F stated that it had been agreed that on the basis of their decision the profits or excess value on the conversions amounted to £141,750, and they amended the assessments appealed against accordingly.

Immediately upon the commissioners so determining the appeal, the bank expressed to them its dissatisfaction with their decision as being erroneous in point of law, and in due course required them to state a Case for the opinion of the High Court pursuant G to the Income Tax Act, 1918.

The Court of Appeal held that enhanced values obtained from realisation or conversion of securities were assessable where what was done was not merely a realisation or change of investment, but an act done in what was truly the carrying on of a business (*Taxes Comrs.* v. *Melbourne Trusts, Ltd.* (3) ([1914] A.C. at p. 1010); there had been a realisation at a profit of the bonds originally held in the carrying on of the bank's H business.

The bank appealed.

Wilfrid Greene, K.C., and *J. S. Scrimgeour* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the respondent.

The House took time for consideration.

I

Nov. 15. **LORD BUCKMASTER.**—The appellants are the Westminster Bank, Ltd., who have occasion while carrying on their business to make, and from time to time to vary, large investments. It is not disputed that any profit made by them on the realisation of an investment is part of the profits of their trade for the purposes of income tax. The question on this appeal is whether in the circumstances I will state such profit has been made.

During the years 1917 and 1918 the appellants obtained the following holdings of National War Bonds:—

Amount.	Series.	Date of Issue.	Date when repayable.	Price at which repayable.
£4,000,000	1st	October, 1917	Oct. 1, 1922	£102
£250,000	2nd	April, 1918	April 1, 1923	£102
£2,205,000	2nd	April, 1918	April 1, 1923	£102
£1,050,000	3rd	September, 1918	Sept. 1, 1923	£102

The prospectus that was issued inviting application for the bonds, contained a provision entitling the holders to convert the bonds into 5 per cent. War Loan 1929/47 at the rate of £100 of such loan for £95 nominal of the value of the surrendered War Bonds. On April 21, 1922, the Treasury made an offer to the holders of all the above bonds entitling them to surrender their holdings in exchange for £134 3½ per cent. Conversion Loan for each £100 5 per cent. National War Bonds. In response to this offer, the appellants surrendered their holdings of four million of the first series, and £2,205,000 of the second series, and subsequently, in exercise of their rights under the terms of the original issue, exchanged their remaining holdings into the 5 per cent. War Loan.

If such transactions be accepted as the equivalent of the realisation of the original holdings, it is agreed that the profit or excess value would amount to £141,750, and it was sought on behalf of the Inland Revenue to bring this sum into the account in determining the profits of the appellants' trade for purposes of income tax under cl. 1 of Sched. D. The bank contended that there had in fact been no realisation of profit, and that there was a mere accretion of capital value which could not be brought into account until in fact it had been realised. The commissioners decided against this contention, and their opinion has been supported, though with some hesitation, by Rowlatt, J., and the Court of Appeal.

On behalf of the appellants it was plausibly argued before the House that the nature of this transaction was equivalent to the mere exchange of an item in the stock-in-trade of a trader, in which case it was contended that unless an item so taken in exchange was sold, or taken out of the business, no tax would be exigible by reason of the fact that the article taken in exchange was of greater value than that for which it was bartered.

I appreciate the strength of this argument, and I am not surprised at the perplexity in which the judges have found themselves, but the wholly different character of the businesses, the uncertainty of values in dealing with a trader's stock and the probability that articles exchanged in the way of trade would prima facie be of equal commercial value renders the analogy unsound. The exchange effected in the present case was in fact the exact equivalent of what would have taken place had instructions been given to sell the original stock and invest the proceeds in the new security. The investment represented by the original War Bonds came to an end as soon as the new securities were taken in its place, when a new venture was begun in relation to the new holding, and the fact that this transformation took place by the process of exchange does not in my opinion avoid the conclusion that there has been what is described as a realisation of the security. This view is, I think, supported by the authority of this House.

In *Brown* v. *National Provident Institution* (1), a discounting firm had bought Treasury Bills; some had been sold, some discounted, and others before maturity had been exchanged for War Loan under an offer then made by the government. It was held that the profit obtained by such exchange was equivalent to the discount value that had accrued since the original issue.

It is perfectly true, as was pointed out, that the liability of discounts to tax is under a special head by itself (Case III, r. 1 (b)), but Lord Warrington, in giving judgment in the Court of Appeal, stated, with regard to this conversion, that it was simply a sale on certain terms fixed by the government and investment of the proceeds, and this expression of opinion was approved in terms in this House. But from this it follows that the process of exchange of one security for another in such circumstances is the equivalent of a sale or realisation and a re-investment, and this principle must apply whether the purpose of its application is the determining the amount of accrued discount or the profit made by the original investment.

The case of *California Copper Syndicate* v. *Harris* (4), although again the facts are different, accepts the same principle. In that case a company formed to deal in mining properties, sold property for fully paid shares in another company, and LORD TRAYNER stated that the profit was realised and that the price was shares, and adds that though there could be no realised profit except when paid in cash, the shares were realisable and could have been turned into cash. And LORD DUNEDIN, in *Taxes Comrs.* v. *Melbourne Trusts, Ltd.* (3) approves of this principle, and states that enhanced values may be assessable where what is done is not merely a realisation or change of investment, but an act in the carrying on or carrying out of the business.

Finally, the case of the *Royal Insurance Co., Ltd.* v. *Stephen* (2) is in my opinion indistinguishable from the present. There a railway company was required under the Railways Act, 1921, to accept new stocks in the amalgamated companies in exchange for the stock held in the companies which were absorbed. A loss having arisen to a company by virtue of this arrangement, it was claimed that the company was entitled to deduct this loss in making their returns, and the claim was upheld by ROWLATT, J. That case was decided some three or four years ago, and it has not been questioned, and indeed, on the basis that it was accurate, the Finance Act, 1931, expressly provided that it should not apply to future exchanges that were then contemplated.

It is not, in my opinion, necessary for this decision to rely on the fact that legislation has therefore been based on the hypothesis that the decision in the *Royal Insurance Co., Ltd.* v. *Stephens* (2) was right, for, in my opinion, the view on which that legislation was based was, for the reason that I have given, accurate, and there is no need to consider its effect on the present case.

For this reason I am of opinion that the appeal must fail and that the bank must pay the income tax.

LORD BLANESBURGH, LORD WARRINGTON, LORD RUSSELL and **LORD WRIGHT** concurred.

Appeal dismissed.

Solicitors: *Travers-Smith, Braithwaite & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

WAHL *v.* ATTORNEY-GENERAL

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), March 14, 15, April 26, 1932]

[Reported 147 L.T. 382]

Domicil—Change of domicil—Abandonment of domicil of origin—Application for naturalisation—Declaration of intention to reside permanently in the United Kingdom.

The deceased was born in 1852 in Germany of German parents. His father was the head of a German commercial firm in Germany. In 1877 the deceased married a German woman and had two sons, born in 1878 and 1880. In 1879 the deceased came to England. In 1881 he brought his two sons to this country, and divorced his wife. In 1884 he applied for and obtained naturalisation under the Aliens Act, 1870. His memorial, which was submitted in his application for naturalisation, stated that during the previous eight years he had for five years resided in the United Kingdom, that he intended to continue to reside permanently in the United Kingdom, and that he had no intention of permanently leaving the United Kingdom. The memorial, which was on a printed form, went (so far as it referred to the intention of the memorialist as to residence) beyond the requirements of the Act of 1870. In 1886 the deceased married an English woman, and they lived in England with his sons. In 1890 he returned to Germany where he remained for two years. In 1893, his wife having become an invalid, he took a house in England on a long lease and established his wife there with a nurse. He lived there himself when he was in England, but he was frequently in Germany, his sole business occupation being in connection with the firm of which his father was head.

In 1901 his father died and he succeeded to his father's interest in the business. He bought out a remaining interest. He made the family home in Germany his residence when he was there, and maintained it at all times. His sons were educated partly in Germany and partly in England. In 1908 his mother died and he used her house, to which he then became entitled, as a second residence in Germany. His wife died in England, and in 1915 the deceased died, also in England. On the question of the deceased's domicil at the date of his death,

Held: (LORD MACMILLAN dissenting) the evidence was insufficient to establish the abandonment by the deceased of his German domicil.

Per LORD ATKIN: it is not the law either that a change of domicil is a condition of naturalisation, or that naturalisation involves necessarily a change of domicil.

Notes. Considered: *Gatty and Gatty* v. *A.-G.*, [1951] P. 444.

As to change of domicil, see 7 HALSBURY'S LAWS (3rd Edn.) 18–23, paras. 33–43; and for cases on the subject see 11 DIGEST (Repl.) 345–346, *144–151*.

Appeal by Charles Emil John Wahl, the administrator of the estate of Charles Frederick Wahl, deceased, from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.), dated March 24, 1931, dismissing his appeal from an order of the King's Bench Division (King's Remembrancer) of the High Court of Justice, dated Dec. 15, 1930, whereby it was declared that the deceased was domiciled in England at the date of his death. The order was made on the trial of an issue directed to be tried under the Crown Suits Act, 1865, s. 58, in proceedings brought by His Majesty's Attorney-General (on behalf of His Majesty) against the appellant for the recovery of death duties on the estate of the deceased.

The appellant was the administrator of his father, the above-named Charles Frederick Wahl, deceased (hereinafter called "the deceased") who died on May 26, 1915. The appellant as such administrator delivered accounts on the footing that the deceased was domiciled in Germany at the date of his death and on that basis including no personal property situate outside the United Kingdom. On facts subsequently coming to their notice which, in the opinion of the Commissioners of Inland Revenue, supported the conclusion that the domicil of the deceased was English, the commissioners called on the appellant to deliver a supplementary account on that basis of the personal property of the deceased situate outside the United Kingdom which was admitted by him to have been of substantial amount. On the appellant persisting in his refusal to deliver such an account the respondent sued out a writ of summons dated March 28, 1927, under the Crown Suits Act, 1865, s. 55, as made applicable to estate duty by the Finance Act, 1894, s. 8, requiring him to do so; and subsequently moved in the King's Bench Division for his attachment for disobedience to the writ. By an order made by consent on the motion, and dated Nov. 28, 1927, the court ordered that an issue should be tried without jury as to whether or not the deceased was domiciled in Germany at the date of his death, namely, May 26, 1915.

The facts, which are summarised in the headnote, are fully set out in their Lordships' judgments. ROWLATT, J., held that the deceased had acquired a domicil of choice in England and that there was no evidence that he ever abandoned this domicil of choice. That decision having been affirmed by the Court of Appeal, the administrator appealed.

C. E. E. Jenkins, K.C., *A. M. Latter, K.C.*, and *T. Mathew* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*), the *Solicitor-General* (*Sir Boyd Merriman, K.C.*), and *J. H. Stamp*, for the respondent.

The House took time for consideration.

April 26. The following opinions were read.

LORD DUNEDIN.—I have had the advantage of reading the opinion which will be delivered by LORD ATKIN, and as I agree in omnibus with it I do not think it necessary to deliver a full opinion. Were it not for the declaration I do not think that in the light of many cases decided as to domicil anyone would say that the determination exuere patriam was proved. Coming to the declaration I make three remarks. First, naturalisation does not carry with it as an inevitable consequence change of domicil. Second, in signing the declaration it is extremely unlikely that the question of domicil was before his mind. Third, the declaration itself is ambiguous, for residence in the United Kingdom as an intention does not discriminate between English and Scotch domicil, though these are essentially different. It seems to me to put too great a burden on the class of residence in England which has been proved, not only to establish the factum, but to turn the ambiguity of expression as to the animus into a certainty.

I think the appeal should be allowed.

LORD WARRINGTON.—This appeal arises in a suit instituted by His Majesty's Attorney-General against the appellant under the Crown Suits Act, 1865. In that suit the following issue was ordered to be tried, namely,

> "The administrator of the estate of Charles Frederick Wahl, deceased, affirms, and His Majesty's Attorney-General denies, that the deceased was domiciled in Germany at the date of his death, May 25, 1915."

The issue was tried before ROWLATT, J., on Dec. 12 and 15, 1930, who decided the issue in favour of the Crown and found that the deceased was domiciled in England at the date of his death. On March 24, 1931, his decision was affirmed by the Court of Appeal (LORD HANWORTH, M.R., and LAWRENCE and SLESSER, L.JJ.). The administrator appeals.

The deceased was a natural-born German subject. His parents were Germans domiciled in Germany where he was born in 1852. His domicil of origin was therefore German. ROWLATT, J., found that, under the circumstances to be mentioned directly, the deceased had in 1884 acquired an English domicil of choice, and that, accordingly, he had only to inquire whether that domicil of choice was ever abandoned. This position was accepted in the Court of Appeal, who also decided that the supposed domicil of choice had not been abandoned.

In my opinion, with all respect to those learned judges, the foundation of their judgments, namely, the adoption in 1884 of an English domicil of choice did not in fact exist, and the real question is whether on the whole of the facts the deceased's domicil of origin was abandoned and an English domicil of choice acquired. It is right to say that in the Court of Appeal at all events the adoption in 1884 of an English domicil of choice was hardly disputed. The learned Master of the Rolls, for instance, stated at the opening of his judgment that the question was whether or not the deceased had reverted to his domicil of origin which was German or whether he had retained his domicil of choice which was English.

The deceased, as I have said, was born in Germany of German parents in 1852. His father was the head of a firm of starch and sugar manufacturers, having a factory at Cüstrin, and the deceased, who was his eldest son, was brought up with a view to his eventually succeeding his father, which, in fact, happened on the death of the latter in 1901. In 1877 he married a German woman. Their home was at Cüstrin, where, in 1878, the appellant, their eldest son, was born. In January, 1880, a second son was born, also at Cüstrin. Unfortunate differences between husband and wife occurred, and in 1879 the deceased came to England and lived at various places in London, and in July, 1884, was living at No. 30, Lanhill-road, Paddington. None of these places, however, was a permanent home, and it appears that he was often in Germany. Some time in 1881 he brought his two children to this country, having apparently obtained a dissolution of his marriage to their mother. So far there is nothing in his conduct or otherwise to support the conclusion that he had abandoned his domicil of origin for an English domicil of choice.

In July, 1884, however, he applied for and obtained naturalisation as a British subject under the Aliens Act, 1870. It is hardly necessary to say that this fact of itself has no bearing on the question of domicil. An alien with a foreign domicil does not by becoming a British subject thereby elect a domicil in this country. The decision of Rowlatt, J., accepted, as I have said, in the Court of Appeal, is based on a statement contained in the memorial presented to the Home Secretary. The Act required that an applicant for naturalisation should have resided for five years in the United Kingdom of Great Britain and Ireland and should have no intention of leaving the United Kingdom. Accordingly the deceased, in his memorial, which was dated July 10, 1884, stated that during the last eight years he had for five years resided in the United Kingdom at the three several places there mentioned, the longest residence in any one of them being two years three months and twelve days. The memorial, which is on a lithographed form, concludes with the following statement:

> "That your memorialist intends to continue to reside permanently within the United Kingdom of Great Britain and Ireland, and has no intention of permanently leaving the United Kingdom."

This form does not appear to have been issued with any official authority, and it clearly goes beyond the requirements of the statute, which do not include any intention "permanently" to reside in the United Kingdom. Moreover, residence or even "permanent" residence does not of itself import domicil, for a man may have a residence in more countries than one. Moreover, domicil carries with it grave results as to status, succession to property, and so forth, and these results are not the same in all parts of the United Kingdom; they are certainly very different in England and Scotland respectively.

The result is that down to 1884 there is, in my opinion, no evidence to support a finding that the deceased had abandoned his German domicil of origin for an English domicil of choice. The onus is therefore on the Attorney-General to establish the adoption of a new domicil of choice subsequently to that date.

From 1884 to 1893 there was no circumstance in the conduct of the deceased pointing even remotely to an intention to abandon his domicil of origin. He paid frequent visits to Germany, and in 1885 he had a flat at Mannheim furnished with material brought from his former home at Cüstrin. He paid visits to England, but had no permanent home there.

In 1893, however, he took a long lease of a house at Hampstead, where he lived whenever he was in England and where he died in 1915. This is without question an important fact, and if unexplained and unqualified by other facts might have led to a conclusion in favour of the contention of the Attorney-General. But it was not either unexplained or unqualified by other facts.

The explanation is simple and, I think, complete. In 1886 he had married in England a lady who had been the governess of his two sons. For some time, and while in health, she had accompanied him in his visits to Germany, but she had been gradually failing, and by 1891 she had become a hopeless invalid. She was paralysed and had become totally blind, and could be moved only in a chair. The house was in fact taken for her, and in it she lived in care of a nurse until in 1906 she died. It was the residence of the deceased when he was in England, but he was frequently absent in Germany on business connected with his father's firm as hereinafter mentioned. On the whole I think the true inference to be drawn from the circumstances under which the house was taken and maintained is that it was an emergency measure dictated by the condition of his wife, and not one which should be held to indicate an intention to establish a family home and thus to adopt a new domicil in this country.

This view is supported by other facts. In 1901 his father, who had been the head of the firm at Cüstrin, died and was succeeded in the management of the business by the deceased. He paid frequent visits to Germany lasting for considerable periods, in attendance at meetings of the board and so forth. He kept up the old family house adjoining the works, leaving an old servant and a sufficient staff in charge, and made it his residence when at Cüstrin on business. In 1908 his mother died. She had lived at Neuwied in a house apparently her own, at all events the deceased succeeded to it at her death. He maintained a staff there also, and used it as a second residence when in Germany. It is true that he continued to occupy the London house until his death in 1915, but we are told by his friend and solicitor that he had endeavoured to dispose of it though without success.

In my opinion the evidence is wholly insufficient to establish the abandonment by the deceased of his German domicil. His business interests were entirely in Germany; all his income was derived therefrom. He does not seem to have severed a single tie with his native country. The issue should, in my judgment, have been and should now be decided in the appellant's favour. Accordingly the appeal should be allowed and the orders of ROWLATT, J., and the Court of Appeal should be reversed and the appellant should have his costs here and below.

LORD ATKIN.—Charles Frederick Wahl, the deceased, died in this country in May, 1915. It is undisputed that his domicil of origin was German. Two questions arise. Did he abandon his German domicil and acquire an English domicil of choice? If so, did he subsequently abandon his English domicil and re-acquire a German domicil? The onus of proving the first is on the respondent: if he succeeds the onus of proving the second is on the appellant.

I am of opinion that the Attorney-General has not discharged the onus of proof that the deceased ever acquired an English domicil. If it were not for the declaration made by the deceased on his application for naturalisation in 1884, the evidence would fall far short of what is necessary to prove such a serious change in a man's status. The deceased was born in 1852; his father had a large interest in a starch and sugar manufacturing business in Germany. The son was brought up in the business; he married a German lady in 1878 and had two sons born in Germany in 1879 and 1880. In 1879 he came to England, where the firm did a large and valuable export business. He resided in this country till 1884 at three different addresses: there is no evidence whether he took tenancies of the houses, whether furnished or unfurnished, or whether he was living in lodgings. There is no evidence whether his wife lived with him here; her second son was born in Germany, and as far as the evidence goes it would appear that the children did not come here till 1884. At that time the husband had apparently divorced his wife, and in that year he brought the two children with a nurse to England and applied for and obtained naturalisation in this country. Under the Naturalisation Act, 1870, s. 7, he had to satisfy the Secretary of State that he had resided for five years in the United Kingdom and intended when naturalised to reside in the United Kingdom. I will return later to the actual declaration made. Immediately after the naturalisation he returned with the children to Germany and for two years appears to have had no residence at all in England. In 1886 he married in England his second wife, who had been governess to the children, a lady of English birth, who had been educated up to the age of seventeen in Germany. Having returned to England in 1886, he lived with his wife and children for two years at Teddington, then for a year at Brighton. He then seems to have returned to Germany for two years—1890–1891—during which time again he appears to have had no British residence, though the two boys appear to have been left at a school at Teddington. Meantime, soon after the marriage, the wife's health had begun to fail. Eventually she became a helpless invalid, blind and paralysed. In 1890 or 1892 husband and wife returned to England, and in 1893 the husband bought a long lease of a house in Hampstead, where he established his wife with a nurse, and where he lived during his stay in this country. In 1901 his father died, leaving him the principal share in the family house at Cüstrin, where the business premises were situate. He bought the remaining share and for the rest of his life left the house open, keeping servants and a motor car there and maintaining the garden. In 1906 his wife died. He did not give up his Hampstead house, but continued as before to live there when in England. In 1908 his mother died and he succeeded to the house she lived in in Neuwied. Throughout the whole of this period his sole business occupation was in the German business. He came frequently to Germany to take part in the management of the business, though apparently he did not stay for more than a month or two at a time. All his income was derived from Germany. His sons for a year, 1891–92, were at school at Malvern. Afterwards they went for their education to Cologne, the elder till 1894, the younger till 1897. The elder joined the British Army: the younger joined the Indian Civil Service and went to Balliol. In these circumstances I am quite unable to draw the inference that the deceased ever intended to abandon his German domicil or to acquire an English domicil. As one of your Lordships has observed, he does not appear to have severed a single tie with Germany, and I see no proof that he either had the intention or that he carried out an intention to make his principal or only home in this country. The facts, indeed, seem to negative both the animus and the factum, the mind and the deed. The learned trial judge appears to have thought that the declaration made for naturalisation, that the applicant intended to continue to reside permanently within the United Kingdom of Great Britain and Ireland, and had no intention of permanently leaving the United Kingdom, coupled with the facts I have mentioned, was conclusive proof of the acquisition of a new domicil of choice. It is worth noting that the words occur in print, in a printed form which does not appear to have been prescribed by any regulations, and go beyond the requirements of the statute. I am far from saying that the fact that they appear in print absolves the declarant from an obligation to make the full declaration truthfully, but I think they might well be understood by him and his advisers as not intended to go beyond the statutory requirement. It is important to remember that naturalisation is one thing, change of domicil is another: and that it is not the law either that a change of domicil is a condition of naturalisation, or that naturalisation involves necessarily a change of domicil. Indeed, when it is observed, as was pointed out to us by counsel for the appellant, that the residence required for naturalisation by the Act of 1870 is residence in the United Kingdom, the evidence of any intention to change domicil is very much weakened, for it is consistent, if it pointed to domicil at all, with domicil in England, Scotland, or Ireland, the two former at any rate involving very different obligations. The present Act of 1914 (British Nationality and Status of Aliens Act, 1914) seems still more clearly to mark the distinction, for the five years' previous residence may now be as to four in the British Dominions, and the future residence may also be intended to be anywhere in the British Dominions. I am far from saying that an application for naturalisation is not a matter to be carefully considered as part of the evidence in a case of domicil, but it must be regarded as one of the totality of facts, and it cannot assume the dominant importance attached to it in the judgment of the trial judge. In the Court of Appeal it seems clear that the question of an original change of domicil was not brought prominently before the court by the appellant. It was not suggested for the respondent that the appellant was precluded from raising the point in this House, but comment can hardly be directed against the Court of Appeal if in the circumstances they treated the substantial question as being whether the appellant had reverted to a German domicil. If that had been the sole question, as at present advised, I should have found a difficulty in differing from the decision come to by the Court of Appeal. As it is, I think that the orders of the Court of Appeal and ROWLATT, J., should be set aside and that the issue be decided in favour of the administrator of Charles Frederick Wahl, deceased, that the deceased was domiciled in Germany at the date of his death. The appellant should receive his costs here and in the courts below.

LORD THANKERTON.—I concur.

LORD MACMILLAN.—Were it not for the emphatic opinion to the contrary which your Lordships have just expressed I confess that I should have felt more confidence in the conclusion which I have reached that the deceased acquired an English domicil of choice and retained it until his death. I give, of course, full recognition to the difference between the legal concepts of nationality and domicil, though it is not always appreciated by the lay mind, but at the same time I regard a deliberate change of nationality as a significant fact to be taken into account in determining whether or not a change of domicil has simultaneously been effected. It is, however, to the declaration which the deceased made in applying for British naturalisation, rather than to the fact of his naturalisation, that in common with the trial judge and the Court of Appeal I attach special importance. When in 1884 the deceased made his application to the Home Secretary he stated that during the preceding eight years he had for five years resided in the United Kingdom, that he intended to reside permanently in the United Kingdom, and that he had no intention of permanently leaving the United Kingdom. Whether a statement in those terms was by law required of him is to my mind beside the question, and I certainly demur to the suggestion that its significance is diminished by reason of the fact that it occurs in a printed form. The deceased accompanied his application with a statutory declaration solemnly and sincerely declaring that the statements set forth in his application, including those I have mentioned, were true. It is seldom that in deciding a question of domicil a court has the advantage of so clear and unequivocal an expression of intention as to residence, and for my part I do not give any the less weight to it because the deceased probably did not have in mind the question of domicil at all, as I am sure he did not have in mind that different systems of law prevail in different parts of the United Kingdom. It is the state of his mind, his animus, as disclosed in the document that seems to me so significant. And when I couple with this announcement of his intentions the subsequent facts of his life I find it difficult to arrive at any other conclusion than that he died a domiciled Englishman. I select only a few of the outstanding incidents. The deceased in 1886 married, as his second wife, an English lady in a London church; in 1893 he acquired a long lease of a house in Hampstead and furnished it: he retained that house and lived most of the remainder of his life in it, before as well as after his wife's death, finally dying there in 1915; his two sons by his first wife both entered the public service of this country, one joining the Army and the other the Indian Civil Service. As against these critical facts there are no doubt to be set the circumstances that the deceased's business interests were entirely in Germany, that he derived his income from a family industry there, that he paid numerous visits to Germany, and that he had a residence in Germany always kept in readiness for his occupation. But in these days it is by no means uncommon for a person to have interests in more than one country, and the question of legal domicil in such cases must always depend on where the person concerned chose to make the real focus of his existence. In my opinion the inference from the facts of the deceased's life is that he deliberately chose England as his physical as well as his spiritual home. As, however, your Lordships have taken a different view, I need not labour the matter further, and I content myself with recording my respectful dissent from the judgment about to be pronounced.

Appeal allowed.

Solicitors: *Mills & Morley*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

YOUNG *v.* MERCHANTS' MARINE INSURANCE CO., LTD.

[COURT OF APPEAL (Scrutton, Greer and Slesser, L.JJ.), June 7, 8, 20, 1932]

[Reported [1932] 2 K.B. 705; 101 L.J.K.B. 567; 147 L.T. 236;
48 T.L.R. 579; 37 Com. Cas. 415; 18 Asp.M.L.C. 341]

Insurance—Marine insurance—Collision clause with cross liabilities principle—Reinsurance against total loss only—Payment by insurers and reinsurer as for total loss—Both vessels equally to blame—Payment by owner of insured ship on basis of single liability—Payment by insurers under running down clause on basis of cross liabilities, as agreed—Claim by reinsurer from insurers on account of notional sum received by insurers.

Insurers insured vessel A on an all risks policy containing a running down clause providing for claims under the clause to be settled on the principle of cross liabilities, and they reinsured their risks under the policy with the exception of their liability under the running down clause. Vessel A collided with vessel B, and, in a subsequent Admiralty action, both vessels were found equally to blame. The damage to vessel B being greater than that to vessel A, a single balance judgment for half the difference was given in favour of the owners of vessel B. The owners of vessel A satisfied the judgment, and the insurers paid the owners of vessel A as on a total loss, and also a sum in respect of their third-party liability under the running down clause. The reinsurer, having paid the insurers as on a total loss, claimed that he was entitled to repayment from the insurers of his proportion of the sum represented by half the damage to vessel A, as being payable by the owners of vessel B on the principle of cross liabilities.

Held: the reinsurer's claim failed because (i) the effect of such an Admiralty balance judgment is that an insurer who has paid a shipowner as on a total loss and is, therefore, subrogated to the shipowner's legal claim in respect thereof is subrogated, not to a claim for the whole loss, but to a claim for half the balance of the two losses; principle in *The Khedive* (1) (1882), 7 A.C. 795, applied;

(ii) in this case the owner of vessel A having suffered the smaller loss, his claim against the owners of vessel B, to which the insurers were subrogated, was for nothing;

(iii) the claim of the owners of vessel A against the insurers under the principle of cross liabilities was res inter alios acta as between the reinsurer and the insurers;

(iv) the terms of the running down clause as to the principle of cross liabilities did not actualise the notional payment to the owners of vessel A of the half damage of that vessel by the owners of vessel B; this sum was not actually paid to the owners of vessel A or to the insurers; and so there had been no payment which the reinsurer could claim.

Per SCRUTTON, L.J.: If the balance had been in favour of vessel A, the reinsurer would have been entitled to reduce his loss by the amount of that balance, but not by the amount of the claim used in computing that balance.

Notes. As to the effect of a collision clause such as the one in this case, see 22 HALSBURY'S LAWS (3rd Edn.) 453, para. 902, note (a).

Cases referred to:

(1) *The Khedive, Stoomvaart Maatschappij Nederland* v. *Peninsular and Oriental Steam Navigation Co.* (1882), 7 App. Cas. 795; 52 L.J.P. 1; 47 L.T. 198; 31 W.R. 249; 4 Asp.M.L.C. 567, H.L.; 41 Digest 924, *8135*.

(2) *De Vaux* v. *Salvador* (1836), 4 Ad. & El. 420; 1 Har. & W. 751; 6 Nev. & M.K.B. 713; 5 L.J.K.B. 134; 111 E.R. 845; 29 Digest 212, *1695*.

(3) *Chapman* v. *Royal Netherlands Steam Navigation Co.* (1879), 4 P.D. 157; 48 L.J.Ch. 449; 40 L.T. 433; 27 W.R. 554; 4 Asp.M.L.C. 107, C.A.; 41 Digest 924, *8134*.

A (4) *The Balnacraig, London Steamship Owners' Insurance Co.* v. *Grampian S.S. Co.* (1890), 24 Q.B.D. 663; 59 L.J.Q.B. 549; 62 L.T. 784; 38 W.R. 651; 6 T.L.R. 288; 6 Asp.M.L.C. 506, C.A.; 29 Digest 212, *1700*.

Appeal from a decision of MacKinnon, J., in the Commercial Court.

The defendant insurers, the Merchants' Marine Insurance Co., Ltd., insured the B *Whimbrel* by an all risks policy for twelve months in the sum of £1,715, that vessel being valued at £26,000. The policy contained a "running down clause" against third-party liability, which was in the following terms:

> "And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay by way of damages to any other person or persons any sum or sums C in respect of such collision, the undersigned will pay the assured such proportion of three-fourths of such sum or sums so paid as their respective subscriptions hereto bear to the value of the ship hereby insured, provided always that their liability in respect of any one such collision shall not exceed their proportionate part of three-fourths of the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability, with D the consent of the undersigned, they will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay: but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other E proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

The defendant insurers reinsured the risks under this policy and under other policies which they had issued to the owners of the *Whimbrel* on the rest of their fleet in respect of "the risk of total and/or constructive total loss" for £34,930 (including the £1,715 on the *Whimbrel*). In this reinsurance policy there was no "running down clause" F against third-party liability. Francis Gordon Young, the plaintiff, an underwriting member of Lloyds, underwrote this reinsurance policy for £34,930 in the sum of £3,123.

During the currency of both policies the *Whimbrel* came into collision with the Canadian Pacific liner, the *Marloch*. The *Whimbrel* was sunk and the insurers paid the owners of that vessel £1,715 as on a total loss under the policy of insurance, and the reinsurers, on the reinsurance policy paid to the insurers his proportion of the G £1,715 on the policy of reinsurance.

On cross actions by the owners of both vessels in the Admiralty Court, both vessels were held equally to blame. One-half of the damage to the *Marloch* was £12,720, and one-half of the damage to the *Whimbrel* was £7,760. The owners of the *Whimbrel*, therefore, paid to the owners of the *Marloch* the balance under the Admiralty rule of single liability, the owners of the *Marloch* making no payment to the owners of the H *Whimbrel*: (see *The Khedive, Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.* (1)).

The owners of the *Whimbrel* then claimed payment under the "running down clause" against the insurers and other underwriters under their policy of insurance in respect of the third-party liability on the basis of cross liabilities as provided in the "running down clause." Their claim was for three-quarters of half the damage sustained by the I *Marloch*—£12,720, i.e., £9,540. The fourth quarter of £3,180 was a claim on the club. Against this sum of £9,540 to which was added £18 proportion of salvage expenses, in all, £9,558, credit was given under the principle of cross liabilities for one-half the damage sustained by the *Whimbrel*, for which the owners of the *Marloch* were liable to the owners of the *Whimbrel*, i.e., £7,760, together with £4 net proceeds of ship's gear salved. The balance of £1,794 was the net amount for which underwriters were liable to the owners of the *Whimbrel*, whose value was £26,000. The insurers were liable to the owners of the *Whimbrel* for their proportion, £118 7s. 10d., which sum they paid under the running down clause, as well as the £1,715 already paid as for a total loss.

The reinsurer was not liable on the reinsurance policy for third-party liability, as it contained no "running down clause": (see *De Vaux* v. *Salvador* (2)). However, having paid under the reinsurance policy his proportion of the £1,715 as for total loss of the *Whimbrel*, he contended that as the owners of the *Whimbrel* in their claim on the "running down clause" against the insurers on the basis of cross liabilities had been credited with £7,760 as a sum payable to the owners of the *Whimbrel* by the owners of the *Marloch*, that sum was payable in respect of the total loss of the *Whimbrel*, and should be treated as a diminution of the insurers liability for the loss of the *Whimbrel*, and that he, the reinsurer, was entitled to a share of that payment. Accordingly he brought this action for repayment of that share from his proportion of the £1,715 he had paid to the insurers as for a total loss of the *Whimbrel.*

MacKinnon, J., held that the sum of £7,760 had not in fact been received by the shipowners in diminution of their total loss of the ship, and the insurers had not become entitled as against the shipowners to any diminution of their liability to the shipowners in respect of the total loss by virtue of the receipt of any money by the shipowners. The sum of £7,760 appeared in the assessment as a figure of account only, and simply because by the convention between the shipowners and the insurers on an all-risks policy, it had been agreed that in assessing that sum which was to be paid by the insurers under the "running down clause" the matter was to be treated as though these were cross liabilities. The truth was that the shipowners had not in fact received any sum in diminution of their total loss, and therefore the liability of the insurers to the shipowners to pay them for a full total loss had not in any way been diminished. Consequently, the liability of the reinsurer to pay to the insurers in full the amount of the total loss which he had reinsured had not been diminished in any way. Accordingly, he gave judgment for the defendant insurers.

The reinsurer, the plaintiff, appealed.

Raeburn, K.C., and *F. Martin Vaughan* for the reinsurer referred to *Chapman* v. *Royal Netherlands Steam Navigation Co.* (3); *The Khedive, Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.* (1); *The Balnacraig, London Steamship Owners' Insurance Co.* v. *Grampian S.S. Co.* (4).

Le Quesne, K.C., and *Sir Robert Aske* for the insurers.

Cur. adv. vult.

June 20. The following judgments were read.

SCRUTTON, L.J.—This appeal raises a question of marine insurance law which we were told has been a subject of much difference of opinion amongst underwriters and average adjusters. It arises on these facts: the steamship *Whimbrel* and the steamship *Marloch* came into collision, and in a collision action were found both to blame. The effect of this in the Admiralty Court is that, the damage to each ship being unascertained, one judgment is given for the ship sustaining most damage for half the excess of her damage over the damage of the other ship. This is called "the single liability principle," and was held to be correct by the House of Lords in *The Khedive, Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.* (1). Treating this as the correct principle, instead of the method of treating each ship as having a claim for which it obtains judgment, has at any rate some very important consequences. When one of the ships limits the liability and the fund is insufficient to pay all claims, the other ship cannot prove on the fund for the total amount of her damage, but only for the balance of the two amounts of damage. It has this further result that when an underwriter has paid a shipowner for the total loss of his ship and is therefore subrogated to the shipowner's legal claim in respect of the subject-matter insured (see s. 79 of the Marine Insurance Act, 1906 (6 Edw. 7, c. 41)) he is subrogated not to a claim for his whole loss, but to a claim for half the balance of the two losses, which if his loss is the smaller will be nothing.

In the present case the *Whimbrel* had been insured by the Merchants' Marine Insurance Co. ("the insurers") against total loss from marine perils, and also against third-party liability from collision. This latter head, which is loss to the shipowner's pocket, not to his ship, has since *De Vaux* v. *Salvador* (2) been held not to be a loss by perils

A of the sea, and is therefore covered by a separate clause known as the "running down clause." When after the decision in *The Khedive* (1) a question arose in *The Balnacraig, London Steamship Owners' Insurance Co.* v. *Grampian S.S. Co.* (4) whether, when both colliding ships were to blame, the subsequent liabilities under the "running down clause" were to be treated as separate claims, each ship for its own damage, or only for a balance claim by the ship having the greatest loss, and the "running down clause" B said nothing on the subject, MATHEW, J., and the Court of Appeal held that the matter under the decision of *The Khedive* (1) was to be treated as one liability for the balance, and not as two liabilities or claims for the whole damage sustained by each ship. As a result of this decision a new "running down clause" was framed which purported expressly to establish by agreement "the principle of cross liabilities."

The next and most vital point in the case is that the insurers had reinsured with C Lloyds Underwriters not the whole of their risk on the *Whimbrel*, but only "the risk of total and/or constructive total loss." They did not reinsure the third-party risk of liability covered by the "running down clause," and the reinsurance policy did not therefore include that clause or say anything about "the principle of cross liabilities." The original underwriters, the insurers, settled with the shipowners for a total loss in the sum of £1,715, and the reinsurers, Lloyds Underwriters settled for a total loss with D the insurers, for the same sum. This settlement had nothing to do with the "running down clause." The insurers then settled a claim under the "running down clause" for £118 7s. 10d. (their proportion of £1,794), and of course did not claim anything from the reinsurer who had not insured this risk. However, this figure was arrived at by taking the balance of the two third-party liability claims the *Whimbrel's* claim against the *Marloch*, some £7,760, as compared with the *Marloch's* larger claim against the E *Whimbrel*. It then occurred to those advising Lloyds Underwriters, the reinsurers of total loss only, to say:

> "We have paid you so many pounds for total loss of the *Whimbrel*, but you have recovered from the *Marloch* so much (£7,760) for their liability for your loss. We must have credit for this as reducing our loss."

F The question is whether this claim of Lloyds Underwriters represented by the plaintiff reinsurer is right; MACKINNON, J., has held it is not right, and Lloyds Underwriters, the reinsurers, appeal.

I approach the matter on comparatively simple lines and do not think it necessary to make any complicated average adjustments to illustrate my view. Lloyds Underwriters, the reinsurers, have settled a total loss on hull and cargo and are therefore G entitled to be subrogated to any legal rights the Merchants' Marine Insurance Co., the insurers, and the shipowners have in respect of hull and cargo. But the shipowners' right being to a simple liability or balance judgment, and the balance being against him, there is no legal right of his against the *Marloch* to which the reinsurers can be subrogated. It is true that by reason of the "running down clause" and the "principle of cross liabilities" therein contained the insurers, the Merchants' Marine Insurance H Co., have paid a further sum, obtained by treating them as having received £7,760 in respect of the *Marloch's* liability in respect of the damage which the *Marloch* did to the *Whimbrel*, and having paid a larger sum in respect of the damage which the *Marloch* has sustained from the *Whimbrel*. But Lloyds, the reinsurers, have not reinsured liability under the "running down clause" and have not made any agreement applying "the principle of cross liabilities." All this is to the reinsurers res inter alios acta; they I are not bound by it, and cannot take advantage of it.

The case for the reinsurers is put in this way. Assume both ships to blame, and each ship to have sustained £10,000 loss for which the other ship is liable. We have settled a total loss for a larger sum than £10,000, but the shipowner has received £10,000 in respect of that loss from the other ship, we are entitled to have the benefit of that sum by which the shipowner has lessened his loss, which we have paid him. The answer made by MACKINNON, J., which, I am of opinion is correct, is that the shipowner has "received" nothing. On the facts stated there will be no judgment in favour of either ship, not a judgment for each ship for £10,000, so that the reinsurers can get the benefit of the judgment against the *Marloch* for £10,000. The appearance of £10,000 in the A figures from which a balance is obtained is only due to a formula adopted by the shipowner and his insurers in respect of a matter in which the reinsurers are not interested, by an agreement to which they are not a party. The reinsurers, having paid a total loss, are entitled to be subrogated to any right of the shipowners in respect of loss of hull and cargo, but as, on the principle in *The Khedive* (1), the balance being against the shipowners, they have no judgment in their favour, the reinsurers cannot claim the B benefit of any of the figures from which the balance against the shipowners is calculated.

I only desire to mention, as MacKinnon, J., does not mention it, that if the balance had been in favour of the *Whimbrel*, the reinsurer would, of course, have been entitled to reduce his loss by the amount of that balance, but not by the amount of the claim used in computing that balance, which is only relevant to a subject-matter and a contract to which he is a stranger. The appeal must be dismissed with costs. C

GREER, L.J.—I think I can make my opinion clearer if I assume that the defendants were the sole insurers of the hull at an agreed value, and the sole insurers of the whole of the liability of the *Whimbrel* to the *Marloch*. This will make it unnecessary to state the liability of the insurers in proportions, but the principle applicable will be exactly the same as if it were so stated. For the same reason I treat the reinsurer, the plaintiff D in the action, as having reinsured the whole of the insurers' liability on the insurance on the hull and machinery and cargo of the *Whimbrel*.

While insured by the insurers the *Whimbrel* came into collision with the *Marloch*, and as a result of the collision became a total loss. Cross-actions were brought in the Admiralty Court by the respective owners of the two vessels, and both vessels were declared to be equally to blame. As the *Marloch's* half damage exceeded the *Whimbrel's* E half damage, the latter had to pay the balance under the Admiralty rule of single liability in accordance with the decision in *The Khedive, Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.* (1). In the result, on the principle of single liability, the *Whimbrel* became liable to pay the owners of the *Marloch*, and did pay to them, that balance. They were entitled to, and did recover, three-quarters of this liability under the "running down clause" in their policy with the defendants and other F insurers of hull, &c., and one-fourth from their Mutual Insurance Club. This division of insured liability is immaterial, and I treat them as having become entitled to recover the whole of their liability from the defendant insurers, and as having been paid that sum.

The insurers had reinsured their liability on hull, &c., with the plaintiff reinsurer who paid them the whole of their liability on this head in respect of the total loss of the G *Whimbrel*. On discovering the form of the "running down clause" in the *Whimbrel's* policy with the insurers, the reinsurer claimed that he had overpaid the insurers by the amount of £7,760, being the amount the *Whimbrel* would have been entitled to recover from the *Marloch* if that liability had been determined separately and independently of the liability of the *Whimbrel* to pay half the *Marloch's* damage.

The owners of the *Whimbrel* never in fact obtained any benefit from the Admiralty H judgment, having been found liable to pay the *Marloch* the balance of the *Marloch's* half damage over that of the *Whimbrel*, which they in fact paid. They could not under the Admiralty rule be called on to pay more than that sum, nor could they recover any sum from the *Marloch*. They could not under their policy, construed as a whole, claim anything more than an indemnity for what they had to pay. Their right to recover from their insurers for their total loss under the insurance on hull and cargo I is not affected by the fact that they had an additional right to recover the balance they had to pay to the owners of the *Marloch*. Nor could the defendants, their insurers, if subrogated to their rights, in fact recover anything more than the *Whimbrel* could, that is to say, nothing.

If the claim of the reinsurer is to be determined by the true facts of the case, it seems plain that the original insurers have in fact paid the *Whimbrel* the *Whimbrel's* total loss on the insurance on hull and cargo, and have been entitled to recover nothing against that loss by subrogation. The argument for the reinsurer was entirely based on the

A special form of the "running down clause" in the *Whimbrel's* policy with the insurers.

The clause is in these terms: [His lordship here read the clause, which is printed at p. 829, ante, and continued:]

I will try to do justice to the argument for the reinsurers, although I am not sure that I understood it accurately. As I understood it, it was as follows: The liability of the insurers was by agreement to be determined by an assumed state of facts contrary to B the decision of the Admiralty Court. It was to be assumed as between the owners of the *Whimbrel* and their insurers, the defendants, that the Admiralty Court had ordered the *Marloch* to pay the owners of the *Whimbrel* half the damage to the *Whimbrel*, which has been ascertained at the amount of £7,760, and that the owners of the *Whimbrel* had to pay the owners of the *Marloch* half the *Marloch's* damage, a sum which exceeded that sum of £7,760.

C It is contended that as a result of this conventional form of settlement the amount paid by the insurers for a total loss must be reduced by the amount they could on this conventional state of facts have recovered from the owners of the *Marloch*. They would then have to pay to the *Whimbrel* on the running-down clause the total amount of the half of the *Marloch's* damages, which the *Whimbrel* would in the conventional state of facts have been called upon to pay to the *Marloch*. Therefore, say the rein- D surers, they never paid a total loss on the insurance on hull, they only paid a total loss less the amount they are conventionally treated as receiving from the *Marloch*. Therefore, the reinsurers say: We find that we have overpaid you, the insurers of the hull and cargo, £7,760 more than you paid on the policy on hull and cargo. We did not reinsure your liability on the "running down clause," to which the loss of this sum should be attributed, therefore pay us back the amount of our overpayment.

E This is an attractive argument, but in my judgment, it is unreal and unsound. It is susceptible of two answers. (i) The amount obtained by subrogation does not enable the insurer to say that his liability for a total loss is reduced. He must acknowledge and pay his liability for total loss before he obtains any right to subrogation. What he recovers by subrogation does not reduce the amount payable for total loss, it is in the nature of salvage, which the insurer is entitled to keep. (ii) The special terms of F the running down clause only affect the relations of the *Whimbrel* and her insurers as to the insurance under the running down clause. They cannot be implied as part of the terms of the reinsurance contract which is concerned only with the reinsurance of the amount of the total loss. These conventional terms were res inter alios acta.

The substance of the matter is, in my judgment, accurately stated by MacKinnon, J., towards the end of his judgment:

G

> "The truth is that the shipowner has not received any sum in diminution of his total loss, and therefore the liability of the insurers to the shipowner to pay him a full total loss has not been diminished in any way, and as the liability of the insurers to pay the shipowner in full his claim for a total loss has not been diminished in any way, so in my judgment the liability of the reinsurer to pay the insurers in full has H not been diminished in any way."

It follows that the insurers have not been overpaid by the reinsurer, and the reinsurer is not entitled to recover anything from the insurers.

For these reasons I agree that this appeal should be dismissed with costs.

SLESSER, L.J.—I agree, and have very little to add. The payment which it is I suggested that the *Whimbrel* recovered from the *Marloch*—an amount equal to that recoverable by the *Marloch* from the *Whimbrel* less a balance—is entirely notional. In reality, under the principle of single liability the *Whimbrel* never recovered their half damage at all; it was cancelled out by the half damage of the *Marloch*: (see *The Khedive, Stoomvaart Maatschappij Nederland* v. *P. & O. Steam Navigation Co.* (1)). The *Whimbrel* alone actually paid damages.

The clause in the *Whimbrel's* policy with the insurers to the effect that "claims under this clause shall be settled on the principle of cross liability" cannot operate to actualise the notional payment to the *Whimbrel* of the half damage by the *Marloch* which was in fact never paid. Perhaps these words were intended to produce the result here contended for by the reinsurer; but, if so, they fail to effect it, because, in reality, the *Whimbrel* has not received any payment at all in reduction of her loss, and, consequently, the reinsurer must look on the insurers as paying the insured loss without abatement.

Appeal dismissed.

Solicitors: *William A. Crump & Sons*; *Waltons & Co.*

[*Reported by* C. G. MORAN, ESQ., *Barrister-at-Law.*]

Re MONRO'S SETTLEMENT. MONRO *v.* HILL

[CHANCERY DIVISION (Maugham, J.), June 24, 1932]

[Reported [1933] Ch. 82; 102 L.J.Ch. 89; 148 L.T. 279]

Settlement—Marriage settlement—Trust to pay husband's fund's income to wife after his death until her re-marriage—Dissolution of marriage—Re-marriage of wife during husband's lifetime—Subsequent death of husband—Right to income of husband's fund.

Clause 3 of a marriage settlement made in 1903 provided that "from and after the death" of the husband the income of the husband's fund should be paid to the wife "during her life or until she shall marry again." After his death and the death or re-marriage of the wife the income of the husband's fund was to be held in trust for the issue as they should by deed jointly appoint, and in default or subject thereto as the survivor should by deed or will appoint, and in default or subject thereto for the children as therein mentioned. There was issue, one child, a son, in 1904. In 1916 the marriage was dissolved on the petition of the wife. The wife re-married in 1930, the husband died in 1932. On the question whether the income of the husband's fund was after his death payable to the wife for life until she should again re-marry and whether her power of appointment over his fund was still exercisable;

Held: the income of the husband's fund was after his death payable to the wife until she should marry again, and the power of appointment over that fund given to her as survivor was still exercisable by her, because, construing the words of cl. 3 without any bias that a divorced spouse is not intended or expected to take any benefit out of the other party's property, (i) the trust for the wife arose only on the death of the husband and the words "until she shall marry again" were words of futurity, primâ facie applying only to marriage after the husband's death; (ii) the wife's re-marriage during his lifetime, an event which the parties never contemplated, therefore did not come within these words.

Per CURIAM: the same rule must be applied to the construction [of such clauses] whether it be upon the husband's or the wife's petition that the marriage is dissolved.

Notes. As to the effect of dissolution of the marriage on powers contained in a marriage settlement, see 25 HALSBURY'S LAWS (2nd Edn.) 594, para. 1048, and ibid., vol. 29, 597, para. 869, note (s), and for cases on the subject see 27 DIGEST (Repl.) 107, *791–793*, and 108, *795–796*.

Cases referred to:

(1) *Re Chapman, Perkins* v. *Chapman*, [1904] 1 Ch. 431; 73 L.J.Ch. 291; 90 L.T. 339; 52 W.R. 467, C.A.; on appeal, sub nom. *Chapman* v. *Perkins*, [1905] A.C. 106; 74 L.J.Ch. 331; 92 L.T. 372; 53 W.R. 485, H.L.; 44 Digest 490, *3095*.

A (2) *Re Crawford's Settlement, Cooke* v. *Gibson*, [1905] 1 Ch. 11; 74 L.J.Ch. 22; 91 L.T. 683; 53 W.R. 107; 27 Digest (Repl.) 644, *6079*.

(3) *Fitzgerald* v. *Chapman* (1875), 1 Ch.D. 563; 45 L.J.Ch. 23; 33 L.T. 587; 24 W.R. 130; 27 Digest (Repl.) 107, *792*.

(4) *Re Metcalfe, Metcalfe* v. *Metcalfe*, [1891] 3 Ch. 1; 60 L.J.Ch. 647; 65 L.T. 426; 7 T.L.R. 558; 35 Sol. Jo. 528, C.A.; 44 Digest 1231, *10648*.

B (5) *Re Muggeridge's Trusts* (1860), John. 625; 29 L.J.Ch. 288; 6 Jur.N.S. 192; 8 W.R. 234; 70 E.R. 569; 5 Digest 663, *5893*.

(6) *Re Pilkington's Settlement, Pilkington* v. *Wright* (1923), 129 L.T. 629; 67 Sol. Jo. 679; 27 Digest (Repl.) 108, *795*.

Adjourned summons as to the construction of a marriage settlement.

C By a settlement, made on Dec. 3, 1903, on the marriage of Harold Edward Monro and Dorothy Elizabeth Browne, it was provided by cl. 3 that "from and after the [husband's] death" the trustees should pay to the wife if she survived her husband the annual income of the husband's fund "during her life or until she shall marry again." By cl. 6 the wife if she should survive her husband had a power of appointment over the husband's fund in default of and subject to any joint appointment made by them D during their joint lives, which did not happen, with remainder in trust for the issue of the marriage. On the other hand, if the husband survived, the income of the wife's fund was to be paid to him. This settlement was confirmed in 1906 by the wife, she being an infant in 1903. There was one child, a son, born in 1904. In 1916 the marriage was dissolved on the wife's petition, and by an order of the Probate Division in 1918 the settlement was varied, extinguishing all the husband's rights in the wife's E fund. In 1929 the son by voluntary deed assigned all his rights to trustees on the trusts therein mentioned. In 1930 the wife remarried, and in 1932 the husband died. The trustees of the settlement now asked whether the income of the husband's fund was, as from the husband's death, payable to the wife during her life until she should again marry, and whether her power of appointment over the fund was still exercisable by her.

F *Vanneck* for the trustees of the settlement.

Belsham for the wife.

L. B. Tillard for the son.

The following cases were referred to: *Re Chapman, Perkins* v. *Chapman* (1); *Re Crawford's Settlement, Cooke* v. *Gibson* (2); *Fitzgerald* v. *Chapman* (3); *Re Metcalfe, Metcalfe* v. *Metcalfe* (4); *Re Muggeridge's Trusts* (5), and *Re Pilkington's Settlement,* G *Pilkington* v. *Wright* (6).

MAUGHAM, J. [after stating the facts, continued:] There seems to be no direct authority on this point. The question which arises is: What is the true effect of cl. 3? Has the wife married again within its meaning, or is the clause confined to the event of her marrying again after the husband's death? This is a case in which the court must construe the clause knowing that an event has happened which the parties to the H settlement never contemplated. Certain legal principles apply to the case. It is established by *Fitzgerald* v. *Chapman* (3) that a marriage settlement, in so far as it is not varied by a judgment or order of the proper tribunal, remains unaffected by a decree of dissolution of marriage and may be enforced for the benefit of an innocent or guilty divorced person, and that it must be construed without any bias, one way or the other, regarding the view that a divorced spouse is not primâ facie expected or I intended to take any benefit out of the property of the other party to the settlement. In that case property was settled upon trust for the wife during the joint lives of herself and her husband, and, after her decease, for him for his life, and then upon trusts for the children of the marriage. The property was brought into settlement by the wife and her father, and the marriage was dissolved on her petition, and it was held that the husband's life interest on the wife's decease had not been forfeited by the dissolution. That decision has been constantly recognised as stating a correct view of the law. I may mention, also, two of the most recent decisions on the point, namely, that of KEKEWICH, J., in *Re Crawford's Settlement* (2), and that of EVE, J., in *Re*

Pilkington's Settlement (6). The result of the decision in *Re Chapman* (1) is that cases dealing with forfeiture of interests in the event of alienation or bankruptcy are in a different category from the case which is now before me, and ought not to affect my mind in considering the question which I have to decide.

Turning back to the clause in question in the present case, I must, I think, without prejudice either way, determine the literal meaning of the words:

> ". . . from and after the death of the said Harold Edward Monro the trustees shall pay the annual income of the husband's fund unto the said Dorothy Elizabeth Browne if she shall survive the said Harold Edward Monro during her life or until she shall marry again. . . ."

The trust arises only upon the death of the husband, and the words "until she shall marry again" are words of futurity, primâ facie applying only to marriage after the husband's death. On this simple ground I hold that the marriage which has taken place during the first husband's life does not come within those words.

I may add that the same rule must be applied to the construction whether it be upon the husband's or the wife's petition that the marriage is dissolved. I can conceive cases in which the innocent party would be suffering very great injustice if, by reason of the necessity for obtaining a divorce occasioned by the conduct of the guilty party, it were to be held that the innocent party could not marry again, possibly for many years, without forfeiting an existing life interest which might have been provided as part of the bargain made upon the marriage. Further, a case might arise in which the innocent party had married again after divorcing the guilty party and where the second spouse had died before the guilty party. Would it be reasonable in that case to hold that a clause in the words of cl. 3 of the will before me has the effect of taking away the life interest of the innocent party? There are a number of similar points with which I might have to deal were I not putting aside considerations of prejudice. For the reason above stated I come to the conclusion that the income of the husband's fund is payable to the wife until she shall marry again and the power of appointment is still exercisable by her.

Solicitors: *Monro, Saw & Co.*; *Reid, Sharman & Co.*; *Boyce, Evans, & Sheppard.*

[*Reported by* A. W. CHASTER, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* JACKSON

[HOUSE OF LORDS (Lord Buckmaster, Lord Warrington, Lord Atkin, Lord Tomlin and Lord Macmillan), November 24, 27, 1931, February 22, 1932]

[Reported [1932] A.C. 365; 101 L.J.Ch. 186; 146 L.T. 450; 48 T.L.R. 261; 76 Sol. Jo. 146; [1931] B. & C.R. 167; 16 Tax Cas. 681]

Executor and Administrator—Retainer—Simple contract debt—Retainer against Crown's claim for tax—Bankruptcy Act, 1914 (4 *& 5 Geo.* 5, *c.* 23), *s.* 33 (1).

An executrix claimed to be entitled to retain out of the insolvent estate of her testator her own simple contract debt as against a Crown debt for taxes.

Held: to the extent to which the Crown's claim for taxes was given priority in bankruptcy by the Bankruptcy Act, 1914, s. 33 (1), it was a debt of higher degree than that of the executrix, and she could not exercise her right of retainer in priority to such a claim.

Re Ambler, Woodhead v. *Ambler* (1), [1905] 1 Ch. 697, overruled or distinguished.

Notes. Followed: *Re Patten, Official Receiver* v. *Patten*, [1936] 2 All E.R. 1119. Referred to: *Re Bailey, Duchess Mill, Ltd.* v. *Bailey* (1932), 76 Sol. Jo. 560; *Re Wester Wemyss, Tilley* v. *Wester Wemyss*, [1939] 3 All E.R. 746.

As to against whom the executor's right of retainer is exercisable, see 16 Halsbury's Laws (3rd Edn.) 307–310, paras. 592, 596; and for cases on the subject see 23 Digest (Repl.) 374–376, *4445–4463*.

Cases referred to:

(1) *Re Ambler, Woodhead* v. *Ambler*, [1905] 1 Ch. 697; 74 L.J.Ch. 367; 92 L.T. 716; 53 W.R. 584; 21 T.L.R. 376; 49 Sol. Jo. 417, C.A.; 23 Digest (Repl.) 381, *4520*.

(2) *Woodward* v. *Lord Darcy* (1558), 1 Plowd. 184; 75 E.R. 282; 23 Digest (Repl.) 373, *4425*.

(3) *Re Harris, Davis* v. *Harris*, [1914] 2 Ch. 395; 83 L.J.Ch. 841; 111 L.T. 666; 58 Sol. Jo. 653; 23 Digest (Repl.) 384, *4548*.

(4) *Re Neville, Lee* v. *Nuttall* (1879), 12 Ch.D. 61; 48 L.J.Ch. 616; 41 L.T. 363; 27 W.R. 805, C.A.; 23 Digest (Repl.) 386, *4570*.

(5) *Re May, Crawford* v. *May* (1890), 45 Ch.D. 499; 60 L.J.Ch. 34; 63 L.T. 375; 38 W.R. 765; 6 T.L.R. 461; 23 Digest (Repl.) 381, *4519*.

(6) *Re Leng, Tarn* v. *Emmerson*, [1895] 1 Ch. 652; 64 L.J.Ch. 468; 72 L.T. 407; 43 W.R. 406; 11 T.L.R. 286; 39 Sol. Jo. 329; 12 R. 202, C.A.; 23 Digest (Repl.) 386, *4572*.

(7) *Re Samson, Robbins* v. *Alexander*, [1906] 2 Ch. 584; 70 L.J.Ch. 21; 95 L.T. 633, C.A.; 23 Digest (Repl.) 356, *4252*.

(8) *Re Bonham, Ex parte Postmaster-General* (1879), 10 Ch.D. 595; 48 L.J.Bcy. 84; 40 L.T. 16; 27 W.R. 325, C.A.; 4 Digest 34, *286*.

(9) *Nunn* v. *Barlow* (1824), 1 Sim. & St. 588; 57 E.R. 232; sub nom. *Nunn* v. ——, 2 L.J.O.S.Ch. 123; 23 Digest (Repl.) 385, *4564*.

(10) *Re Laycock, Laycock* v. *Income Tax Special Comrs.*, [1919] 1 Ch. 241; 88 L.J.Ch. 128; 120 L.T. 473; 63 Sol. Jo. 302; [1918–19] B. & C.R. 165; 23 Digest (Repl.) 351, *4187*.

(11) *Re Albion Steel & Wire Co.* (1878), 7 Ch.D. 547; 47 L.J.Ch. 229; 38 L.T. 207; 42 J.P. 279; 26 W.R. 348; 24 Digest (Repl.) 878, *8770*.

(12) *Re Land Financiers Association* (1881), 16 Ch.D. 373; 50 L.J.Ch. 201; 43 L.T. 753; 29 W.R. 277; 10 Digest (Repl.) 994, *6836*.

(13) *Re Rhoades, Ex parte Rhoades*, [1899] 2 Q.B. 347; 68 L.J.Q.B. 804; 80 L.T. 742; 15 T.L.R. 407; 6 Mans. 277, C.A.; sub nom. *Re Rhoades, Ex parte Official Receiver (Trustee)*, 47 W.R. 561; 43 Sol. Jo. 571; 23 Digest (Repl.) 376, *4464*.

(14) *Re Heywood, Parkington* v. *Heywood*, [1897] 2 Ch. 593; 67 L.J.Ch. 25; 77 L.T. 423; 46 W.R. 72; 42 Sol. Jo. 33; 4 Mans. 321; 24 Digest (Repl.) 880, *8796*.

Appeal by the Crown from decision of the Court of Appeal (Lord Hanworth, M.R., and Lawrence, L.J., Romer, L.J., dissenting).

By his will dated June 5, 1919, the testator appointed the respondent, Mrs. Jackson, to be his sole executrix, and devised and bequeathed to her the whole of his estate and effects absolutely. On June 14, 1929, the testator died, and on Aug. 2, 1929, probate of his will was granted to the respondent. The testator's estate was insolvent. The respondent was one of the creditors of the testator. Among the other creditors were the Inland Revenue Commissioners, who claimed as preferential creditors for one year's arrears of income tax. If the respondent had the right to retain the assets for her debt of about £1,000 the estate would have been exhausted and the Crown would have received nothing. An originating summons was therefore taken out to ascertain whether the respondent had the right to retain in priority to the Crown's preferential claim for income tax under the Bankruptcy Act, 1914, s. 33 (1) (a), and the Administration of Estates Act, 1925, s. 34, and Sched. I.

Clauson, J., held that the respondent, as executrix, had the right to retain the assets in payment of the debt due to her from the testator in priority to any right of the Crown for a year's assessed taxes.

The Court of Appeal (Lord Hanworth, M.R., and Lawrence, L.J., Romer, L.J., dissenting) held, affirming the decision of Clauson, J., that under the Administration of Estates Act, 1925, s. 34 (1) and (2), the executor's right of retainer when the estate was insolvent was still effective against debts which were by law payable in priority to other debts, including a debt in respect of one year's assessed taxes due to the Crown, and s. 34 (2) was not to be read as subservient to s. 34 (1); s. 34 (2) made no provision in favour of the Crown and no such provision was to be implied.

Sir William Jowitt, K.C., and *J. H. Stamp* for the appellant.

Fergus Morton, K.C., and *Norman Daynes, K.C.*, for the respondent.

The House took time for consideration.

Feb. 22. The following opinions were read.

LORD ATKIN.—The question in this case is as to the executrix's right of retainer. The testator died on June 19, 1929. By his last will he bequeathed the whole of his estate to the respondent, whom he appointed his sole executrix. The estate was obviously insolvent. In round figures the assets were worth about £1,000. The Crown had a claim for arrears of income tax and supertax amounting to over £4,000; there were other creditors for about £4,000, including a claim by the executrix for about £1,000 for money lent. The executrix claims to retain the whole of the assets to satisfy her debt. The Crown dispute the right to retain any assets against their debt, claiming that the right of retainer does not operate against any part of their debt, or alternatively does not operate against so much of their claim as is given priority by the provisions of the Bankruptcy Act, 1914, s. 33, read with the Administration of Estates Act, 1925, s. 34, which is limited as "not exceeding in the whole one year's assessment." The meaning of the limitation does not arise on the appeal to this House.

Clauson, J., and the majority of the Court of Appeal have decided in favour of the executrix, Clauson, J., on the ground that the terms of the legislation place the Crown in the same position as any other creditor, and as the right of retainer is expressed to be exercisable as to "all assets of the deceased" the retainer must be available against the Crown. The majority of the Court of Appeal, Lord Hanworth, M.R., and Lawrence, L.J., have held that the prerogative right of the Crown to priority is now regulated by the Bankruptcy Act, 1914; and that the result is that in administration the Crown cannot claim to be a creditor of higher degree than the personal representative. Romer, L.J., on the contrary, has held that the executor can only exercise his right of retainer subject to the priorities constituted by the Bankruptcy Act, 1914, and that the retainer is subject in the present case to the claim of the Crown for taxes "not exceeding in the whole one year's assessment."

I think that the question can be solved by a short consideration of the common law right of retainer. The reason for it is to be found in the report of the opinions of the judges of both the King's Bench and the Common Pleas in *Woodward* v. *Lord Darcy* (2) given in 1547 after discussion in several previous terms. The explanation is that without the right the executor would be bound to pay the other debts of the testator and to leave the testator's debt to himself unpaid. The reporter states (1 Plowd. at p. 185):

> "But our law is not so unreasonable or uncharitable, for the executor may retain assets to pay himself notwithstanding he may not bring an action to recover it, for true it is that the action is gone by the act of administration."

The reporter later states (1 Plowd. at p. 186):

> "This was the clear opinion of all the justices of the one Bench and of the other except Brook [C.J. of the Common Pleas], who was strongly of opinion against them, and it was the opinion of all the serjeants also as well as the rest of them as of Catline at last, who was of counsel for the plaintiff."

The case shows the right of retainer well established, but does not refer to the limitation of the right to retain only against debts of equal degree. It did not arise in that case where the action was in debt, and the plea averred a retainer of a debt due on a recognisance of the force of a statute staple. The limitation is, however, also well established. As stated by Blackstone, A "the law allows the executor to retain so much as will pay himself before any other creditors whose debts are of equal degree."

We, therefore, are brought to consider what is meant by debts of equal or higher degree.

> "In payment of debts the executor must observe the rules of priority, otherwise on deficiency of assets, if he pays those of a lower degree first, he must answer those B of a higher out of his own estate."

For the purpose of administration the order of degree of debts was the order in which they were entitled to priority of payment. Such an order was established by common law. It was, of course, capable of being varied by statute; and, accordingly, in the order of degrees there found place debts which have been given priority by statute. Thus BLACKSTONE, in stating the order, says first funeral and testamentary expenses.

> C "Secondly, debts due to the King on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woollen (30 Car. II, c. 3), money due on poor rates (17 Geo. II, c. 38) [this refers to money due from overseers of the poor], for letters to the Post Office by Anne, c. 10 [I cannot find this in the statute cited], and some others. Fourthly, debts of record; as judgments . . . statutes, and recognizances. Fifthly, debts D due on special contracts; as for rent . . . or upon bonds, covenants, and the like under seal. Lastly, debts due on simple contracts."

And it may be noted that as to the last class he adds

> "among these simple contracts servants' wages are by some with reason preferred to any other; and so stood the ancient law, according to BRACTON and FLETA."

E The same order is substantially maintained in WILLIAMS ON EXECUTORS. In the first edition, by SIR EDWARD VAUGHAN WILLIAMS in 1832, vol. 2, p. 654, the order of priority is set out. Next after debts due to the Crown by record or specialty appear: "Certain specific debts which are by particular statutes to be preferred to all others." He cites the statutes referred to by BLACKSTONE, and adds the Friendly Society Act, F 1793 (33 Geo. 3, c. 54) and the Local Metropolis Act (57 Geo. 3, c. 29), in respect of money due from the deceased as collector to saving commissioners. The same order of degrees is maintained in succeeding editions. In the 11th Edn. (1921) the only effective additions to the statutes are the Trustee Savings Bank Act, 1863, and the Workmen's Compensation Act, 1906, s. 5 (3), so far as it relates to priority in bankruptcy.

G Such statutes as have been referred to are instances where the legislature has thought fit to exalt simple contract debts to a higher degree of priority. Similarly, debts of higher estate may be abased. This was the result of Hinde Palmer's Act, 1869, which in administration put specialty debts in the same degree as simple contract debts. The necessary result was as held by SARGANT, J., in *Re Harris, Davis* v. *Harris* (3), that an executor could retain for a simple contract debt against a specialty debt. H Applying the above rules to the present facts, it appears to me reasonably plain that the result of the priority section in the Bankruptcy Act, 1914, when applied to the administration of estates by the Administration of Estates Act, 1925, is to place all the priority debts to the extent of their priority in the degree of debts "which are by particular statutes to be perferred to all others." The Act of 1914 alone would not have been sufficient; but once the priorities there mentioned are incorporated into the law I as to administration, and the duty to observe them is imposed on the personal representative, the debts to which preference is given appear to me at once to rise in the scale. The same result would necessarily follow in respect of the corresponding right of the executor to prefer creditors which is similarly limited to a preference amongst creditors of equal degree. If this view be correct, it appears not to be of great importance how we construe the words appended to Administration of Estates Act, 1925, s. 34 (2):

> "Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative or his right to prefer creditors."

The right still remains as before, the right to retain against debts of equal degree. Some debts have been put in a higher degree than they were before; but the executor's right always has been subject to changes of that description. What has been affected is not the right, but the classes in respect of which the right is exercised. But if that is not the true meaning, then in order to give any effect to the first words of the section it becomes necessary to read "subject as aforesaid" as referring to sub-s. (1), just as in Sched. I the same words in r. 2 obviously refer to r. 1. I attach great importance to the fact that the saving applies to the right to prefer creditors in the same words as it applies to the right of retainer; and nothing will persuade me that it is consistent with the intention of the legislature, as deduced from the language of the statute, to give power to the administrator of an insolvent estate, before any administration order, to pay ordinary debts in preference to rates or taxes, wages of servants or workmen's compensation, the priority of which is now by the Workmen's Compensation Act, 1925, s. 7 (3), unlimited in amount, subject to the provision of the Act as to insurance.

The question whether the personal representative can exercise his right of retainer against the debts which are directed to be paid pari passu will only arise in the present case if the Crown are wrong in their construction of the words "not exceeding one year's assessment." But, as that event is at least possible, I think it right to say that in my opinion there are now only two or possibly three degrees of priority of debts, being, first, those which are by the Bankruptcy Act, 1914, expressly given priority; secondly, those which are expressly directed to be paid pari passu; and possibly, thirdly, those mentioned in s. 36 of the Act of 1914 and in the Partnership Act, 1890, s. 3, the effect of the latter section being expressly retained in the Bankruptcy Act, 1914, s. 33. It follows that the balance of any Crown debt in excess of that portion which is given priority is now of the same degree as the debt of the executrix in the present case, and that she can retain against such balance.

The difficulty which the courts below experienced in deciding this matter was the line of authority, *Lee* v. *Nuttall* (4); *Re May, Crawford* v. *May* (5); *Re Leng, Tarn* v. *Emmerson* (6), culminating in *Re Ambler, Woodhead* v. *Ambler* (1), which decided that, notwithstanding the terms of the Married Women's Property Act, 1882, which would postpone in bankruptcy a wife's proof for a debt lent by her to her husband for the purposes of his trade, the wife, if executrix of her husband, could retain such a debt against trade creditors. It is a curious instance of how a series of decisions, none of which are of binding force on this particular matter, gradually assume authoritative influence. *Lee* v. *Nuttall* (4) had nothing to do with degrees of debts. It only decided that the executor was not a secured creditor and that s. 10 of the Supreme Court of Judicature Act, 1875, did not make him a secured creditor, and in that sense did not apply to retainer. In fact, s. 10 did not incorporate any provisions of the Bankruptcy Act as to priorities; and no question of priority or even of proof arose. *Re May, Crawford* v. *May* (5) was a case where the widow executrix had lent money to her husband for the purposes of his trade. There had been an administration order. The estate was insolvent, and the bankruptcy rules as to priority had been introduced into such an administration by the Preferential Payments in Bankruptcy Act, 1888, s. 5. North, J., held that the executrix could retain, relying on the supposed decision in *Lee* v. *Nuttall* (4) that the Supreme Court of Judicature Act, 1875, s. 10, did not affect the right of retainer. In *Re Leng, Tarn* v. *Emmerson* (6) it was held that the effect of the Married Women's Property Act, 1882, s. 3, and Supreme Court of Judicature Act, 1875, s. 10, in the administration of an insolvent estate after an administration order was to postpone the claim of the widow in respect of a loan to which the Married Women's Property Act, 1882, applied. No question of retainer arose; but Lindley, J., said that the decision of the court was not inconsistent with *Re May* (5) that the law of retainer had not been altered, and that the Married Women's Property Act, 1882, s. 3, was not addressed to that subject. In *Re Ambler, Woodhead* v. *Ambler* (1) the judges followed the dicta in *Re Leng* (6), though both Farwell, J., and Stirling, L.J., would have themselves decided otherwise. I do not think that there was any decision constraining the Court of Appeal to decide *Re Ambler, Woodhead* v. *Ambler* (1) as they did. It may be that the decision can be supported by reference to the more restricted rules as to the effect of the Bankruptcy Act, governing the administration of estates under an order of the court before the Act of 1925. And it is possible that the position of debts covered by s. 36 of the Act of 1914, which by s. 2 takes the place of the Married Women's Property Act, 1882, s. 3, may at some future time be held not to be in a lower degree than the debts to which they are postponed, though I cannot foresee the reason for so holding. But I am satisfied that unless *Re Ambler, Woodhead* v. *Ambler* (1) can be distinguished in some such way it should not be followed in this House so as to defeat what appears to me to be a very plain application of the well-established law relating to retainer. I am of opinion that, to the extent to which the Crown claim for taxes is given priority in bankruptcy, it is a debt of higher degree than that of the executrix in this case and that she cannot exercise her right of retainer in priority to such claim and that the first question in the summons should be answered accordingly. The appeal should be allowed, and the judgments below should be set aside and a declaration should be made as above stated.

LORD WARRINGTON.—I have had the advantage of reading the opinion of my noble friend on the Woolsack, and of my noble friend, LORD TOMLIN, and concur in those opinions.

LORD TOMLIN.—The question to be determined in this case is whether an executrix can retain out of the insolvent estate of her testator her own simple contract debt as against a Crown debt for taxes.

To find the answer it is, I think, necessary to examine a series of statutes beginning with the Administration of Estates Act, 1869 (commonly called Hinde Palmer's Act) and ending with the Administration of Estates Act, 1925. It would have been noteworthy if a number of statutes extending over so many years had not generated some cases upon their construction. They have, in fact, done so, and these cases also require consideration.

Now the right of retainer as it stood before it was affected by statute was a right on the part of the legal personal representative to retain out of legal assets actually or constructively in his possession any debt due to him from the deceased as against all creditors whose debts were of equal degree with or of lower degree than his own. The priority in which debts by law fell to be paid determined the degrees. The Crown had priority over the subject in respect of specialties and debts of record. Other Crown debts had priority over the debts of the subject of equal degree. Subject to the rights of the Crown the order of priority of the payment of debts was as follows: (i) debts to which particular statutes give priority; (ii) judgments in courts of record; (iii) recognisances and statutes, e.g., statutes merchant; (iv) debts by specialty; (v) debts by simple contract.

The right of retainer, unlike in this respect the right to prefer, was not interfered with by a decree for administration, and the legal personal representative could retain out of legal assets come to his hands after decree, for it was said that this decree did not affect the legal priorities of creditors and that there was therefore no distinction between assets possessed prior to the decree and assets possessed subsequent to it: (see *Nunn* v. *Barlow* (9)).

In 1869 the first material change was made. By the Administration of Estates Act, 1869, s. 1, it was enacted as follows:

> "In the administration of the estate of every person who shall die on or after Jan. 1, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

This section does not in terms refer to or purport to deal with the right of retainer. It does, however, alter priorities in administration by abolishing the existing priority of specialties and by making specialties and simple contract debts of equal degree. It also directs that these debts shall be paid out of the assets accordingly.

It has been held that as a result of this section a simple contract debt can be retained as against a specialty, not, as I understand it, because there has been any alteration in the right of retainer itself, but because a change has been made in the field in which the retainer operates, and because the effect of the direction for payment out of the assets pari passu of specialties and simple contract debts was to convert creditors on specialty and simple contract into creditors of equal degree: (see *Re Samson, Robbins* v. *Alexander* (7), and *Re Harris, Davis* v. *Harris* (3)).

In the Bankruptcy Act, 1869, provision was made (s. 32) for payment in bankruptcy of specified debts, including certain assessed taxes in priority to all other debts, the preferred debts ranking equally inter se, and it was enacted that subject to these preferences all debts should be paid pari passu. The order of priorities prescribed by this Act differed from the order of priorities in administration. In particular, there was no priority for Crown debts beyond that in respect of some assessed taxes. The Act also provided (see s. 49) that an order of discharge should not release a bankrupt from debts due to the Crown.

Under the Act it was held that the Crown was not bound except by the sections in which it was referred to: (see *Re Bonham* (8)). The next step was that certain of the rules in bankruptcy were by the Supreme Court of Judicature Act, 1875, s. 10, introduced into the administration by the court of insolvent estates of deceased persons. That section, so far as material, was as follows:

> "In the administration by the court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts, 1862 and 1867, whose assets may prove to be insufficient for the payment of its debts and liabilities and the cost of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of Bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons who, in any such case, would be entitled to prove for and receive dividends out of the estate of any such deceased person, or out of the assets of any such company, may come in under the decree or order for the administration of such estate, or under the winding-up of such company, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

It is to be noted (i) that this section applies to the administration of insolvent estates only when they are being administered by the court (see *Re Laycock, Laycock* v. *Income Tax Special Comrs.* (10), so that thereafter the rules governing an administration by the court differed from those governing an administration by the legal personal representative out of court, and (ii) that the rules of bankruptcy introduced into a court administration were limited to those relating to certain specified matters not in terms covering the priorities of debts.

There followed conflicting decisions as to whether the rules as to bankruptcy priorities were introduced by this section: (see *Re Albion Steel and Wire Co.* (11), and *Re Land Financiers Association* (12). The question was later on treated as set at rest by the Preferential Payments in Bankruptcy Act, 1888, the provisions of which I shall presently mention.

The only other case up to this point requiring notice is *Lee* v. *Nuttall* (4), which, in my view (notwithstanding an expression of opinion to the contrary by North, J., in *Re May, Crawford* v. *May* (5)), decided nothing more than that the legal personal representative was not, by reason of his right of retainer, in the position of a secured creditor in the administration by the court of an insolvent estate.

A In 1882 the Married Women's Property Act was passed. Section 3 of that Act was as follows

> "Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reser- B vation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied."

This section purported to regulate the position in the bankruptcy of the husband of C the wife who had lent money to the husband for the purposes of his business. The position of the wife under the combined effect of this section and s. 10 of the Act of 1875 fell to be considered in some later cases to which I shall hereafter refer.

The next relevant Act was the Bankruptcy Act, 1883, which replaced the Act of 1869. This Act, by s. 10, in effect re-enacted the provisions of the Act of 1869 as to priorities, with some modifications, and provided that subject to the provisions of the D Act all debts proved in the bankruptcy should be paid pari passu. It also provided (s. 30) that, with certain exceptions, which covered a limited class of Crown debts, all debts should be released by the order of discharge. By s. 125 power was given to the court in bankruptcy to administer in bankruptcy the estate of a deceased debtor where the court was not satisfied that there was a reasonable probability that the estate would be sufficient for the payment of the deceased's debts. By s. 150 it was provided that E the provisions of the Act as to (inter alia) the priorities of debts and the effect of an order of discharge should bind the Crown.

At this stage in the history of the legislation it is to be observed (i) that the Crown was clearly bound by the priority provisions in any bankruptcy proceedings; (ii) that there was nothing to introduce into the administration of insolvent estates by the court outside the bankruptcy jurisdiction the bankruptcy rules as to the priorities of debts F if such rules were not introduced by the Supreme Court of Judicature Act, 1875, s. 10; and (iii) that, nevertheless, where an order was made under s. 125 for the administration in bankruptcy of a deceased person's estate the bankruptcy rules as to priorities of debts undoubtedly applied.

In this state of affairs the question was bound to arise, and did, in fact, later on arise, as to the effect on retainer of an administration under s. 125. The answer given G was that the executor still had the right of retainer and that the official receiver could not take as against the executor more than the creditors could have taken: (see *Re Rhoades, Ex parte Rhoades* (13). It is to be observed, however, that in this case there was not any question of priorities. There is nothing, therefore, in this decision inconsistent with the view that though the right of retainer continued as against the official receiver, the field in which it operated was determined by the priorities prevailing in H the bankruptcy administration.

Next came the Preferential Payments in Bankruptcy Act, 1888. By s. 1 (1) some further modification was made in bankruptcy priorities. By s. 1 (6) it was provided that s. 1 of the Act should apply in the case of a deceased person who died insolvent as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order. By s. 3 the Act is made to apply only in the case of receiving I orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made after the commencement of the Act.

In *Re Leng, Tarn* v. *Emmerson* (6), referred to more fully later on, the Court of Appeal took the view that s. 1 (6) of the Act of 1888 extended the bankruptcy priorities of debts to the administration in the Chancery Division of insolvent estates.

The position had now developed to a point at which the question might arise as to how the legal personal representative stood in regard to his retainer where the estate was being administered in the Chancery Division, the priorities of debts in bankruptcy being regarded as applicable to that administration.

In *Re May, Crawford* v. *May* (5), where the administration order in the Chancery Division was made after this Act of 1888 had come into force, it was held by North, J., that a widow, the executrix of her deceased husband, was entitled to retain a debt which would have been postponed in bankruptcy by reason of the Married Women's Property Act, 1882, s. 3. This decision appears to have been based on three grounds, namely: (i) that s. 3 did not apply at all because the event referred to therein, i.e., the husband becoming bankrupt, had not occurred; (ii) that s. 10 of the Act of 1875 only imported certain rules which were not wide enough to cover the particular case; and (iii) that the last-mentioned section did not affect the right of retainer. The effect of the Act of 1888 does not appear to have been considered.

A few years later in *Re Leng, Tarn* v. *Emmerson* (6), the widow of an insolvent testator having lent money to her husband for his business was held by the Court of Appeal to be postponed to other creditors in a Chancery administration action on the ground that s. 3 of the Act of 1882 constituted one of the rules as to debts provable in bankruptcy and was therefore imported into the administration by s. 10 of the Act of 1875. Here there was no question of retainer, and, in distinguishing *Re May, Crawford* v. *May* (5), Lindley, L.J., said:

> "The legislature has not yet thought proper to alter the law of retainer and s. 3 of the Married Women's Property Act is not addressed to that subject."

It may be observed that in this case Lindley, L.J., assumes that s. 1 (6) of the Act of 1888 had introduced bankruptcy priorities into the administration of an insolvent estate in the Chancery Division. The effect of s. 3 of the Act of 1888 does not seem to have been considered, but Stirling, J., in *Re Heywood* (14), treated himself as bound to regard the decision in *Re Leng, Tarn* v. *Emmerson* (6) as one made on consideration of s. 3 of this Act of 1888.

Finally, in *Re Ambler, Woodhead* v. *Ambler* (1), the Court of Appeal, basing themselves to some extent on dicta in *Re Leng* (6), held that by the combined effect of s. 3 of the Married Women's Property Act, 1882, and s. 10 of the Act of 1875, a widow's debt due from her husband in respect of his business was postponed in proof and distribution but that her right of retainer was not affected.

The Bankruptcy Act, 1914, replaced the Acts of 1883 and 1888 without material alteration so far as concerned the matter under consideration. Section 33 of the new Act regulated debt priorities, the assessed taxes to which priority is given being limited to those "not exceeding in the whole one year's assessment." Section 130 was substituted for s. 125 of the Act of 1883.

Now the position at this stage on the statutes and the decided cases may, it seems to me, be summarised as follows:

(i) The bankruptcy priorities were introduced into the administration of the estate of a deceased insolvent both in an administration in bankruptcy and in an administration in the Chancery Division, but were not introduced into such an administration conducted by the legal personal representative out of court.

(ii) If the administration of a deceased's insolvent estate began out of court, but was at a later stage continued under an order for administration, the order of the priorities of debts would change in said administration.

(iii) The Crown in administration in bankruptcy and in the Chancery Division had lost its priority under the general law and was only entitled to the limited priority conferred by the bankruptcy rules.

(iv) The right of retainer continued to be exercisable whether the administration took place out of court, in bankruptcy or in the Chancery Division.

(v) The priorities of debts by reference to which the retainer operated was in the case of administration out of court the old order of priorities, but in the case of administration in bankruptcy or in the Chancery Division there was room for doubt. There was no decision in connection with administration in bankruptcy as to the priorities by reference to which the right of retainer was to be exercised, but *Re Ambler, Woodhead* v. *Ambler* (1) is, I think, only consistent with the view that in an administration in the Chancery Division regard must be had to the old priorities in exercising such right.

A In this position of affairs the Administration of Estates Act, 1925, was passed. That Act provided as follows:

> "Section 34: (1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of Sched. I to this Act. (2) The right of retainer of a personal representative and his right to prefer creditors may be exercised in respect of all assets of B the deceased, but the right of retainer shall only apply to debts owing to the personal representative in his own right whether solely or jointly with another person. Subject as aforesaid, nothing in this Act affects the right of retainer of a personal representative, or his right to prefer creditors. (3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the C provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of Sched. I to this Act."
>
> "Section 57: (1) The provisions of this Act bind the Crown and the Duchy of Lancaster, and the Duke of Cornwall for the time being, as respects the estates of D persons dying after the commencement of this Act, but not so as to affect the time within which proceedings for the recovery of real or personal estate vesting in or devolving on His Majesty in right of His Crown, or His Duchy of Lancaster, or on the Duke of Cornwall, may be instituted."
>
> "Schedule I, Part I.—Rules as to Payment of Debts where the Estate is Insolvent:
>
> E "1. The funeral, testamentary, and administration expenses have priority.
>
> "2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons F adjudged bankrupt."

It will be observed (i) that s. 34 (1) in effect reproduces the Supreme Court of Judicature Act, 1875, s. 10, with the modifications resulting from the Act of 1888, and extends the operation of the provisions as to the bankruptcy rules expressly including those relating to debt priorities to all classes of administration of insolvent estates whether in court or out of court, and (ii) that the first paragraph of s. 34 (2) enlarges G the right of retainer and the right to prefer so as to be capable of exercise in respect of all assets, that is, equitable as well as legal, but limits the right of retainer to debts owing to the personal representative in his own right. The first three words of the second paragraph of sub-s. (2), namely, "subject as aforesaid," in my opinion, refer only to the provisions of the first paragraph of that subsection. To my mind, the position of these words is conclusive on this point.

H As the new Act applies the bankruptcy rules to the whole area of administration, i.e., both in court and out of court, there cannot be any case of an insolvent estate where the administration will be governed by any other rules.

In all cases all debts (with the exceptions to which priority is given) must be paid pari passu. The Crown has lost its old priority and can now only claim the limited priority conferred by the exceptions from the general equality. In other words, there I has been a complete alteration by statute of the priorities, and therefore of the degrees of debts in the whole field of insolvency, the only field in which the rights to retain and to prefer have any importance or value.

In these circumstances I think that the principle applied in construing Hinde Palmer's Act (where words directing payment similar to those of the Bankruptcy Act are to be found) should be applied in construing the Act now under consideration: (see *Re Harris, Davis* v. *Harris* (3)).

The right to retain or to prefer has not been altered, but the degrees in which debts are ranged have been changed, and it is in the field as so changed that the rights in question must to-day operate. The result is that all debts fall within one or other of two degrees where the Act of 1925 applies. If, therefore, a legal personal representative is a creditor for a debt in the higher of the two degrees he can retain against all creditors, of whichever degree they may be. If, however, this debt falls within the lower degree, he can retain against all creditors of such degree, but against none in the higher degree. This is not, I think, inconsistent with my reading of the second paragraph of s. 34 (2), inasmuch as s. 34 (2) deals only with the nature of the rights themselves. This view of the matter avoids the many difficulties which would arise if the rights to retain and to prefer (and in this respect the two rights cannot, I think, be distinguished) were to be governed by priorities differing from those which determine payment of debts. It is, however, difficult to reconcile with the decision in *Re Ambler, Woodhead* v. *Ambler* (1). It is true that that case was decided on different statutes and at a time when the whole field of insolvency was not occupied by the bankruptcy rule of priorities of debts, and on these grounds some distinction may be founded. I am satisfied, however, that, whether distinguishable or not, it ought not to afford a guide to your Lordships' House in resolving the question now under consideration.

My conclusion, therefore, is that in the present case there was no right to retain against the Crown so far as the Crown has priority under the bankruptcy rules affecting debt priorities. The point raised by the second question of the originating summons as to how much of the Crown's debt is covered by the priority given by those rules has not yet been considered by the courts below.

It is proper at this point to add a word with regard to the judgments given in the court of first instance and in the Court of Appeal. With all deference to CLAUSON, J., I am unable to accept his view as to the effect of extending to all assets the right to retain and to prefer. This extension seems to me to do nothing more than for the purposes of these rights to put legal and equitable assets on the same footing.

Again, with all respect, I am unable to accept the reasoning of the majority of the Court of Appeal by which they reach the conclusion that the right of retainer is available against the Crown. The matter must, I think, be regarded in the way which I have indicated, with the result that in my opinion the appeal should be allowed. There should be a declaration that to the extent of the priority conferred by the Bankruptcy Act, 1914, on Crown debts the right of retainer cannot be exercised and the case should be remitted to the Chancery Division to determine the second question on the originating summons as to the extent to which the Crown debt has priority.

My noble friend **LORD BUCKMASTER** desires me to say that he concurs in the opinions expressed.

LORD MACMILLAN.—I concur in the opinions expressed by my noble friends LORD ATKIN and LORD TOMLIN.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue*; *Keene, Marsland, Bryden, & Besant.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

A

H. COLLIER & SONS, LTD. (IN LIQUIDATION) *v.* INLAND REVENUE COMMISSIONERS

[COURT OF APPEAL (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), November 16 and 17, 1932]

B [Reported [1933] 1 K.B. 488; 103 L.J.K.B. 33; 148 L.T. 199; 49 T.L.R. 46; 18 Tax Cas. 83]

Surtax—Company—Undistributed profits—"Available for distribution"—Income for broken period before winding-up resolution—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17), *s.* 21 (1)—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 31 (4).

A company, which was incorporated in 1908, was at the material dates under C the control of five or fewer persons. By an agreement dated Nov. 16, 1928, made with M., Ltd., the company agreed to sell to M., Ltd., all its assets and undertaking, also agreeing that it should retain possession of its assets and undertaking up to completion (i.e., on or before Dec. 15, 1928) and that as from the close of business on Aug. 31, 1928 (when the company's financial year terminated), the company should be deemed to be carrying on business on behalf of M., Ltd., and should D account and be entitled to be indemnified accordingly. On Dec. 20, 1928, the company went into voluntary liquidation. No dividend was declared by the company in respect of the period from Sept. 1, 1928, to Dec. 20, 1928. The Special Commissioners of Income Tax directed (under the Finance Act, 1922, s. 21) that for the purpose of assessment to surtax the actual income from all sources of the company for the period from Sept. 1, 1928, until Dec. 20, 1928, should be deemed E to be the income of the members of the company, and the amount should be apportioned among them. It was accepted that the actual income of the company for that period comprised only the profits made for the period from Sept. 1, 1928, to Nov. 15, 1928.

Held: the company's income for the period was, by virtue of the Finance Act, 1927, s. 31 (4), to be deemed to be income of that period available for distribution F to the members for the purposes of s. 21 (1) of the Act of 1922, which was to be applied as if the words "within a reasonable time" were omitted. The Special Commissioners had rightly given the direction.

Notes. The judgments in this case are considered at length in *A. & J. Mucklow, Ltd. (in liquidation)* v. *I.R.Comrs.*, [1954] 2 All E.R. 508.

Considered: *Haldin and Philipps, Ltd.* v. *I.R.Comrs.* (1953), 34 Tax Cas. 497; *A. & J.* G *Mucklow, Ltd.* v. *I.R.Comrs.*, [1952] All E.R. 1094; [1954] 2 All E.R. 508. Referred to: *Montague Burton, Ltd.* v. *I.R.Comrs.*, [1934] All E.R. Rep. *829*.

As to Special Commissioners' power to make directions on companies as to surtax, see 20 HALSBURY'S LAWS (3rd Edn.) 551, 552, para. 1073.

Appeal by H. Collier & Sons, Ltd. (in liquidation), from an order of FINLAY, J., reported 148 L.T. 199, made on a Case stated for the opinion of the High Court of Justice by the H Board of Referees, pursuant to the Finance Act, 1922, Sched. I, para. 2.

1. At a meeting of the Board of Referees held at the Royal Courts of Justice on June 2, 1931, for the purpose of re-hearing appeals, under para. 2 of Sched. I to the Finance Act, 1922, the referees present at the said meeting re-heard an appeal by H. Collier & Sons, Ltd. (in liquidation), hereinafter called "the company," whose registered office is at 46, Basinghall-street, London, E.C.2, against directions made by I the Commissioners for the Special Purposes of the Income Tax Acts on Oct. 18, 1929, under s. 21 of the Finance Act, 1922, whereby they directed that for the purposes of assessment to surtax the actual income from all sources of the company should for the periods ended Aug. 31, 1928, and Dec. 20, 1928, be deemed to be the income of the members of the company, and the amount thereof should be apportioned among the members of the company.

2. The company being aggrieved by the said directions appealed against the same to the said Special Commissioners, who, upon the hearing of the said appeal on Oct. 8, 1930, determined that the said directions should be confirmed.

3. The company being dissatisfied with the said determination required the said appeal A to be re-heard by the Board of Referees, and they re-heard the same accordingly, and affirmed the decision of the Special Commissioners. At the same time they re-heard an appeal in respect of the income for the year ended Aug. 31, 1927. The Special Commissioners had discharged the direction in respect of that year, and they affirmed their decision. In respect of that year there has been no further appeal.

4. On the re-hearing before the referees of the said appeal the following facts were B admitted or proved:

(A) The company was incorporated on Feb. 28, 1908, under the Companies Acts, 1862 to 1900 as a private limited company with an authorised capital of £6,000, divided into 6,000 shares of £1 each, with the object inter alia of carrying on the business of manufacturers of motor cycles. The company went into voluntary liquidation on Dec. 20, 1928. C

(B) The nominal capital of the company had been increased from time to time, and was now £100,000 divided into 25,000 preference shares of £1 each, and 75,000 ordinary shares of £1 each. 59,220 £1 ordinary shares had been issued and were fully paid up, and of these shares, 30,987 had been issued for cash, the balance, namely, 28,233, having been issued to the shareholders in 1920 when the company capitalised £28,233 of its undivided profits. D

(C) The company had also issued first, second and third mortgage debentures. At Aug. 31, 1928, the following debentures were outstanding, namely:

	£	
fifty 6½ per cent. mortgage debentures of £100 each	5,000	
6½ per cent. second mortgage debentures	3,000	
fourteen 10 per cent. third mortgage debentures of £250 each	3,500	E

(D) The principal shareholders at Aug. 31, 1928, and Dec. 20, 1928, were as follows:

Aug. 31, 1928.	£1 ordinary shares.	
Executors of H. H. Collier, decd.	11,547	
Mr. H. A. Collier	8,800	
Mr. C. R. Collier	8,800	F
Executors of S. H. Turner, decd.	21,027	
E. C. Parkell	8,842	
Dec. 20, 1928.		
Mr. D. Kerman	59,020	
Mr. H. A. Collier	100	G
Mr. C. R. Collier	100	

Messrs. H. A. Collier and C. R. Collier were joint managing directors from 1925.

(E) From 1920 to 1928 the company expended over £18,000 in the extension, renewals and replacement of buildings, plant and machinery. After the war a considerable portion of the pre-war buildings were rebuilt, as the original structures were unsuitable for the most efficient manufacture. H

(F) The profit and turnover for the years from 1920 to 1928 were as follows:

	Profit.	Turnover.	
	£	£	
Year to Aug. 31, 1921 ...	14,027 ...	270,158	
,, ,, 1922 ...	10,002 ...	181,303	
,, ,, 1923 ...	3,535 ...	142,197	I
,, ,, 1924 ...	10,113 ...	219,024	
,, ,, 1925 ...	10,320 ...	204,647	
,, ,, 1926 ...	10,097 ...	187,894	
,, ,, 1927 ...	11,397 ...	214,483	
,, ,, 1928 ...	40,500 ...	394,194	

For the year ended Aug. 31, 1927, the export trade covered 30 per cent. of the turnover of £214,483, of which 10 per cent. represented new customers. For the year ended Aug. 31, 1928, export trade covered 35 per cent. of the turnover of £394,194, of which 38 per cent. represented new customers. For the year ended Aug. 31, 1927, a dividend of 7½ per cent. was declared, but payment was postponed, and was ultimately made in November, 1928.

(G) The net profit for the period ended Aug. 31, 1928, was £40,500 subject to income tax, but no dividend was declared in respect of this period. The liabilities and assets of the company at the said date, as shown in the balance sheet, were:

Liabilities.	£	s.	d.
Issued capital	59,220	0	0
6½ per cent. first mortgage debentures, with interest	5,043	6	8
6½ per cent. second mortgage debentures, with interest ...	3,026	0	0
10 per cent. third mortgage debentures, with interest ...	3,546	13	4
Sundry liabilities	6,589	3	8
Sundry trade creditors	11,065	8	4
Dividend declared March 29, 1928, unpaid	3,553	4	0
Profit and loss account	73,730	12	9
	£165,774	8	9

Assets.	£	s.	d.
Freehold land and buildings	51,713	6	2
Furniture and fittings	455	10	11
Plant and machinery	23,463	18	1
Matchless Hire Purchase Sales, Ltd.	398	0	0
Stock	27,576	9	7
Goodwill	10	0	0
Sundry assets and payments in advance	2,180	16	3
Loans on mortgage	850	0	0
Sundry debtors	20,482	2	4
Bills receivable	4,835	9	6
£5,000 4½ per cent. Conversion Stock	4,903	8	6
Cash	28,905	7	5
	£165,774	8	9

The report of the auditors on the said balance-sheet is dated Nov. 13, 1928.

(H) By an agreement dated Nov. 3, 1928, and made between the said H. A. Collier and the said C. R. Collier of the one part and David Kerman of the other part, it was agreed that the parties of the first part should sell and transfer, or cause to be sold and transferred, the whole of the issued shares of the company to the said David Kerman in consideration of the sum of £165,000. This agreement was entered into pursuant to a scheme for the formation of a public company to carry on the business of the company. It was a term of the agreement that the parties of the first part should subscribe in cash for 165,000 shares of 5s. each in the new company.

(I) By an agreement dated Nov. 16, 1928, and made between the company of the one part and Matchless Motor Cycles (Colliers), Ltd. (therein called "the purchasing company") of the other part, it was agreed that the company should sell to the purchasing company all its freehold premises, plant and machinery, stocks, letters patent and trade marks, undertaking and goodwill, trading contracts and engagements, and all other assets. By cl. 2 of this agreement it was provided that the company should retain all its cash in hand and at bank (less the sum of £3,533 4s., the amount of a dividend declared prior to Aug. 31, 1928), £5,000 4½ per cent. Conversion Stock, bills receivable, and all book debts due to the company as at Aug. 31, 1928. By cl. 5 it was provided that the consideration for the sale should be £165,000, to be satisfied by the allotment to the company of 660,000 shares of 5s. each in the capital of the purchasing company credited as fully paid up. By cl. 8 it was provided that possession of the assets and undertaking of the company should be retained by the company up to completion (i.e., up to or before Dec. 15, 1928) and that as from the close of the business on Aug. 31, 1928, the company should be deemed to be carrying on the said business on behalf of the purchasing company, and should account and should be entitled to be indemnified accordingly. A

(K) By an agreement dated Nov. 16, 1928, and made between the company of the one part and Dulcia Securities Trust, Ltd., of the other part, the company sold to the party of the second part 640,000 shares of 5s. each in the capital of Matchless Motor Cycles (Colliers), Ltd., at the price of 6s. per share. Shortly after the date of the last-mentioned agreement Dulcia Securities Trust, Ltd., offered 560,000 of the shares therein mentioned to the public. B

(L) No accounts of the company for the period ended Dec. 20, 1928, were made up, but for income tax purposes the profits of Matchless Motor Cycles (Colliers), Ltd., have been apportioned on a time basis, liability in respect of the period from Sept. 1, 1928, to Nov. 15, 1928 (the date on which the business changed hands) falling to be met by the company. These accounts show that a profit of £44,649 3s. 3d. was made for the said year. No dividend was declared by the company in respect of the period from Sept. 1, 1928, to Dec. 20, 1928. C

5. At the re-hearing of the appeal evidence was given by Mr. H. A. Collier and Mr. Hogg, a partner in the firm of Jeffreys, Hogg, Henry, and Marks, chartered accountants, the company's auditors. Mr. Collier stated that in the view of the directors the position of the company in 1925 was precarious, requiring the building up of reserves and the expansion of the export trade, that the company found a new outlet for its products in the expansion of the export trade, and that the export trade during the year ended Aug. 31, 1928, was more than twice that of the year ended Aug. 31, 1927, while the supplies to new customers amounted to £53,546 as compared with £7,000 in the year ended Aug. 31, 1927. D E

Mr. Hogg stated that on the assumption that the business of the company would continue to be carried on by it, in his opinion no part of the profit for the period ended Aug. 31, 1928, could have been distributed by it, since reserves and contingencies would have absorbed the whole of the profit, viz.:

	£
Necessary working cash balance	15,000
Wear and tear previously written off	10,590
Bills receivable under discount	1,721
Reserve against guarantee to Road Transport Development Co., Ltd.	3,000
Outstanding debentures and interest	11,616
	£41,927

F G

It was stated that the guarantee above referred to was given to Road Transport Development Co., Ltd., against advances made by it to the company on account of hire-purchase sales of the company's products effected through the company's agents.

6. It was contended on behalf of the company:

(A) That the Finance Act, 1927, s. 31 (4), postulated a case where a company was in liquidation, and proceeded to draw a distinction between the period ended on a date preceding the date of liquidation and the period ended on the date of liquidation. H

(B) That as regards the period ended Aug. 31, 1928, the income of the company for that period was not available for distribution at that date having regard to the facts and circumstances hereinbefore set out, and that the subsequent liquidation of the company was irrelevant for the purposes of the Finance Act, 1922, s. 21 (1), and the Finance Act, 1927, s. 31 (4). I

(C) That as regards the period ended Dec. 20, 1928, in consequence of the terms of the agreement dated Nov. 16, 1928, between the company and Matchless Motor Cycles (Colliers), Ltd., there was no income of the company for that period which could be deemed to be income of that period available for distribution within the meaning of the Finance Act, 1927, s. 31 (4).

(D) That the determination of the Special Commissioners should be reversed, and the directions for the periods ended Aug. 31, 1928, and Dec. 20, 1928, discharged.

A 7. It was contended on behalf of the Crown:

(A) That the income of the company for the year ended Aug. 31, 1928, was available for distribution to the members of the company.

(B) That the profits made by the company between Sept. 1, 1928, and Nov. 15, 1928, were, for the purposes of the Finance Act, 1922, s. 21, and the Finance Act, 1927, s. 31, income of the company for the period from Sept. 1, 1928, to Dec. 20, 1928.

B (C) That the company went into voluntary liquidation on Dec. 20, 1928, and that the year ended Aug. 31, 1928, was the last year for which accounts of the company had been made up; that under the Finance Act, 1927, s. 31 (4), the income of the company for the period from Sept. 1, 1928, to Dec. 20, 1928, was for the purposes of the Finance Act, 1922, s. 21, deemed to be income of that period available for distribution to the members of the company, and that as respects that period and the year ended Aug. 31, C 1928, the said s. 21 applied as if the words "within a reasonable time" in s. 21 (1) were omitted therefrom.

(D) That the company had not distributed a reasonable part of its income in the manner described in the Finance Act, 1922, s. 21, for either the year ended Aug. 31, 1928, or the period from Sept. 1, 1928, to Dec. 20, 1928.

(E) That the directions made by the Special Commissioners under the Finance Act, D 1922, s. 21, in respect of the income of the company for the year ended Aug. 31, 1928, and the period from Sept. 1, 1928, to Dec. 20, 1928, should be confirmed.

8. The members of the board present at the said meeting dismissed the said appeal and confirmed the directions made by the Special Commissioners on Oct. 18, 1929, as aforesaid.

9. The company immediately upon the determination of the appeal declared to us E its dissatisfaction therewith as being erroneous in point of law, and in due course required the referees to state a Case for the opinion of the High Court, pursuant to the Finance Act, 1922, Sched. I, para. 2.

10. The questions of law for the opinion of the court were:

(A) Whether the income of the company for the year ended Aug. 31, 1928, was available for distribution among the members of the company?

F (B) Whether the profits made by the company for the period from Sept. 1, 1928, to Nov. 15, 1928, were for the purposes of the Finance Act, 1922, s. 21, and the Finance Act, 1928, s. 31, income of the company for the period ended Dec. 20, 1928?

(C) Whether the income of the company for the period ended Dec. 20, 1928, was for the purposes of the Finance Act, 1922, s. 21, to be deemed to be the income of the company available for distribution among the members of the company?

G (D) Whether the Finance Act, 1922, s. 21 (1), applied in respect of the year ended Aug. 31, 1928, and the period ended Dec. 20, 1928, as if the words "within a reasonable time" were omitted therefrom?

(E) Whether there was evidence upon which the referees could hold that the company had not distributed a reasonable part of its income for either the year ended Aug. 31, 1928, or the period ended Dec. 20, 1928, in the manner described in the Finance Act, H 1922, s. 21?

FINLAY, J., held that there was evidence on which the Board of Referees could properly reach the conclusion at which they had arrived, and dismissed the appeal both in relation to the period up to Aug. 31, 1928, and the period from Sept. 1, 1928, to Dec. 20, 1928. The appeal to the Court of Appeal was restricted to the direction relating to the latter period.

I *Roland Burrows, K.C.*, and *H. B. L. Braund* for the company.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *Reginald Hills* for the Crown.

LORD HANWORTH, M.R.—This case involves the construction to be put on the Finance Act, 1922, s. 21 (1), which has been amended by the Finance Act, 1927, s. 31.

The facts can quite shortly be stated: A prosperous company had as its date for making up its annual account Aug. 31 and down to Aug. 31, 1928, it had been making substantial profits. After the close of its accounting period on Aug. 31, 1928, an agreement was entered into on Nov. 3, which, by the sale of shares, altered the controlling power of the company. It was a company which falls within these sections A to which I have referred as being a company which is under the control of not more than five persons. On Nov. 16 an agreement was made between the company of the one part and Matchless Motor Cycles (Colliers), Ltd., of the other part, and the company in effect sold its business to the new company; it sold all its freehold premises, plant and machinery, stocks, letters patent and trade marks, undertaking and goodwill, trading contracts and engagements, and all other assets. One of the terms of the B purchase agreement was that the possession of the assets in the undertaking should be retained by the company up to completion, which, in fact, was Dec. 15, and that the company should be deemed to be carrying on the business on behalf of the purchasing company as and from the close of its financial year which, as I have already said, ended on Aug. 31, 1928.

In consequence of that purchase agreement, a resolution for the purpose of winding- C up the company was passed on Dec. 20, 1928. No question arises about tax in the present appeal down to the close of the financial year ended on Aug. 31, 1928, and no question of tax arises with regard to the period after the agreement had been entered into on Nov. 16, 1928. It is accepted on the part of the revenue authorities that, from and after the time when this agreement was entered into, it may be taken that the profits made by the company could be sold and taken and retained by the purchasing D company; for present purposes, whatever may be the liability of any person in respect of those profits, they are not in suit in the present case. It is claimed that it is a company to which the sections, to which I have referred, apply, and there were in fact profits being made from Sept. 1, down to Nov. 16, which ought to be taken as profits made by the company. Those profits had not been distributed, and may be caught by the terms of s. 21 (1) of the Act of 1922, which gives power to the Special Commis- E sioners, where it appears to them that any company, to which that section applies, has not,

> "after the end of any year or other period ending on any date subsequent to Apr. 5, 1922, for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the F statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income from all sources for the said year or other period";

then

> "the commissioners may by notice in writing to the company direct that for G purposes of assessment to supertax the said income of the company shall for the year or other period specified in the notice be deemed to be the income of the members, and the amount thereof shall be apportioned among the members."

It is said by the Crown that in this case the Special Commissioners were right in claiming that they are entitled to include in the returns for supertax falling to be paid by the members of the company an aliquot part of the undistributed profit which was H earned between the time when the last of the accounts was made up and the time when the purchasing agreement was entered into. It is claimed that such profit as therein accrued to the company was for all practical purposes a profit which would come in ordinary course to be distributed, which ought to be distributed, and if the company had gone on would have been distributed, or ought to have been distributed in ordinary course. It will be observed that s. 21 (1) of the Act of 1922 does not deal I with the case where a company has been wound-up. In the case of this company, the winding-up resolution was passed on Dec. 20. That date is important. It is provided by s. 31 (6) of the later Act that:

> "The income apportioned to a member of a company for the period from the end of the last year or other period for which accounts have been made up to the date of the order or resolution for winding-up shall, for the purposes of supertax, be deemed to have been received by him on the date of that order or resolution."

A So every member of this company, who is assessed to supertax by virtue of the powers granted to the Special Commissioners under s. 21 (1) of the Act of 1922, must be treated as having received this sum which would stand to his credit as undistributed profits on the date of the resolution for the winding-up.

Section 31 (4) of the Act of 1927 provides:

> B "Where an order has been made or a resolution passed for the winding-up of a company to which the said s. 21 applies, the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company."

C We have in this case a company to which s. 21 applies; there was a resolution passed for the winding-up of the company on Dec. 20, and then the income of the company from the end of the last year—i.e., from Aug. 31, 1928—to the date of the resolution for winding-up—Dec. 20—for the purposes of the said section is "deemed to be income of that period available for distribution to the members of the company." What, therefore, is there which would prevent the rights of the commissioners attaching to D the income of that period? It is said that one must go back to s. 21, and one sees that, as it stood originally, it made provision for the case where a company had not

> "within a reasonable time after the end of any year or other period distributed to its members . . . a reasonable part of its actual income,"

and in the proviso it was laid down that

> E "in determining whether any company has or has not distributed a reasonable part of its income as aforesaid"

regard is to be had

> "not only to the requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance and development of that business."

F It is said that when those considerations are introduced, there are a number of factors which disturb the simple direction under which the income for the period in question is to be treated as income available for distribution to the members of the company. It is argued that no one can say, except the directors, what was the right course to adopt, what was a reasonable provision for the maintenance and development of that business. I have come to the conclusion that, in the case where there has been a G winding-up order or resolution, we are bound by the direct and simple words of s. 31 (4) of the Act of 1927. In such a case the income of the company is to "be deemed to be income of that period available for distribution to the members of the company," and the section explicitly eliminates the words "within a reasonable time." The effect of taking out those words is that there is a hard and fast terminus ad quem, to which regard is to be had. There is to be no period during which there can be a determination H whether the company shall or shall not divide a reasonable part of its actual income. The elasticity which s. 21 (1) originally gave has been eliminated. Take the proviso that

> "in determining whether any company has or has not distributed a reasonable part of its income as aforesaid"

I that is a reasonable part of its actual income determined within a reasonable time. Section 31 (4) of the Act of 1927 expressly eliminates any latitude with regard to time, and its words are direct and definitive. I do not think that it is possible to read s. 21 (1) of the Act of 1922 in this case—where there has been a winding-up resolution—as of uncertain import. Where such facts obtain as in the present case, then the income of that period is to be deemed to be available for distribution to members of the company. We have to bear in mind the terms of the amending section, the elimination of the reasonable time, and the direction that the income of the company down to the particular date from the last making up of the accounts is to

> "be deemed to be income of that period available for distribution to the members of the company." A

No such words as "available for distribution" had appeared in s. 21 (1) of the Act of 1922. Those words are introduced; they are words which are to be applicable to something that is not necessarily income for distribution, but what is to be deemed to be the income for distribution. In my opinion, those words in s. 31 (4) of the Act of 1927 are so direct that it excludes the possibility of the latitude asked for by the company in this case. B For these reasons the appeal fails and must be dismissed with costs.

SLESSER, L.J.—I have come to the same conclusion. The whole matter which has here to be considered falls, in the first place, under s. 31 (4) of the Act of 1927, for there is no question but that this is a company concerning which a resolution had been passed for its winding-up voluntarily. C

The question which I ask myself is whether the language of s. 31 (4) of the Act of 1927, being as it is an amendment of s. 21 of the Act of 1922, must be read as containing in itself an express direction as to what is to be done in such a case as the present, or whether there are certain elements, and if so, what elements, to be read into s. 21 of the Act of 1922.

As my Lord has pointed out, the language, on the face of it, of s. 31 (4) is express. D It states:

> "Where an order has been made or a resolution passed for the winding-up of a company . . . the income of the company for the period from the end of the last year or other period for which accounts of the company have been made up to the date of the order or resolution for winding-up shall, for the purposes of the said section, be deemed to be income of that period available for distribution to the members of the company." E

If the words "income of that period available for distribution to the members of the company" are to be read in their ordinary and natural meaning, without any reference to any earlier statute, the direction is clear: given a period between the time when the accounts were made up and the time of the resolution for the winding-up, the income F of the company shall be deemed to be income of that period and available for distribution amongst the members, and so liable to the incidence of supertax as provided in the Act of 1922.

The Finance Act, 1922, s. 21 (1), after dealing with the question of a reasonable time, which has been excluded by the Act of 1927, goes on to speak of the company having failed to distribute G

> "in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of supertax, a reasonable part of its actual income."

Under that Act the Special Commissioners have to consider, for the purpose of getting at a notional figure on which supertax is to be imposed on the members of the company through the company, what is a reasonable part of its actual income, and there is a H proviso to that section saying that

> "in determining whether any company has or has not distributed a reasonable part of its income . . . the commissioners shall have regard not only to the current requirements of the company's business, but also to such other requirements as may be necessary or advisable for the maintenance and development of that business." I

In the case of a company which is under sentence of death, which has had either voluntarily or compulsorily a resolution or an order for winding-up, the question of advisability for the maintenance and development of the business does not arise, and those matters which have to be taken into consideration under s. 21 (1) of the Act of 1922, do not seem appropriate; as my Lord has pointed out, the words "income available for distribution among the members" do not occur in the Act of 1922. For this reason, I think that they were there dealing only with that part of the income which was deemed to be a reasonable part ascertained as in that section provided. I ask myself, therefore, whether there is any third case between the total income available for distribution among the members on the one side, and an ascertainment of the reasonable part by considering the current requirements of the business, and what may be necessary or advisable for the maintenance and development of that business, because it might well be that there would be a reasonable part which yet would not fall within the particular matters to be considered in the proviso to s. 21 (1). I find considerable light on that matter in the amendment to that subsection passed in the Act of 1927 by s. 31 (1), which is, so far as is here material, to this effect: "For the purpose of this subsection"—that is, the proviso giving considerations which the commissioners may have regard to in determining what is a reasonable part of the income which may be distributed among the members—

> "any such sum as is hereinafter described shall be regarded as income available for distribution among the members of the company [using precisely the same language as that which is used in sub-s. (4) of s. 31] and not as having been applied or being applicable to the current requirements of the company's business or to such other requirements as may be necessary or advisable for the maintenance and development of that business."

That points to a complete and exhaustive antithesis between the distribution of income available for distribution among members of the company on the one hand, and money applied to the requirements of the company's business or requirements for maintenance and development of the business on the other hand, which matters may be excluded under s. 21 (1) of the Act of 1922 as forming a reasonable part. If that be a right view, and it is consistent with and supports the other views which my Lord has expressed, it follows that, when the statute of 1927 speaks of "income available for distribution to the members of the company," it means what it says—those matters now become irrelevant with regard to the requirements of the business and the maintenance of the company—and is an express provision that the sum ascertained shall be deemed to be the sum available.

There remains one other question which I do not propose to decide in this case; I do not think that it is necessary. Counsel for the company has put to us the case that, even on a winding-up, it may be that it would be unlawful for one reason or another to distribute part of the income. He says, for that reason, the question what is a reasonable part may still apply, notwithstanding the fact that there is no business still to be maintained or to be developed. I think the answer may be that, in such a case, such an income would not be available for distribution at all in law, and, therefore, if that be so, would not fall within s. 31 (4), and it would not be necessary to consider whether a part of it was or was not reasonable. As I say, I do not think it is necessary to consider that point in this case.

ROMER, L.J.—In my opinion the words of the Finance Act, 1927, s. 31 (4), are too strong for counsel for the company, and constrain us to dismiss this appeal. According to the plain words of that subsection, applied to the facts of this case, the income earned by the company between Sept. 1 and Nov. 15 inclusive in 1928 is to be deemed, for the purposes of the Finance Act, 1922, s. 21 (1), income of the company for the period ending on Dec. 20, 1928, available for distribution amongst its members. It is said by counsel for the company, and, as at present advised, I think there is a great deal to be said for his contention, that, in point of fact, the income was not available for distribution among the members on Dec. 20, apart altogether from the fact that there was a winding-up, inasmuch as on Nov. 15 that income had been sold to the company that purchased the whole of the company's business as a going concern, but, nevertheless, the subsection says that it is to be deemed to be income of the company available for distribution among its members. That being so, all we have to consider, then, is whether it was open to the Board of Referees to come to the conclusion that a reasonable part of that income had not been distributed to the members. As the income is to be deemed to be income available for distribution to the members, and inasmuch as on that hypothesis there was no conceivable reason why the income should not have been distributed among the members, it is clear that the commissioners could find, as they did in fact find, that there was no reason, that it was unreasonable not to have distributed, in other words, that a reasonable part of that income had not in fact been distributed amongst the members. That is sufficient to dispose of this case, and I express no opinion whatever as to some of the other points that have been argued. In particular I express no opinion as to what would have been the result if, instead of going into liquidation on Dec. 20, the company had continued to exist as a holding company—that is to say, a company holding shares in the purchasing company, up to Aug. 31 following, that is to say, Aug. 31, 1929. I can then see that interesting questions would arise, and, in particular the question would arise whether the Finance Act, 1922, s. 21 (1), is not dealing solely with income which is, in fact, available for distribution amongst its members, or has to be regarded as income so distributable by reason of the amendment to that subsection by the Finance Act, 1927, s. 31 (1).

For the reasons I have given, and solely for those reasons, I agree that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors: *Forsyte, Kerman, & Phillips*; *Solicitor of Inland Revenue.*

[*Reported by* GEOFFREY P. LANGWORTHY, ESQ., *Barrister-at-Law.*]

MANN *v.* NASH (INSPECTOR OF TAXES)

[KING'S BENCH DIVISION (Rowlatt, J.), March 10, 1932]

[Reported [1932] 1 K.B. 752; 101 L.J.K.B. 270; 147 L.T. 154; 48 T.L.R. 287; 76 Sol. Jo. 201; 16 Tax Cas. 523]

Income Tax—Profits—Illegal trade—Liability to tax.

The taxpayer carried on the business of providing on various sites automatic machines for the purposes of amusement. The business was not illegal. In 1924 and 1925 he purchased a large number of "fruit" machines, which he installed in licensed and other premises by arrangement with the proprietors. The "fruit" machines were used for the purposes of gaming, and their operation was unlawful. The taxpayer derived profit from the operation of these "fruit" machines, but failed to include it among the profits of his business as returned for the purposes of income tax in 1926, 1927 and 1928.

Held: although the profit arose from an illegal business, it was liable to tax and must be accounted for.

Hayes v. *Duggan* (1), [1929] I.R. 406 not followed.

Notes. Applied: *Southern* v. *A.B.*, *Southern* v. *A.B., Ltd.*, [1933] All E.R. Rep. 916. Referred to: *Betteley, Addyman and Jalland, Ltd.* v. *Sington*, [1948] 2 All E.R. 81.

As to profits from illegal and gambling transactions, see 20 HALSBURY'S LAWS (3rd Edn.) 121, para. 214; and for cases on the subject see DIGEST Supp., tit. Income Tax, No. 99 g, et seq.

Cases referred to:

(1) *Hayes* v. *Duggan*, [1929] I.R. 406; Digest Supp.

(2) *Daniels* v. *Pinks*, [1931] 1 K.B. 374; 100 L.J.K.B. 337; 144 L.T. 372; 95 J.P. 23; 47 T.L.R. 166; 75 Sol. Jo. 59; 29 L.G.R. 120; Digest Supp.

(3) *Minister of Finance* v. *Smith*, [1927] A.C. 193; 95 L.J.P.C. 193; sub nom. *Canadian Minister of Finance* v. *Smith*, 136 L.T. 175; 42 T.L.R. 734; 70 Sol. Jo. 941, P.C.; Digest Supp.

(4) *Partridge* v. *Mallandaine* (1886), 18 Q.B.D. 276; 56 L.J.Q.B. 251; 56 L.T. 203; 35 W.R. 276; 3 T.L.R. 192; 2 Tax Cas. 179, D.C.; 28 Digest 61, *310*.

A (5) *Inland Revenue Comrs.* v. *Alexander Von Glehn & Co.*, [1920] 2 K.B. 553; 89 L.J.K.B. 590; 123 L.T. 338; 36 T.L.R. 463, C.A.; 28 Digest 46, *236*.

Case Stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts B held on April 20, 1931, for the purpose of hearing appeals, E. Mann, hereinafter called the appellant, appealed against the undermentioned assessments to income tax made upon him by the Additional Commissioners of Income Tax for the Brighton Division under the provisions of the Income Tax Acts:

A first assessment in the sum of £3,000 for the year ending April 5, 1927, in respect of automatic machines (shop) and Hastings Pier.

C An additional assessment in the sum of £1,000 for the year ending April 5, 1927, in respect of profits from automatic machines.

An additional assessment in the sum of £2,800 for the year ending April 5, 1928, in respect of profits from automatic machines.

An additional assessment in the sum of £5,000 for the year ending April 5, 1926, as a dealer in automatic machines.

D The appellant, who described himself in his returns as an amusement caterer, had for some years past carried on the business of providing automatic machines in places to which members of the public resort, such as Hastings Pier, Brighton Beach and Fort Arcade, Margate. These machines were operated in the ordinary way by the patrons by putting a penny in the slot. The appellant either paid a rent for the use of the site on which the machines were set up or, as in the case of Hastings Pier, paid E over one-half of the gross takings to the owner of the site.

The appellant furnished the inspector of taxes with copies of his audited accounts, and he had usually been assessed to income tax, in the first assessments, in accordance with his returns on the basis of the profits shown by such accounts. Doubts arose as to the sufficiency of his returns, and his return for the year 1926–27 was not accepted, but an estimated assessment in the sum of £3,000 was made upon him in the first F assessment for that year. Inquiries revealed that there had been large increases in his capital which were not accounted for by the profits shown by the accounts, and the appellant explained that these increases were due to profits obtained by him from dealings in or the use of certain automatic machines known as "fruit" or "diddler" machines, which he had not included in his accounts or returns because he did not regard them as liable to income tax, as the machines were of a kind that could not G legally be used in this country. The additional assessments in respect of profits from automatic machines and profits as a dealer in automatic machines were thereupon made in estimated amounts under s. 125 of the Income Tax Act, 1918, on the ground that the Inspector of Taxes had discovered that the appellant had not made full and proper returns, and that the profits omitted from the returns and from the first assessments were profits chargeable to tax. There was no reason to doubt that the explanation H given by the appellant was true, that the accounts furnished by him were accurate accounts of the transactions comprised in them, and that the profits omitted from his returns were in fact derived from dealing in or the use of "fruit" or "diddler" machines; and there was no dispute about the figures.

The "fruit" or "diddler" machines were of American manufacture. They contained three revolving drums operated by levers, which were depressed by the insertion in a I slot of a 5 cent. piece, or, when used in this country, of a metal disc of the same size and weight. The drums bore representations of various kinds of fruit, and according to the combinations of fruits appearing when the drums ceased revolving the person inserting the disc either lost it, or, if he were fortunate, won from two to twenty discs. The combinations appearing were entirely a matter of chance, and the odds were against the appearance of a combination favourable to the player.

In the course of 1924 and 1925 the appellant bought three hundred and twenty-two "fruit" or "diddler" machines, of which, over a period of several months, he resold forty-eight at a profit of £384. He was advised by counsel at that time that the machines were illegal, but he nevertheless decided to bring them into use, and those retained by him were installed mainly in licensed premises. As these machines could not be operated with English coins but involved the use of special metal discs, the presence of an attendant was necessary for the sale of discs and the supervision of the operations, and they were not suitable for installation in the same places as his other machines. He, therefore, entered into arrangements with the proprietors of licensed houses and other places of refreshment, who purchased the discs from him at the price of £4 per thousand and sold them to their customers for a penny each for use in the machines, and as a general rule retained 33⅓ per cent. of the gross takings, paying over the balance to the appellant. Players who were successful in winning discs from the machines could either replay them or exchange them at the rate of one penny each for articles from the stock in trade of the proprietor of the premises.

In May, 1926, the appellant was warned by the police authorities in Brighton that the use of these machines was illegal and must be discontinued. At about the same time he received a similar warning from the police at Margate. He thereupon caused all his "fruit" or "diddler" machines to be removed and sold them at a loss. The use of his other machines has been continued without interruption.

The use of "fruit" or "diddler" machines of the same type as those used by the appellant had been held to be illegal by the Court of Criminal Appeal, and it had been held by the Divisional Court that even a members' club in which similar machines were installed was to be deemed to be a common gaming house (*Daniels and others* v. *Pinks* (2)), and many successful prosecutions had been instituted against persons responsible for the use of these machines. The appellant himself had not been convicted of any offence in relation to these machines, and he was not aware of any convictions against any other persons in relation to the use of similar machines having occurred prior to November, 1926.

As regards the machines sold, the appellant admitted that, while he did not concern himself as to their destination, he knew that some of them had been purchased for export to foreign countries, where he had no reason to suppose that their use would be illegal.

It was contended on behalf of the appellant:

(a) That the profits obtained by the appellant from the use of or from dealing in "fruit" or "diddler" machines were profits of an unlawful business and were not chargeable to income tax.

(b) That his transactions in connection with such machines did not form part of his ordinary lawful business, but constituted a series of independent criminal enterprises carried on in partnership with the respective proprietors of the premises in which the machines were installed.

It was contended on behalf of the Crown, inter alia:

(a) That the appellant carried on a lawful business of providing automatic machines for the use of the public and the profits of that business were chargeable to income tax as a whole.

(b) That the appellant was not entitled to have a part of such profits excluded from assessment on the ground that they had been derived from the use of the said "fruit" or "diddler" machines in a manner which might have rendered him liable to conviction.

(c) That the sale of the machines was not illegal, and the appellant was assessable to income tax on the profits of the trade of dealing in machines.

The commissioners who heard the appeal came to the conclusion that the appellant in the course of carrying on his lawful business of providing automatic machines had ventured upon an extension of that business by providing machines, the use of which he had reason to think might prove to be illegal, taking the risk of interference by the police and discontinuing the use of the machines when he found that its continuance would lead to legal proceedings. They considered that the provision of these machines formed part of his ordinary business, and that he was not entitled to claim that the portion of his profits derived from them was immune from taxation on the ground that it had been earned by unlawful means. He had also engaged for a short time in the

A trade of dealing in such machines, and they held that the profits of this trade were chargeable to income tax. They, therefore, rejected the appeal in principle, and amended the assessments in accordance with the figures agreed upon, reducing the assessment of £3,000 for 1926–27 to £2,652, discharging the additional assessment for that year, increasing the additional assessment for 1927–28 to £13,139, and reducing the assessment on profits as a dealer to £384.

B The appellant immediately after the determination of the appeal declared to the commissioners his dissatisfaction therewith as being erroneous in point of law and in due course required them to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

H. St. John Field for the appellant.

C *The Attorney-General* (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.

ROWLATT, J.—In this case the appellant was an amusement caterer, and he used in his business a great many automatic machines, to the use of which no exception can be taken. He put them up in public places, and reaped a revenue therefrom. He also concerned himself with machines which were made for the purpose of unlawful gaming. It is not unlawful to have such a machine. As I understand it, one might have one in D one's own house for children to play with, counters being given to them for the purpose of obtaining sweetmeats or something of that sort, and in that there is nothing wrong; but when they are used for the purpose of gaming, their use becomes an offence.

He used to place these machines with the proprietors of public premises, licensed victuallers principally, in order that the people resorting there might indulge in gaming by the use of them, and the profits that accrued were divided in certain proportions E between the appellant and the occupier of those premises, and, I suppose, on those facts he has been a party to illegal gaming.

The question arises whether the profits of those machines can be charged as income to income tax in the hands of the appellant, and the broad position is taken that the Income Tax Acts, when they tax the profits of any trade, adventure, manufacture or concern in the nature of trade—because those are the widest words—impliedly exclude F profits of illegal trades, or to put it in another way, that an illegal trade is not a trade within the meaning of the Income Tax Acts. That is, as LORD HALDANE pointed out in the *Minister of Finance* v. *Smith* (3), simply a question of the construction of the words used.

The commissioners in this case have treated the use of these machines by the appellant as merely part of his trade as an amusement caterer, dealing with other machines G as well. Counsel for the appellant says that these profits ought to be treated as the profits of a separate trade, and he makes that point because in *Hayes* v. *Duggan* (1) a difficulty was felt in saying that if there is a trade which is not entirely illegal, but which embraces some illegal transactions, one may go through the books and strike out the illegal transactions, and reduce the profits by their elimination.

I find myself in the difficulty that the commissioners have clearly found that the H trade of the appellant is all one, and therefore the case relied on by counsel for the appellant is not reached. But I do not want to decide it on that narrow ground because I think one ought to face the question whether the words of the Income Tax Acts are impliedly limited in the way that is suggested. I myself can see no basis for a distinction between a trade which is wholly illegal and a trade which only contains illegal transactions.

I The appellant realised some profit from the sale of some of the machines; that profit has been brought in and there could be no possible ground for saying that it is not taxable. We are concerned with the other sort of transaction, namely, sharing in the earnings of these machines.

The broad question whether the profits of an illegal trade can be taxed was adverted to by DENMAN, J., in *Partridge* v. *Mallandaine* (4). I do not think that those dicta carry us any further. The vocation of a bookmaker is not illegal, and the emphatic remarks of DENMAN, J., which appear in the TAX CASES, are not retained in the judgment as reported in the LAW REPORTS. At any rate, the dicta were obiter.

In *I.R.Comrs.* v. *Alexander Von Glehn & Co.* (5), goods had been sold for export, and in exporting them the law had been violated and penalties were exacted. The question in that case was whether the penalties could be set up as an expense of the trade or business, and the decision was that payment of those penalties was nothing to do with the trade or business; they were not an expense for the earning of the profits, but an expense in the form of an inconvenience which supervened when the profits were made, because illegality had been committed in the course of earning them. Nobody suggested in that case that the profits of the transactions, the difference between the buying and the selling, should be eliminated from the trade because they were illegal profits; but at the end of his judgment SCRUTTON, L.J., expressed some doubt whether the position was not such as is contended for by counsel for the appellant in the present case. He said ([1920] 2 K.B. at p. 573):

> "If DENMAN, J., meant to say that the Income Tax Acts recognise illegal businesses in the sense of businesses which it was not legal to carry on, because they were punishable, I at present very much doubt whether any such extension of the Acts is possible."

But in *Minister of Finance* v. *Smith* (3) in the Privy Council, LORD HALDANE said at the end of his judgment ([1927] A.C. at p. 198):

> "We have no reason to differ from the conclusion reached in the *Von Glehn Case* (5) but they must not be taken to assent to any suggestion sought to be based on the words used by the learned lord justice, that Income Tax Acts are necessarily restricted in their application to lawful businesses only."

That leaves the matter open. I cannot see why the letting out of the machines in a commercial way, with a view to the reception of profits in a commercial way, is not trade, adventure, manufacture or concern in the nature of trade. On the words it clearly is. The question really is whether as a matter of construction those words are to be cut down by an overriding consideration that the trade is tainted with illegality. The great mainstay of the argument on behalf of the appellant was *Hayes* v. *Duggan* (1) decided in the Irish Free State, and that decision seems to have gone on the principle that no construction could be admitted which recognised that the State should come forward and take a profit from what the State prohibited, because the State ought to have prevented it; and it was argued in a somewhat rhetorical style: Does the State keep its revenue eye open and its eye of justice closed? I must say I do not feel the force of that observation at all. Would it have made any difference, I ventured to ask in the argument, if the State had kept both its eyes open and prosecuted the man for the lottery and taxed him for the profits at the same time? That would at any rate have protected the State from the reflections which were made on it in the words I have quoted. But in truth, it seems to me that all that consideration is misconceived. The revenue representing the State, is merely looking at an accomplished fact. It is not condoning it; it has not taken part in it; it merely finds profits made from what appears to be a trade, and the revenue laws happen to say that the profits made from trades have to be taxed.

It was said in *Hayes* v. *Duggan* (1) that nemo allegans suam turpitudinem non est audiendus. I cannot see that the State are alleging their own turpitude; it is the appellant who is alleging his own turpitude.

It is also said: "Is the State coming forward to take a share of unlawful gains?" That is mere rhetoric. The State is doing nothing of the kind; they are taxing the individual with reference to certain facts. They are not partners; they are not principals in the illegality, or sharers in the illegality; they are merely taxing a man in respect of those resources.

In those circumstances I have come to the conclusion that the Revenue are right, and that the appeal must be dismissed with costs.

Solicitors: *Stow, Preston, & Lyttleton*, for *Fowler & Shaw*, Brighton; *Solicitor of Inland Revenue.*

[*Reported by* J. H. G. BULLER, ESQ., *Barrister-at-Law.*]

Re RECKITT. RECKITT *v.* RECKITT

[COURT OF APPEAL (Lord Hanworth, M.R., Lawrence and Romer, L.JJ.), June 7, 8, 1932]

[Reported [1932] 2 Ch. 144; 101 L.J.Ch. 333; 147 L.T. 275]

Income Tax—Annuity—Annuity "free of income tax"—Freedom from surtax.

By his will dated Nov. 12, 1924, a testator who died on Dec. 29, 1930, bequeathed to his trustees "the sum of £200,000 upon trust to pay my wife during her life the annual sum of £5,000 free of income tax."

Held: the gift to the widow was payable free of surtax as well as income tax, because surtax was an additional income tax and there was nothing in the context of the will so to restrict the meaning of "income tax" as to exclude surtax.

Re Crosse (1), [1920] 1 Ch. 240; *Re Doxat* (2), [1920] W.N. 262; *Re Crawshay* (3), [1915] W.N. 412 and *Re Bates* (4), [1925] 1 Ch. 157 considered.

Dicta of LORD HANWORTH, M.R., and ROMER, L.J., in *Lord Michelham's Trustees* v. *I.R.Comrs.* (5) (1930), 144 L.T. at p. 168 applied.

Appeal dismissed.

Notes. Distinguished: *Conway* v. *Wingate*, [1952] 1 All E.R. 782. Referred to: *Re Skinner, Milbourne* v. *Skinner*, [1942] 1 All E.R. 32; *Re Arno, Healey* v. *Arno*, [1947] 1 All E.R. 64.

As to exoneration of an annuity from income tax by a testator, see 28 HALSBURY'S LAWS (2nd Edn.) 215, 216, paras. 386, 387; and for cases on the subject, see 39 DIGEST 166–168, *572–593*.

Cases referred to:

(1) *Re Crosse, Oldham* v. *Crosse*, [1920] 1 Ch. 240; 89 L.J.Ch. 145; 122 L.T. 462; 64 Sol. Jo. 260; 28 Digest 104, *645*.

(2) *Re Doxat, Doxat* v. *Doxat* (1920), 125 L.T. 60; [1920] W.N. 262; 64 Sol. Jo. 651; 28 Digest 104, *644*.

(3) *Re Crawshay, Crawshay* v. *Crawshay* (1915), 60 Sol. Jo. 275; [1915] W.N. 412; 140 L.T.Jo. 132; 28 Digest 105, *652*.

(4) *Re Bates, Selmes* v. *Bates*, [1925] Ch. 157; 94 L.J.Ch. 190; 132 L.T. 729; 28 Digest 112, *691*.

(5) *Michelham's Trustees* v. *I.R.Comrs., Executors of Dowager Lady Michelham* v. *I.R.Comrs.* (1930), 144 L.T. 163; 15 Tax Cas. 737, C.A.; Digest Supp.

(6) *Re Hulton, Hulton* v. *Midland Bank Executor and Trustee Co., Ltd.*, [1931] 1 Ch. 77; 99 L.J.Ch. 316; 144 L.T. 343; 46 T.L.R. 348; 74 Sol. Jo. 233; Digest Supp.

(7) *Bowles* v. *A.-G.*, [1912] 1 Ch. 123; 81 L.J.Ch. 155; 105 L.T. 870; 76 J.P. 57; 28 T.L.R. 137; 56 Sol. Jo. 176; 5 Tax Cas. 685; 28 Digest 96, *577*.

Appeal from an order of EVE, J., dated March 22, 1932.

The material facts are set out in the headnote.

Gavin Simonds, K.C., and *L. W. Potts* for the residuary legatees.

H. B. Vaisey, K.C., and *Wilfrid M. Hunt* for the annuitant.

R. W. Turnbull for the plaintiffs, trustees of the will.

LORD HANWORTH, M.R.—This is an appeal from EVE, J., who held that a direction given to trustees to pay an annuity to the widow of the testator was a direction to pay free, not only of income tax, but also of surtax. Sir Harold James Reckitt made his will on Nov. 12, 1924, and he died on Dec. 29, 1930. Clause 12 of his will provided:

> "I bequeath to my trustees the sum of £200,000 upon trust to invest the same in any of the investments hereinafter authorised and to hold the said investments upon trust thereout to pay my wife during her life the annual sum of £5,000 free of income tax."

There are no further directions that are relevant. There is no direction to pay in quarterly payments, or equal quarterly payments, there is no reference to deductions.

EVE, J., held that that freedom so prescribed included freedom from surtax as well as income tax. Counsel for the residuary legatees contend that those words ought to be confined to income tax alone, and cannot be made to cover the surtax. I am not unmindful that a distinction between surtax, or supertax, and income tax can be drawn. I will use in future the words "supertax"; surtax was introduced by the Finance Act, 1927, s. 38 (1) (b), but although the name is different, I agree with BENNETT, J., who said in *Re Hulton, Hulton* v. *Midland Bank Executor and Trustee Co.* (6), after going very B carefully through the provisions relative to the matter: "In every essential feature, supertax and surtax are, in my judgment, the same tax." What is supertax? It was originally imposed by the Finance (1909–10) Act, 1910, s. 66. By that section it is declared that: A

> "In addition to the income tax charged . . . there shall be charged, levied, and paid for the year . . . in respect of the income of any individual, the total of which from all sources exceeds [a certain standard] an additional duty of income tax (in this case referred to as a supertax)." C

Those words are reproduced in the Income Tax Act, 1918, s. 4. The relevant words are exactly the same: "an additional duty of income tax (in this Act referred to as supertax)." The question arose whether or not, for the purposes of the collection of D supertax, it was possible to rely on the section which leaves standing, for the purpose of the maintenance and collection of income tax, these sections from year to year. In *Bowles* v. *A.-G.* (7), which was decided by PARKER, J., in dealing with the Customs and Inland Revenue Act, 1890, s. 30, the question arose whether that section enured for the purpose of the supertax, and PARKER, J., said: "Is not s. 30 of the 1890 Act kept in operation for the purpose of collecting supertax in due time?" PARKER, J., further E said ([1912] 1 Ch. at p. 134):

> "The only question I have to decide in this action is whether this section applies not only to ordinary income tax, but to supertax as well. In other words, I have to determine whether supertax is a 'duty of income tax,' within the meaning of this section."

He held that it was. He so held, in spite of a differentiation which it is not difficult to F make, and which has been forcibly presented to us in the argument for the residuary legatees. It is said that it is not the income tax for the year; it is an additional tax. It is said, quite truly, that for the purposes of supertax there is a duty cast on every person chargeable therewith to give notice that he is chargeable to it, which shows that the initiative lies on the subject, whereas in the case of the income tax the assessment is made on him by the surveyor. More than that, by the Income Tax Act, 1918, G s. 7 (6), it was necessary to declare that:

> "All provisions of this Act relating to persons who are to be chargeable with income tax, and to income tax assessments, and to appeals against those assessments, and to the collection and recovery of income tax . . . shall . . . apply to the charge, assessment, and recovery of supertax."

Therefore it can be said that here it is something which is an additional income tax. H It is called a supertax, but the mode of its incidence, the mode of its initiation, and the mode of its collection, are different. I pointed that out in *Michelham's Trustees* v. *I.R.Comrs.* (5), where I said (144 L.T. at p. 168):

> "The fact that it is paid, or may be paid, a little differently from the income tax, that deduction does not apply, does not alter its character." I

The consideration, therefore, of the nature of supertax seems to disclose that, in spite of the differentiation between it and income tax on which criticism can be founded, that differentiation is not effective to destroy the fact that it remains an additional duty of income tax, and for the purposes of the payment. I feel myself unable to carry into effect any differentiation between the income tax and supertax when the words "income tax" are used, as they are used in cl. 12 of the testator's will. I am not unmindful of the inconvenience which would be caused to those who have to fulfil the duty cast on them by this direction in law. It is easy to deal with income tax which

A has to be deducted, but the duty in relation to supertax is quite a different one, and more burdensome. In spite, therefore, of a desire, from matters of convenience, to hold that income tax is income tax, and supertax is supertax, I find it impossible to disregard the authority in the sequence of statutory phrases which are to be found in the statutes to which I have referred.

We have been referred to three or four authorities which have been decided on this B point. PETERSON, J., in *Re Crawshay, Crawshay* v. *Crawshay* (3), held that the phrase "Clear of all deductions, including income tax," did not include supertax. The nature of supertax is that it is paid on an assessment made direct by the assessor, it is not paid by deduction, and r. 19 and r. 21 do not apply. Thus where there is the word "deduction," indicating that the freedom which is to be allowed is allowed in the course of deduction, one may reach a conclusion different from that which would be reached C in the absence of that word. The word "deduction" does not appear in the present case.

In *Re Doxat, Doxat* v. *Doxat* (2), SARGANT, J., took a different view. The words that had to be considered in that case were:

> "I give to my wife an annuity of £2,500 during her life, free of income tax and of D all other deductions."

SARGANT, J., held, relying on the words introduced by reference to the deduction, that the widow was entitled to the amount of the annuity free from income tax, and from supertax. But it will be observed in both those cases that close attention was directed to the actual words used in order to determine what was the meaning of the direction given in the will.

E In *Re Bates, Selmes* v. *Bates* (4) there was a gift to the wife of

> "such a sum in every year as, after the deduction of income tax for the time being payable in respect thereof, will leave a clear sum of £2000."

RUSSELL, J., held that that was free of income tax only, and that the wife was not entitled to payment of any sum in respect of supertax. He founded his judgment on F the reference to "deduction," and pointed out ([1925] 1 Ch. at p. 159):

> "Supertax was not a charge in respect of any particular annuity or sum, but was a charge in respect of the recipient's whole income, and was not a matter with which the trustees would be charged or concerned at all."

He is dealing there with the judgment of PETERSON, J., in *Re Crawshay* (3), but, as he G puts it:

> "The question is: Did the testator mean only income tax 'in respect thereof' was to be deducted, and that supertax was not to be deducted."

He then holds that:

> "The testator did not intend that, in addition to income tax being deducted, a H proportion of the supertax payable by his wife in respect of her total income, should also be deducted."

In the use of the words,

> "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of £2,000,"

I is a restrictive indication. But in the present case the trustees are directed to hand over £5,000 in each year. It is not prescribed in what instalments that is to be paid. No reference is made to the system, or the power of the trustees to make deductions; it is simply that a total sum in each year is to be paid free of income tax. Supertax remains in essence an additional income tax, and, that being so, there being no indication to restrict the words to income tax as known for so many years, it must follow that immunity is given in respect of what is additional income tax.

For these reasons I feel bound to agree with EVE, J. In these circumstances, the appeal fails and must be dismissed.

LAWRENCE, L.J.—This case raises the question whether a direction to pay an annuity free from income tax includes freedom from supertax or surtax, a question which, so far as courts of first instance are concerned, has been settled for upwards of ten years. I refer to *Re Crosse, Oldham* v. *Crosse* (1), which was decided by Astbury, J., in 1920, and *Re Doxat, Doxat* v. *Doxat* (2), decided by Sargant, J., in the same year. Counsel for the residuary legatees relied on the decision of Russell, J., in *Re Bates, Selmes* v. *Bates* (4) given in 1924. It is important to observe what were the words of the will in that case. It was not a gift of an annuity free from income tax, as in the present case, but a gift of

> "such a sum in every year as, after deduction of the income tax for the time being payable in respect thereof, will leave a clear sum of £2,000."

The learned judge, at the outset of his judgment, expressly stated that the testator had not said that the annuitant was to be paid her annuity free from income tax, and he referred in his judgment both to *Re Crosse* (1) and *Re Doxat* (2), and distinguished those cases on the ground that there the gift was of an annuity free from income tax. He then proceeded to consider the words which he had to deal with, and came to the conclusion that, on the construction of the particular bequest, the freedom from income tax did not include freedom from supertax, relying (inter alia) on the words "in respect thereof" occurring in the bequest, and pointing out that supertax was not strictly speaking a tax payable in respect of the annuity.

Counsel for the residuary legatees, however, contended that a gift of an annuity free from income tax must necessarily mean a gift of an annuity free from income tax payable "in respect thereof," and that, therefore, the reasoning of Russell, J., in *Re Bates* (4) ought to be applied to the present case; but it is to be observed that the learned judge in that case relied on the express use of the words "in respect thereof" as distinguishing the case from the case of a gift such as we have here.

I have said that the question was settled, so far as the courts of first instance were concerned, but the matter does not quite rest there. In *Michelham's Trustees* v. *I.R.Comrs.* (5), there was a gift of an annuity free from income tax simpliciter. Although the question was not argued, the Master of the Rolls stated in his judgment (144 L.T. at p. 168), with regard to the liability in respect of supertax:

> "The liability it appears to us is clear. The fact that it is paid, or may be paid, a little differently from the income tax does not alter its character."

Slesser, L.J., agreed with the Master of the Rolls. Romer, L.J., said (ibid.):

> "The testator has also directed that the annuity shall be paid free of supertax, it was so held by the Court of Chancery, and, in my opinion, was rightly so held."

thus expressing his approval of the decision that a gift of an annuity free from income tax is a gift of an annuity which carries with it freedom from supertax, and therefore agreeing with what had been settled by the courts of first instance.

In my judgment (quite apart from the question whether it is open in this court or not) the decisions in *Re Crosse* (1) and in *Re Doxat* (2) were right, and no distinction can be drawn in the present case between income tax properly so called, and supertax, or surtax, both the latter being, in fact, additional income tax, and therefore included in the words "income tax."

For these reasons I agree that the appeal fails, and ought to be dismissed.

ROMER, L.J.—I agree. For the reasons given by the Master of the Rolls it is, in my opinion, clear that, primâ facie, the words "income tax" include supertax. Therefore, it seems impossible to contend that where one finds simpliciter a gift of an annuity free of income tax, that that is not a gift of an annuity free of income tax and supertax; it is, indeed, a gift to the annuitant of such a sum as will, after all questions as between the annuitant and the Crown in respect of income tax and supertax for that year have been settled, leave the annuitant with the sum mentioned. Of course, somebody has to pay the annuity, and the person who has to pay it will have to see that he pays, whether he be a trustee or anybody else, such a sum as I have mentioned. If, therefore, in any particular year the annuitant has had to pay something in respect of supertax on the annuity, by which I mean a sum calculated in the way indicated in the statute, the person whose duty it is to carry into effect the gift of the annuity will have to pay, not only the sum that is mentioned in the gift, but also the amount paid by the annuitant, or payable by the annuitant that year, in respect of supertax. If that is so, I cannot conceive why it should make any difference that the gift of the annuity is only to be found in a direction to a trustee to pay. The trustee, in that case, has to perform the same duty as the executor or trustee or other person would have had to perform in the first case that I have mentioned, namely, where there is a gift simpliciter of an annuity free of income tax. There are, of course, cases—the Master of the Rolls has referred to some of them—where the testator, by the use of the words "pay without deduction" has shown that he is not dealing with the position as between the annuitant and the Crown, but is dealing with the position that will exist as between the annuitant and the trustee who has to pay, and words that give a direction "to pay without any deduction" indicate that the testator is providing against a deduction by the trustee which, but for the provision, the trustee would be entitled to make. Inasmuch as the trustee, in the absence of such words, is not entitled to make any deduction in respect of supertax, it is plain that such words show that the testator, although referring to income tax, does not intend to include in those words the supertax.

For these reasons I think that this appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Gerald & Arthur Marshall*; *Slaughter & May*; *Nicholl, Manisty & Co.*

[*Reported by* Geoffrey P. Langworthy, Esq., *Barrister-at-Law.*]

OSWALD TILLOTSON, LTD. *v.* INLAND REVENUE COMMISSIONERS

[Court of Appeal (Lord Hanworth, M.R., Slesser and Romer, L.JJ.), July 21, 1932]

[Reported [1933] 1 K.B. 134; 101 L.J.K.B. 737; 147 L.T. 481; 48 T.L.R. 628]

Company—Stamp duty—Reconstruction—Sale of undertaking to new company for shares—Allotment to shareholders—Renunciation in favour of purchaser—Less than ninety per cent. of new shares registered in names of shareholders in original company—Stamp duty on conveyance of assets to new company—Finance Act, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 55 (1) (*c*) (*i*).

In April, 1929, a company determined to reconstruct itself. In May, 1929, the company and its liquidator agreed to sell the undertaking and assets of the company to a new company, in consideration of the payment by the new company of the debts and liabilities of the company and certain costs and the allotment to nominees of the liquidator of 340,000 fully paid shares of 5s. each in the new company, to the intent that such shares might be distributed to members of the company as nearly as might be in accordance with their rights and interests as members of the company. The liquidator nominated the shareholders in the company to receive the shares in the new company, including 270,628 shares to J.O.T. On June 12, 1929, duty on the agreement for sale was assessed at 10s., and the agreement was so stamped. Letters of allotment were sent to the shareholders, accompanied by forms of renunciation. In June, 1929, J.O.T. sold 40,000 of his shares and renounced, to that extent, the shares allotted to him in favour of the purchaser. The secretary of the new company entered the name of the purchaser in the new company's register as the original holder of the 40,000 shares. In August, 1929, conveyances of the property of the company to the new company were presented for adjudication and the commissioners claimed ad valorem duty. They also re-assessed the agreement for sale to ad valorem duty. The new company claimed exemption from ad valorem duty under the Finance Act, 1927, s. 55 (1) (c) (i).

Held: the exemption under s. 55 was inapplicable because the consideration for the acquisition by the new company (apart from the portion of the consideration comprising the transfer of liabilities of the old company) did not consist, as to not less than 90 per cent. thereof, in the issue of shares to holders of shares in the old company, notwithstanding that the ultimate destination of the shares was determined by such holders.

Re Ambrose Lake Tin and Copper Co., Clarke's Case (1) (1878), 8 Ch.D. 635 applied.

Notes. Referred to: *Re Walker's Setttement, Royal Exchange Assurance Corpn.* v. *Walker and others,* [1935] All E.R.Rep. 790.

For the Finance Act, 1927, s. 55 (1), see 21 HALSBURY'S STATUTES (2nd Edn.) 935.

Cases referred to:

(1) *Re Ambrose Lake Tin and Copper Co., Clarke's Case* (1878), 8 Ch.D. 635; sub nom, *Re Ambrose Lake Tin and Copper Co., Ltd., Clarke's Case, Taylor's Case,* 47 L.J.Ch. 696; 38 L.T. 587; 26 W.R. 601, C.A.; 9 Digest (Repl.) 323, *2029.*

(2) *Mosely* v. *Koffyfontein Mines, Ltd.,* [1911] 1 Ch. 73; 80 L.J.Ch. 111; 103 L.T. 516; 27 T.L.R. 61; 55 Sol. Jo. 44; 18 Mans. 86, C.A.; on appeal, sub nom. *Koffyfontein Mines, Ltd.* v. *Mosely,* [1911] A.C. 409; 80 L.J.Ch. 668; 105 L.T. 115; 27 T.L.R. 501; 55 Sol. Jo. 551; 18 Mans. 365, H.L.; 9 Digest (Repl.) 147, *864.*

Appeal by Oswald Tillotson, Ltd., from an order of FINLAY, J., on a Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

On May 27, 1929, an instrument was presented on behalf of Oswald Tillotson (1929), Ltd., whose name has since been changed to Oswald Tillotson, Ltd. (hereinafter called "the appellant company", by their solicitors to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891 (54 & 55 Vict. c. 39) for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable. The instrument in question (hereinafter called "the agreement for sale") is an agreement under seal dated May 22, 1929, and made between Oswald Tillotson, Ltd. (hereinafter and in the agreement for sale called "the old company") and William Taylor, the liquidator thereof, of the one part, and the appellant company of the other part, and is an agreement for sale to the appellant company by the old company of all its undertaking and assets for the consideration therein mentioned. The duty on the agreement for sale was assessed as hereinafter mentioned on June 24, 1929.

On Aug. 19, 1929, five separate conveyances or assignments of certain of the properties agreed to be sold made by the old company and its liquidator to the appellant company in pursuance of the agreement for sale were presented on behalf of the appellant company by their solicitors to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the commissioners as to the stamp duty with which the instruments were chargeable.

The old company was incorporated under the Companies Acts, 1908 and 1913, as a private company on Jan. 19, 1914, with a nominal capital of £8,000 divided into shares of £1 each. Its capital was in December, 1927, increased to £40,000, divided into 40,000 shares of £1 each, of which 23,672 have been issued and are fully paid. At extraordinary general meetings of the old company held respectively on April 25, 1929, and May 11, 1929, the following resolutions were duly passed and confirmed as special resolutions, namely: (i) That it is desirable to reconstruct this company and accordingly that this company be wound-up voluntarily and that William Taylor, of 3, Grimshaw-street, Burnley, in the county of Lancaster, be hereby appointed liquidator for the purposes of such winding-up. (ii) That the said liquidator be hereby authorised to consent to the registration of a new company to be named Oswald Tillotson

(1929), Ltd., or some similar name, with a memorandum and articles of association which have already been prepared with the privity and approval of the directors of this company. (iii) That the draft agreement submitted to this meeting and expressed to be made between this company and its liquidator of the one part and the said new company of the other part be hereby approved, and that this company and its said liquidator be hereby authorised pursuant to art. 111 of the articles of association of this company and to s. 192 of the Companies (Consolidation) Act, 1908, to enter into an agreement with such new company (when incorporated) in the terms of the said draft and to carry the same into effect with such (if any) modification as he thinks expedient.

By a special resolution of the old company duly confirmed on May 11, 1929, Mr. William Taylor was appointed liquidator of the old company.

The appellant company was incorporated under the Companies Acts, 1908 to 1917, on May 17, 1929, with a nominal capital of £150,000, divided into 600,000 shares of 5s. each. One of its objects, as disclosed by its memorandum of association, was to enter into and carry into effect, with or without modification, the agreement mentioned in cl. 3 of the articles of association (being the agreement for sale) for the acquisition of the undertaking and assets of the old company.

On May 22, 1929, the agreement for sale was entered into, and by that agreement the old company and its liquidator agreed to sell its undertaking and assets to the appellant company. It was therein provided that as part of the consideration for the sale the appellant company should: (a) pay, satisfy, discharge, perform, and fulfil all the debts, liabilities, contracts, engagements, and obligations of the old company as on the date of sale; (b) pay certain costs and keep the old company and its contributories and the liquidator indemnified in respect thereof; and as the balance of the consideration for the sale the appellant company was to allot to the nominees of the liquidator 340,000 fully-paid shares of 5s. each in the capital of the appellant company to the intent that such shares might be distributed among the members of the old company as nearly as might be in accordance with their rights and interests as members of the old company.

Pursuant to the terms of the agreement for sale the liquidator of the old company nominated John O. Tillotson, T. E. Rhodes, and David Coleman, who were shareholders in the old company, as the persons to whom the 340,000 shares of the appellant company referred to in cl. 3 of the agreement for sale were to be allotted as follows:

To Mr. John O. Tillotson	270,628 shares
,, ,, T. E. Rhodes	13,888 ,,
,, ,, David Coleman	55,484 ,,
	340,000 shares

The appellant company sent an allotment letter to each of the said shareholders in the old company for the said shares of the appellant company so directed to be allotted to him.

The duty on the agreement for sale was assessed by the commissioners at 10s. on June 24, 1929. The duty of 10s. was paid and the agreement for sale so stamped. The adjudication stamp was impressed on the agreement for sale on July 9, 1929, and the agreement subsequently filed with the Registrar of Joint Stock Companies.

In June, 1929, Mr. Tillotson sold 40,000 of the shares so directed to be allotted to him as aforesaid, and in the same month Mr. David Coleman requested the appellant company to register certain of his relatives as holders in the aggregate of 14,400 of the 55,484 shares so directed to be allotted to him as aforesaid, and these 40,000 shares and 14,400 shares were renounced by Mr. Tillotson and Mr. Coleman respectively in favour of persons who were not shareholders in the old company. The commissioners were subsequently (in August, 1930) informed that these relatives of Mr. Coleman were from the date of the renunciation to hold the 14,400 shares mentioned above in trust for him. Mr. Rhodes did not deal with any part of his shares in any way.

The secretary of the appellant company accordingly, instead of entering Messrs. J. O. Tillotson, T. E. Rhodes and David Coleman in the register of members of the appellant company as the original holders of the said 340,000 shares, made the following entries of original holders of the said 340,000 shares in the register of the appellant company:

Mr. John O. Tillotson	230,628
The parties being purchasers or sub-purchasers of the said 40,000 shares	40,000
Mr. T. E. Rhodes	13,888
Mr. David Coleman	41,084
Mr. Ronald Coleman	4,800
Mr. Walter Coleman	4,800
Miss Gwendoline Coleman	4,800
	340,000

By reason of the facts hereinbefore mentioned the first registered holders in the books of the appellant company of the shares of the appellant company, which formed part of the consideration for the sale to the appellant company under the agreement for sale, were to an extent exceeding ten per cent. of such shares and exceeding ten per cent. of the amount or value of the total consideration for the sale (except such part thereof as consisted in the transfer to or discharge by the appellant company of liabilities of the old company) persons who were not holders of shares in the old company.

When the conveyances or assignments referred to above in the second paragraph of this case were subsequently presented for adjudication of stamp duty the commissioners intimated to the solicitors for the appellant company that before exemption from ad valorem duty could be granted on the assignments and conveyance it would be necessary for the commissioners to be satisfied that the conditions of the Finance Act, 1927, s. 55 (1) (c) (i), had been complied with. The appellant company contended that all the conditions of s. 55 of the Finance Act, 1927, had been complied with and that the exemption from ad valorem duty applied. The commissioners were of opinion that in the circumstances hereinbefore detailed the conditions referred to had not been complied with, and they accordingly on April 21, 1931, assessed the conveyance and assignments and reassessed the agreement for sale to ad valorem duty with interest.

On May 4, 1931, the solicitors to the appellant company paid the ad valorem duty and interest in accordance with the notice of assessment last mentioned, amounting altogether to £1,102 9s. 9d. The agreement for sale (which was filed on the appellant company's file with the Registrar of Joint Stock Companies) was restamped by the Commissioners of Inland Revenue with the duty of £516 10s. and with a stamp denoting that £47 12s. interest had been paid; the assignment of goodwill, &c., was stamped with a stamp indicating that it had been adjudged not liable to duty and also with a stamp indicating that ad valorem duty of £516 10s. had been paid, and each of the other conveyances and assignments was stamped with ad valorem duty and interest and the adjudication stamp impressed.

The appellant company, being dissatisfied with the assessment made and having paid the duty in accordance therewith, required the commissioners to state and sign a Case under s. 13 of the Stamp Act, 1891.

Since the date of the said notice the commissioners were advised that in the circumstances hereinbefore detailed no interest was payable by the appellant company and they repaid the interest paid as aforesaid amounting in all (including the said sum of £47 12s.) to a total sum of £87 19s. 9d.

The question for the opinion of the court was whether the agreement for sale and subsequent conveyances or assignments were liable to ad valorem duty as assessed by the commissioners or whether they were exempt from such duty.

FINLAY, J., upheld the claim to ad valorem duty.

Topham, K.C., and *Wynn Parry* for the company.

The Solicitor-General (*Sir Boyd Merriman, K.C.*) and *J. H. Stamp* for the Crown.

A **LORD HANWORTH, M.R.**—This is an appeal by the company, Oswald Tillotson, Ltd., which appeals against a judgment of FINLAY, J., who held that the company had lost the relief from stamp duty granted by virtue of the Finance Act, 1927, s. 55.

I need refer to very few of the facts, which are stated in the Case. A company determined at an extraordinary general meeting in April, 1929, by resolutions which were confirmed on May 11, 1929, to reconstruct the company. It was to be reconstructed B by a sale to a new company, and on May 22, an agreement for sale was entered into. By that agreement the old company and its liquidator agreed to sell its undertaking and assets to the appellant company. That it was enabled to do by virtue of the Companies Act, 1908, s. 192, which is now s. 234 of the Act of 1929; and under both of those sections—the one replacing the other—a member of a transferor company may require the liquidator to abstain from carrying the resolution into effect, or to purchase his C interest at a price to be determined by agreement. In other words, the plan which was adopted by the liquidator was one which he was authorised to carry out, and by the terms of the section which gave him that authority he had to contemplate the possibility of some dissentient shareholders standing apart from the plan of the sale to the new company, and requiring him to purchase their shares at a value to be determined by arbitration.

D If the company were a new company it would have to pay the stamp duty on its capital, but as I read s. 55, where there is merely an amalgamation or a reconstruction, and the company has already, in substance, paid its stamp duty, there is not to be exacted from that company—the old company in a new form—a new stamp duty; but there are certain limitations. Those are provided for in the structure of the section; and there is, indeed, a caution. Even though the limitations laid down in s. 55 have E been observed, by sub-s. (6) there is a warning that if the conditions specified in sub-s. (1) are not fulfilled in the reconstruction as actually carried out, then the claim for exemption will fail. The company made a claim for exemption, and received a notice dated June 24, 1929, and there it was told that the instrument of transfer was subject to a duty of 10s. and no more; but, inasmuch as some hardship has been suggested, it is worth while pointing out that in that same letter these words follow:

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> "Attention is directed to sub-s. (6) (a) of s. 55. It is pointed out that if the scheme as carried out does not fulfil the conditions imposed by sub-s. (1) of that section, exemption from conveyance on sale duty may be deemed not to have been allowed."

In fact, what happened was this. There were several shareholders, and 340,000 shares of the appellant company were allotted as to 270,628 of them to Mr. John Tillot-G son, and he sold 40,000 of those shares. Mr. Rhodes sold none of his shares; Mr. David Coleman put 14,400 shares into the names of nominees in trust for him. I leave that aside, because it may be that that transaction raises different issues; but there appeared as shareholders in the new company persons who held 40,000 of the shares lately belonging to Mr. Tillotson; and by reason of those transfers so carried out it could not be said that the terms of sub-s. (1) (c) of s. 55 were carried out;

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> "that the consideration for the acquisition . . . consists as to not less than 90 per cent. thereof (i) where an undertaking is to be acquired, in the issue of shares in the transferee company to the existing company or to holders of shares in the existing company."

Less than 90 per cent. were shares held by holders in the existing company.

I What is the meaning of the word "issue" in the phrase "in the issue of shares in the transferee company?" A letter of allotment was issued to the transferor, accompanied by a form for renunciation. The right of renunciation was exercised, with the result that the purchaser from Mr. Tillotson was to be registered as the holder of those new shares. It is said that inasmuch as the ultimate destination of the shares was determined by the volition of Mr. Tillotson and Mr. Coleman, the shares had been issued to the holders of shares in the existing company, and that one ought not to look beyond that and see whether or not the recipient of the shares was other than a holder in the existing company. I have come to the conclusion, after considering a great number of cases which have been brought to our attention, that it is impossible to say that the word "issue" is used in all Acts of Parliament and in all circumstances with the same meaning. I think that an illustration of the divergence of its meaning is to be found by looking at *Re Ambrose Lake Tin and Copper Co., Clarke's Case* (1), and the observations which were made in *Mosely* v. *Koffyfontein Mines, Ltd.* (2) by Sir H. Cozens-Hardy, M.R. ([1911] 1 Ch. at p. 80). It is obvious that different observations may be made according to what, in the particular case, seems to be the issue, but in *Clarke's Case* (1), which went to the Court of Appeal, the members of the court there, both the Lord Chief Justice (Sir Alexander Cockburn) and Cotton, L.J., thought of the word "issue" as something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete.

The reason for exemption from transfer stamp duty under s. 55 is that the old company is really represented or replaced by the new company, and the shareholders in the new company are in substance the same as were the shareholders of the old company; there has not been an out-and-out transfer simply for cash, but there has been merely a reconstitution of the same corporators in a new company. Bearing that principle in mind and looking to whether or not there is a real identity as to not less than 90 per cent. of the old holders of the shares, one comes to the conclusion that the meaning of the word "issue" is something more than the mere giving of an allotment letter to an old shareholder and enabling him to deal with the shares offered to him at his volition. It must connote, as indicated by Sir Alexander Cockburn, a later stage; and the test has to be applied as to whether the shares ultimately belong to some person who was the holder of shares in the old company, so that the identity of the old corporators and the new corporators is maintained.

For these reasons I think that Finlay, J., was right, and the appeal must be dismissed with costs.

SLESSER, L.J.—I agree, and have only one further observation to make in support of the judgment given by my Lord. Section 55 (1) (c) deals with a transference from the transferor company to the transferee company, or to the holders of shares in the transferee company who have been holders in the transferor company. In the case of a transfer from company to company, as was pointed out by the Solicitor-General, by sub-s. (6) (b), it is provided that where shares in the transferee company have been issued to the existing company in consideration of the acquisition, and the existing company, within a period of two years, ceases to be the beneficial owner of the shares so issued to it, the privileges do not apply. In the case of an individual shareholder, there is no such limitation of time; once that individual shareholder becomes a registered shareholder in the new company, then he can dispose of his shares, like any other shareholder, as he thinks fit; but the words of sub-s. (6) (b), speaking of the new company being "the beneficial owner of the shares so issued to it," seems to me to be valuable in construing the word "issue" when it is applied to a shareholder. I think there is contemplated in both cases a continuity of personality—either company to company or shareholder to shareholder—and that the word "issue" means such an issue as effectually makes the shareholder in the new company a beneficial owner in that company, and does not give him a mere equitable right to call on the company subsequently to register him as a beneficial owner, as would be the case if the mere allotment in itself, with a letter of renunciation, were to be the same as "issue."

ROMER, L.J.—I agree. One cannot read this section without seeing that, whatever the word "issue" may mean in other collocations, here it is equivalent to the creation of a registered shareholder: i.e., that by the issue of the shares to the shareholders of the old company is meant that the shareholders in the old company become shareholders in the new company. It is quite clear, looking at s. 55, that the benefit of it was intended to be conferred only on a company which really was the old company in a new form—which substantially was that company, although it was a different legal entity. The restriction put on the sale by the old company of the shares allotted to it points strongly in that direction, and although, when the shares are issued directly to

A the shareholders of the old company, it is impossible to prevent those shareholders from exercising their rights as shareholders of transferring the shares, the section was not intended to meet a case like the present, where shareholders of the old company, instead of becoming shareholders in the new company, are expressly given, by the letters of allotment, the power of not becoming members, but of selling their shares to other people, who so become members in their stead.

B For these reasons it appears to me that the decision of Finlay, J., was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *Solicitor of Inland Revenue.*

C [*Reported by* J. H. G. Buller, Esq., *and* Geoffrey P. Langworthy, Esq., *Barristers-at-Law.*]

D

KEREN KAYEMETH LE JISROEL, LTD. *v.* INLAND REVENUE COMMISSIONERS

E [House of Lords (Lord Tomlin, Lord Warrington, Lord Thankerton, Lord Macmillan and Lord Wright), May 9, 10, 1932]

[Reported [1932] A.C. 650; 101 L.J.K.B. 459; 147 L.T. 161; 48 T.L.R. 459; 76 Sol. Jo. 377; 17 Tax Cas. 27]

Income Tax—Charity—Zionist association—Object to settle Jews in Holy Land—
F *Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1) (*b*).

A company limited by guarantee formed part of the Zionist organisation, the objects of which were the restoration of Jews to and their settlement in the Holy Land. The primary object of the company was the acquisition in perpetuity of land in the Holy Land as the inalienable property of the Jewish people for the purpose of settling Jews on such land. The memorandum of association contem-
G plated the acquisition of land in an area which extended beyond the Promised Land according, for instance, to Genesis, ch. 15, v. 18. No part of the income or property of the company was payable or transferable by way of dividend or bonus or otherwise by way of profit to members of the company, nor, in the event of a winding-up, were the surplus assets distributable among them. The settlers to whom land had been let by the company were destitute Jewish refugees from
H Eastern Europe and elsewhere. The funds of the company were collected by subscriptions, donations and bequests on the understanding that they would be employed pursuant to the company's main object. The association had been recognised by the Government of Palestine as a public benefit undertaking. Evidence was given by the ecclesiastical assessor to the Chief Rabbi that the objects of the association were religious, that it was part of the religious duty of every Jew to
I assist the repatriation of the Jews in the Holy Land. The Inland Revenue Commissioners refused to grant to the company exemption from income tax under the Income Tax Act, 1918, s. 37 (1) (b), on the interest on £32,000 consolidated stock owned by the company and representing donations, the commissioners taking the view that the company was not a charity within that provision.

Held: the company was not a charity for the following reasons:

(i) although those concerned with the company's operations might be affected by religious motives, the object specified in the company's memorandum did not constitute a religious purpose;

(ii) the company's object could not be said to be beneficial to the community or a class of the community because it was not possible to identify the community which benefited; A

(iii) the company was not established for the relief of poverty because an element of poverty was not essential to the scheme which the memorandum embodied.

Notes. The Income Tax Act, 1918, s. 37 (1), was replaced by the Income Tax Act, 1952, s. 447 (1) (b). B

Considered: *Hon. Company of Master Mariners* v. *I.R.Comrs.* (1932), 17 Tax Cas. 298; *Re Coats' Trusts, Coats* v. *Gilmour,* [1947] 2 All E.R. 422. Applied: *Tennant Plays Ltd.* v. *I.R.Comrs.,* [1948] 1 All E.R. 506. Considered: *Associated Artists, Ltd.* v. *I.R.Comrs.,* [1956] 2 All E.R. 583. Referred to: *Williams' Trusts Trustees* v. *I.R.Comrs.,* [1947] 1 All E.R. 513; *Oxford Group* v. *I.R.Comrs.,* [1949] 2 All E.R. 537; *Polish Combatants' Association, Ltd.* v. *I.R.Comrs.* (1949), 93 Sol. Jo. 513. C

As to exemption of charities from income tax, see 20 HALSBURY'S LAWS (3rd Edn.) 604–607; for the Income Tax Act 1952, see 31 Halsbury's Statutes (2nd Edn.); and for cases on the subject, see 28 Digest 82-84, *469-483.*

Case referred to:

(1) *Verge* v. *Somerville,* [1924] A.C. 496; 131 L.T. 107; 40 T.L.R. 279; 68 Sol. Jo. 419; sub nom. *Verge* v. *Somerville, A.-G. for Australia* v. *Somerville,* 93 L.J.P.C. 173, P.C.; Digest Supp. D

Appeal from the decision of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and SLESSER, L.JJ.), reported [1931] 2 K.B. 65, on a Case stated under s. 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice. E

The Case stated as follows:

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 10, 1929, Keren Kayemeth Le Jisroel, Ltd. (hereinafter called the association), appealed against the refusal of the Commissioners of Inland Revenue to grant exemption from income tax under s. 37 of the Income Tax Act, 1918, on the interest on £32,000 Consolidated Stock owned by the association and representing donations, the commissioners being of opinion that the association was not a charity within the meaning of that section. F

The association is a company limited by guarantee forming part of the Zionist organisation, the objects of which are the restoration of Jews to and their resettlement upon the Holy Land. The primary object and function of the association is the acquisition in perpetuity of land in the Holy Land as the inalienable property of the Jewish people for the purpose of settling Jews on such land. No part of the income or property of the association is payable or transferable directly or indirectly by way of dividend, bonus or otherwise howsoever by way of profit to the members of the association, nor, in the event of the winding-up of the association, are the surplus assets distributable among them. G

In addition to the acquisition and letting of land to Jews, the association has, under its ancillary powers, installed a water supply upon much of such land, planted forests, cultivated plantations, and in a few cases in urban districts has erected homesteads for workers and has, in carrying out such operations and otherwise, trained and found employment for agricultural and other workers. The association has also granted land for and advanced money in connection with the erection of synagogues, orphanages, hospitals, social clubs for homeless workers, technical, art and other schools, instructional farms, the Hebrew university, a Jewish national museum and other religious, charitable and educational institutions. H I

The settlers to whom land has been let by the association and for whose benefit the funds of the association have otherwise been employed, have been destitute Jewish refugees from Eastern Europe and elsewhere, consisting largely of fugitives from religious persecution and the homeless dependants of victims of massacres, and other impecunious Jewish settlers who could not without such assistance have followed their agricultural or other occupations in the Holy Land. The funds of the association have been collected by subscriptions, donations and bequests upon the understanding that they would be so employed, and in many cases donations and bequests to the association have been allocated by the donors themselves to a specific object. The association has been recognised by the Government of Palestine as a public benefit undertaking.

In the great majority of cases there were no contracts between the association and the settlers, but under the law of Palestine a tenant acquires rights of occupancy which may be described as tenant rights after occupation for a certain number of years. The association does not receive any rent for the lands acquired by it, except in the case of a small number of settlers who originally came to Palestine without means, and, having gained experience on the association's farms and otherwise, have been enabled to earn a livelihood. In the year 1927 the total rentals so received by the association amounted to £1,433 or about 0·1 per cent. of the capital value of the land acquired by the association. In no instance did the rent charged exceed 2 per cent. of the capital value of the land.

The annual general meeting of the association is held in various countries. It was last held in England in 1920. The association's head office is in Jerusalem and its funds are banked partly in England and partly in Palestine. The association's common seal and its books are kept in Palestine. The registered office of the association is in England and the association has an administrative officer and a secretary permanently in England and employs a solicitor in England whenever necessary.

Dr. Asher Feldman, B.A., Ph.D., ecclesiastical assessor to the Chief Rabbi, stated in evidence that in his view the objects of the association were religious, and that it was part of the religious duty of every Jew to assist the repatriation of the Jews in the Holy Land. His view was based upon Leviticus, chapter 25, verses 23 and 24, and upon a continuous line of authorities extending from biblical times to the present day, including the oral or Rabbinic law, such as the Talmud and other books of authority, and he stated that it represented the universal religious sentiment of Jews throughout the ages and at the present day, forming part of their daily prayers.

On behalf of the association it was contended that:

(i) It being a part of the Jewish religion to acquire and hold land in Palestine for the Jewish people assisting in such work was a religious act and the furtherance of that object was correctly described as the advancement of religion.

(ii) The funds of the association having been subscribed or given upon the understanding that they would be devoted for the benefit of impecunious Jewish settlers, the Jewish settlers for whose benefit those funds were employed being, in fact, all poor people, the objects and activities of the association were for the relief of poverty.

(iii) The purposes of the association were purposes beneficial to the community.

(iv) That for some or all of the above reasons, and in view of the facts hereinbefore stated, the association was a body established for charitable purposes only and that the interest formed part of its income, and was applied to charitable purposes only.

(v) Alternatively, that for such reasons, and in view of such facts, the interest, according to the rules established by the memorandum of association, was applicable to charitable purposes only, and was in fact so applied.

On behalf of the respondents it was contended—

(i) That the main object of the association was the repatriation of the Jews in the Holy Land without regard to the means of the immigrants.

(ii) That the objects of the association did not necessarily include the alleviation of poverty among the Jews or the relief of the destitute.

(iii) That the promotion of the objects of the association was not a religious duty of members of the Jewish faith nor for the advancement of religion.

(iv) That the object of the association was not a purpose beneficial to the community in the charitable sense.

(v) That it had not been proved that the association was established either for the advancement of religion, the relief of poverty, or a purpose beneficial to the community.

(vi) That the association was not a body to which s. 37 (1) (c) of the Income Tax Act, 1918, applied, as it was controlled and resident abroad, and its activities were carried on abroad.

(vii) That it had been proved that the dividends from the said consols did not form part of the income of any body of persons or trust established for charitable purposes only and had not been applied to charitable purposes only. A

The commissioners held that the association was not a charity, and that its funds were not applicable to nor applied to charitable purposes only. They therefore refused the claim.

The Court of Appeal held, affirming the decision of ROWLATT, J., that in order to exempt the income of any trust from income tax it must be established in accordance with s. 37 (1) (b) that the trust was for charitable purposes only, and this trust was for other purposes. There was no mention in all the twenty-two clauses of the memorandum of association of the advancement of Jewish religion or a religious object, and the word "settling" could not be said to connote poverty; the object was not confined to the settlement of poor Jews only. Every philanthropic scheme or trust beneficial to the community or of public general utility was not necessarily charitable. B C

The association appealed.

Norman Bentwich, H. Infield and *L. J. Stein* for the appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*), *J. H. Stamp* and *R. P. Hills*, for the respondents, were not called upon.

LORD TOMLIN.—This is an appeal from an order of the Court of Appeal affirming an order of ROWLATT, J., he, on his part, having affirmed the decision of the Commissioners for the Special Purposes of the Income Tax on a Case stated by the commissioners for the opinion of the court. D

The question arises under the Income Tax Act, 1918, s. 31 (1) (b), under which exemption is granted

> "from tax under Sched. C, in respect of any interest, annuities, dividends or shares of annuities, and from tax under Sched. D in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed or trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only." E F

The appellants in this case seek exemption under that section.

The appellants are an association limited by guarantee and not having a capital divided into shares. The association was incorporated in April, 1907, and is no doubt an association connected with what is known as the Zionist movement.

The memorandum and articles of association provide for a number of matters, to some of which it is necessary to refer. Clause 3 of the memorandum provides for the objects of the association. Sub-clause (1) is as follows: G

> "To purchase, take on lease or in exchange, or otherwise acquire any lands, forests, rights of possession and other rights, easements, and other immovable property in the prescribed region (which expression shall in this memorandum mean Palestine, Syria, any other parts of Turkey in Asia and the Peninsula of Sinai) or any part thereof, for the purpose of settling Jews on such lands." H

Then in the subsequent sub-clauses there follow a number of objects of a very varied kind, conferring the widest possible powers. There is a power to clear, cultivate, irrigate, or otherwise improve the lands of the association; power to let any of the land or other immovable property of the association to any Jews on any terms; power to construct and maintain roads, ways, tramways, railways, bridges, viaducts, aqueducts and a number of other works of public utility: power to purchase or otherwise acquire, and to sell, dispose of, work, develop, deal with and otherwise turn to account mines and mining rights, and to carry on the business of mining in any part of the prescribed region, but with a prohibition against anything enabling the association to divest itself of the paramount ownership of any of the soil of the prescribed region, which it may from time to time acquire. Some importance is attached to that limitation. Then there is power to purchase or otherwise acquire and undertake all or any part of the business, property and liabilities of any person or company carrying on any business which the I association is authorised to carry on; power to acquire from any government or other authority concessions and the like; power to sell, mortgage, exchange, grant licences, easements and other rights, in respect of and over, and in any other manner deal with or dispose of or turn to account the undertaking, and all or any of the property and assets for the time being of the association; and there is a similar qualification against the association's divesting itself of the paramount ownership of the soil. There is also power to borrow or raise money, to make, accept, endorse and execute negotiable instruments and bills of exchange; power to promote any companies for any purpose which may seem likely, directly or indirectly, to benefit the association, and to acquire, hold, and deal with shares or other interests in any such company; power to enter into any arrangement for sharing profits, union of interests, joint adventure, or co-operation with any person or company carrying on or about to carry on any business which the association is authorised to carry on. There are a number of other very wide and general powers. Then at the end of cl. 3 there is this proviso:

> "Provided also that the primary object of the association shall be and is hereby declared to be the object specified in sub-cl. (1) of this clause, and the powers conferred by the succeeding sub-clauses of this clause shall be exercised only in such a way as shall, in the opinion of the association, be conducive to the attainment of the said primary object."

Clause 4 provides:

> "The income and property of the association, whencesoever derived, shall be applied solely towards the promotion of the objects of the association, as set forth in this memorandum of association, and no part thereof shall be paid or transferred, directly or indirectly, by way of dividend, bonus, or otherwise howsoever by way of profit, to the members of the association."

In the same way there is a provision that in a winding-up the members are to take nothing.

In cl. 7 there is a provision that

> "unless and until an order shall have been made or an effective resolution shall have been passed for the winding-up of the Jewish Colonial Trust, Ltd. [another company connected with the Zionist movement], no person shall be capable of becoming a member of the association who is not a holder, either solely or as one of two or more joint holders, of founders' shares or a founders' share in the said Jewish Colonial Trust."

After an order has been made for winding-up that trust

> "no person shall be capable of becoming a member of the association who is not a member of some body which shall for the time being be carrying on an undertaking similar to and in succession to the undertaking of the said Jewish Colonial Trust or of some other body designated by special resolution of the association."

Under the articles there is what is called a controlling committee, the purpose of which is really to act as a delaying committee—that is to say, it can veto the exercise by the directors of any of their powers until either the controlling committee or the association in general meeting resolve to the contrary. That controlling committee consists of persons who from time to time form the small actions committee, constituted by or under the rules or regulations adopted or recognised by the most recent Zionist Congress for the time being. So there is a body nominated by the Zionist Congress which has an element of control over this association.

Now the claim of the association is that certain funds which it holds—some £32,000 invested in consols of this country, the association itself being an English company—are exempt from income tax under the section which I have read, on the ground that it is an institution established for charitable purposes only within the meaning of the section. Those funds in fact, I understand, are the result, in the main, of donations which various persons have made to the association, but it is not disputed that they form part of the general funds of the association and are not the subject of any special trust. Therefore the question arises under the first part of sub-s. (1) (b) of s. 37.

The courts below have reached the conclusion that this is not an institution established A for charitable purposes only, and the appellants complain of the orders that have been made by the courts below substantially on three grounds. It is said that the association is an institution established for charitable purposes only, first, because it is really established for a religious purpose; secondly, because, if it is not established for a religious purpose, it is established for the benefit of a community within the meaning of those cases in which it has been held that a trust fund is held on a good charitable trust if it is B held on trusts which are beneficial for the community or some class of the community: thirdly, because, if the case cannot be made good on either of those heads, it still may be made good as being a trust which is for the benefit of poor Jews. I shall consider the matter under each of those three heads.

With regard to the submission that this is a good charitable trust for religious purposes, the case is put in this way: It is said, and no doubt truly, that the return of the C Jews to the Promised Land is an element of great importance in their religion and their religious life. Attention is called to the texts in which the promises were made to Abraham. It is pointed out that in those texts—and the one in Genesis, ch. 15, is taken as an illustration—the promise in relation to the land extends beyond what is commonly called the Holy Land or Palestine, and that the Promised Land includes more than that. D

Genesis, ch. 15, v. 18, is in these terms:

> "In the same day the Lord made a covenant with Abram saying, Unto thy seed have I given this land, from the river of Egypt unto the great river, the river Euphrates."

Verse 19 and the following verses refer to the Kenites and the Kenizzites and the E Kadmonites and a number of other tribes. It is said that this promise covers a wider area, as no doubt it does, than Palestine in the ordinary acceptance of that term as a geographical term. On the other hand, it may be said that the precise geographical limits indicated by those verses is somewhat obscure, but this, I think, is certain, and is recognised, quite fairly by counsel for the appellants, that sub-cl. (1) of cl. 3 of the memorandum goes beyond any area which on any view of these texts could be comprised F in the terms used. The prescribed region in sub-cl. (1) of cl. 3 is defined in this way:

> "which expression shall in this memorandum mean Palestine, Syria, any other parts of Turkey in Asia, and the Peninsula of Sinai."

Now it must be remembered that the articles of association were framed in 1907, and the extent of Turkey in Asia at that time was considerable; it extended much beyond Palestine and Syria, and certainly included, as it does to-day, Asia Minor, and no doubt G other regions. Asia Minor, and other regions outside Syria and Palestine, could not on any view be treated as included in the region covered by the description in Genesis. However, bearing that in mind, the point is this, and this is the way it is put—it is said that it is an essential part of the Jewish religion to look forward to the return of the race to the Promised Land and that this is apparent not only from the texts of scripture but from Rabbinical writings, from the daily prayers, and from other matters connected H with the Jewish religion. Indeed, it is put in two ways. It is said first that there are many commandments of the religion which cannot be effectively performed except in the Promised Land, and secondly that it is only with Judaism established in the Promised Land that the real influence of Judaism can be properly exercised. That being so, it is an essential part of the Jewish religion that daily the devout Jew should pray for the return of the race to the Promised Land, and it is to him of the very essence of his I religion that the race should so return. Basing themselves on that, which I accept absolutely as an accurate statement of the Jewish feeling in the matter, the appellants say that we must construe this memorandum and the articles of association so as to give them the sense of establishing an association for charitable purposes.

I think myself that that argument must fail. We are concerned here only with the language which is employed in this memorandum before us. There is not in it a word which can suggest anything of a religious character. It is quite true that the minds of those who are intimately concerned with the working of this association may be affected by religious motives and religious sentiments in taking the part which they do take in the work which this association performs, but, none the less, the object of the association is not to do something which is in itself religious; it is not, in any sense in which the words, as English words, can be construed, creating a trust for the advancement of religion. It is only when you go subjectively to the minds of those concerned that you are able to introduce any element of the kind at all. If the arguments of learned counsel in favour of this view were well founded it seems to me that such clauses as these might have a different meaning and effect according to the character of those who happened to be the promoters concerned in the working of the association.

But, whether that be well founded or not, there are other reasons why it seems to me the argument must fail. There are a great number of objects in this memorandum. They are all expressed to be ancillary to the main object, and I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion on that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable. I confess I feel great difficulty in the face of the elaborate powers of a non-charitable character which are contained in this memorandum, in saying, quite apart from any other reason, that sub-cl. (1), which in itself has no language directly indicative of charitable purposes, is to be construed as charitable.

But there is another reason which seems to me disastrous to the appellants' argument on this head, and that is the prescribed region itself, because the whole argument with regard to the religious element is linked up with the return to what they call the Promised Land, and in fact this region is far wider than the Promised Land on any construction of the promise. Even if they are right in the view which they take about an activity to settle Jews in the Promised Land, it seems to me that as soon as you find that the activity is not only to settle Jews in the Promised Land but to settle Jews in lands which are not and never have been part of the Promised Land, you have a combination of objects, religious and non-religious, which cannot be separated, and this combination is fatal to the contention that this association is established for charitable purposes only. In my view, therefore, the first point, that this is a religious charity, necessarily fails.

Then the next point is that, if it is not religious, it is said to be beneficial to the community. I have great difficulty, as indeed counsel for the appellants had, in identifying the community. They suggest some alternatives. First of all, they suggest that the community is the community of all the Jews throughout the world. That seems to me to be very difficult. They next suggest that it is the Jews in the prescribed region, but I have great difficulty in seeing why they should be the community, because, although the Jews who are to be settled under the objects no doubt include Jews in the prescribed region, there are also included Jews outside the prescribed region, and whether a settling of Jews from outside the prescribed region is for the benefit of Jews within the prescribed region—it may or may not be; I do not see any indication one way or the other—I think it is extraordinarily difficult to say that within the meaning of the cases there is really any community to be found in the circumstances before your Lordships' House.

That leaves the third point—the poverty point. I confess that this point seems to me very difficult to advance consistently with the argument which has been put before your Lordships on the point that the association is an institution for religious purposes. The two things do not seem to me to be really consistent, but on the merits of the point I confess I am unable to see how, by any straining of the language, this can be limited to poor Jews. Clause 3 (1) is "for the purpose of settling Jews on such land." It is suggested that there can be got out of the word "settling" some element which suggests poverty, and reference is made to the case of the repatriation of Australian soldiers, *Verge* v. *Somerville* (1), where it was said that the word "repatriating" connoted something suggestive of poverty: but I am unable to find in this word any such element at all. Indeed, it is legitimate to refer to some others of the clauses, which may not be decisive on the matter, but which seem to me to point against the contention of the appellants. For example, cl. 3 (3) contains power A

> "to let any of the land or other immovable property of the association to any Jews upon any terms."

Although, as I say, it is not decisive on a point of this kind, it is certainly an element which points against it, and I think there is not sufficient in the language employed to justify the conclusion that any element of poverty is an essential part of the scheme which the memorandum embodies. B

For these reasons I think that this appeal must fail, and I move your Lordships that it be dismissed with costs.

LORD WARRINGTON.—I agree, and have nothing to add.

LORD THANKERTON.—I agree with the opinion which has just been delivered by my noble and learned friend on the Woolsack. I would also like to express my concurrence in particular with the judgment of LAWRENCE, L.J., in the Court of Appeal, which seems to me to deal very fully and very adequately with the matter before your Lordships. C

There is only one point on which I would like to add a sentence or two, and that is on the question of the claim that this is a trust for purposes beneficial to the community. The first ground on which it was put, as my noble and learned friend has just said, was that it was for the benefit of Jews all over the world. I desire to say on that point that I also do not think that they can be described as a community in the sense in which that word is used in this connection. It seems to me that "community" predicates the existence of some political or economic body settled in a particular territorial area, and that the trust must be for that political or economic unit or a particular class within that particular political or economic unit. D E

The alternative ground on which it was sought to bring this trust within that class was in the view that it was for the benefit of Jews within the prescribed area. In addition to the comment, which would be fatal in itself, that those Jews may include people who are not actually within the prescribed area at all, again it does seem to me more than doubtful whether that is a community in the sense which I have suggested, because the area here is an enormous area with no political or economic homogeneity between the various parts of the area. It is quite indefinite, and I doubt very much whether, on that head, there is a community in which even the Jews who are settled within the prescribed region could be described as a particular class. F

LORD MACMILLAN.—The question in this appeal is really a very short one on ultimate analysis. It is whether the appellant company are a body of persons established for charitable purposes only. The memorandum of association of the company expresses the purpose of the company in the clearest possible way. The association is stated to have been established with the object of entering into certain transactions and carrying on certain activities, all for the purpose of settling Jews on lands in the prescribed region in Asia. The purpose being thus defined for us by the memorandum, the question is whether this purpose of settling Jews in a certain region of Asia is a charitable purpose. G H

It has been suggested that, while the transactions which may be entered into and the operations which may be carried on are ordinary enough operations of land acquisition, settlement and development, nevertheless the motive which is behind all these transactions and operations is predominantly a religious motive. It may well be that those who propose to carry on these activities are in point of fact animated by religious motives, but I am afraid that the income tax code applies a more objective test; it looks at the nature of the transactions; it looks at the character of the activities; and it does not look behind these to what may be the motive which has prompted the formation of the company. I

For the reasons which my noble and learned friend on the Woolsack has already so fully expounded I am quite unable to see that the purpose of settling Jews in this region can be described as a religious purpose, whatever may be the actuating motive, or as a charity having for its purpose the benefit of a certain section of the community, or as a

A charity for the relief of the poor. These were the three categories into one or other or all of which it was suggested that this charity, if it be a charity, might fall. In my opinion the appellants have failed to bring it within any one of these categories, and consequently have failed in what it was essential for them to make out, namely, that this company are a body of persons established for charitable purposes only.

B **LORD WRIGHT.**—I entirely agree with the opinion which has been delivered by the noble Lord on the Woolsack.

Appeal dismissed.

Solicitors: *Herbert Baron & Co.*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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MUNICIPAL MUTUAL INSURANCE, LTD. *v.* HILLS (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Dunedin, Lord Warrington, Lord Atkin, Lord Thankerton and Lord Macmillan), February 23, 25, March 15, 1932]

E [Reported 147 L.T. 62; 48 T.L.R. 301; 16 Tax Cas. 430]

Income Tax—Insurance company—Mutual fire insurance—Miscellaneous business on a non-mutual basis—Liability to tax of surplus from miscellaneous business—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. D, Case* 1.

In 1903 a company was incorporated as a company limited by guarantee not having a capital divided into shares. Its main object was to enable local authorities F and other public bodies by co-operation to insure against fire and other risks. The company's memorandum provided that no part of the company's income and property should be paid or transferred by way of dividend, bonus or otherwise by way of profit to the members. The members of the company were in effect the fire policy holders, who had substantial control of the company. On a winding-up the fire policy holders were entitled to any surplus assets. It was conceded that the G fire insurance business done by the company was mutual business and that any annual surplus arising from it was not taxable.

In 1913 the company began accepting miscellaneous business and in 1918 extensive employers' liability insurance began to be undertaken. Cumulative reductions of fire insurance premiums were allowed each year by the company, but no similar reductions were granted in the case of policies other than fire. It was admitted by H the company that the company was liable to income tax in respect of any surplus arising from miscellaneous business or employers' liability business done with persons who were neither members of the company nor fire policy holders. The company claimed exemption from income tax in respect of any surplus arising from miscellaneous or employers' liability business done with fire policy holders.

Held: any surplus arising from the company's miscellaneous or employers' liability I business was profit liable to income tax under the Income Tax Act, 1918, Sched. D, Case 1, because such business entirely lacked the element of mutuality on which rested the exemption of any surplus arising from the company's fire insurance business.

Notes. The Income Tax Act, 1918, Sched. D, Case 1, was replaced by the Income Tax Act, 1952, s. 123.

Considered: *I.R.Comrs.* v. *Ayrshire Employers Mutual Insurance Association, Ltd.*, [1946] 1 All E.R. 637; *English and Scottish Joint Co-operative Wholesale Society, Ltd.* v. *Assam Agricultural Income Tax Comr.*, [1948] 2 All E.R. 395. Referred to:

Falconbridge v. *National Employers Mutual General Insurance Association, Ltd.* (1952), A
33 Tax Cas. 103.

As to surpluses arising from mutual trading, see 20 HALSBURY'S LAWS (3rd Edn.) 124, 125, paras. 220, 221; for the Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.); and for cases on the subject see 28 DIGEST 57, *293* et seq.

Cases referred to: B

(1) *New York Life Insurance Co.* v. *Styles* (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; 5 T.L.R. 621; 2 Tax Cas. 460, H.L.; 28 Digest 59, *300*.

(2) *Cornish Mutual Assurance Co., Ltd.* v. *I.R.Comrs.*, [1926] A.C. 281; 134 L.T. 545; 95 L.J.K.B. 446; 42 T.L.R. 255; 70 Sol. Jo. 343; 24 Ll.L.Rep. 56, H.L.

(3) *Jones* v. *South-West Lancashire Coal Owners' Association*, [1927] A.C. 827; 96 L.J.K.B. 894; 137 L.T. 737; 43 T.L.R. 725; 71 Sol. Jo. 680, H.L.; Digest Supp. C

(4) *Last* v. *London Assurance Corpn.* (1885), 10 App. Cas. 438; 55 L.J.Q.B. 92; 53 L.T. 634; 50 J.P. 116; 34 W.R. 233; 1 T.L.R. 617; 2 Tax Cas. 100, H.L.; 28 Digest 58, *297*.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.), dated May 11, 1931, upon a Case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts D for the opinion of the King's Bench Division of the High Court of Justice.

The Case Stated as follows:

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 16, 1929, for the purpose of hearing appeals, Municipal Mutual Insurance, Ltd. (hereinafter called the company), appealed against assessments to income tax in the estimated sums of £12,000 for the year ending April 5, 1921, £13,000 for the year E ending April 5, 1922, and £13,000 for the year ending April 5, 1923, made upon the company by the Additional Commissioners of Income Tax for the Division of Finsbury under the provisions of the Income Tax Acts.

The company was incorporated under the Companies Acts in 1903 as a company limited by guarantee and not having capital divided into shares. Its main object was to enable local authorities and other public bodies by co-operation to insure against fire F and other risks on the most favourable terms. The memorandum of association provided that no part of its income and property should be paid or transferred by way of dividend, bonus, or otherwise by way of profit to the members of the company, and every member undertook in the event of winding-up to contribute such amount as might be required not exceeding £10 for the payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member and the G expenses incidental to winding-up. The original articles of association were superseded by a special resolution passed in 1910, and other articles substituted therefor.

The company undertakes practically all classes of insurance business except life and marine insurance. In its origin it was the outcome of a conference of the London central and local authorities which first met in 1900 with the object of establishing a system of mutual insurance against fire upon the view that as a class the properties H belonging to municipal authorities were less liable to damage by fire than properties in general, and the cost of insurance against fire at the ordinary rates quoted by insurance companies was therefore excessive, but that it was undesirable that individual authorities should take the risk of relying upon insurance funds of their own. The conference was advised that a scheme by which a number of authorities should simply insure each other by a mutual contract to contribute to any fires that might occur on the properties I of any of the contracting parties in a certain ratio would be open to objection on the ground that it would be ultra vires for an authority to make payment out of its rates towards an expense incurred outside its own area, and a scheme was mooted for the payment of insurance premiums to a body of trustees constituted by a trust deed for the purpose of receiving, managing, and applying them. Eventually this proposal was modified, and it was decided that the representatives of the authorities which approved the revised scheme should form a company and appoint trustees as managers thereof, and the company was registered in pursuance of this decision.

By art. 2 of the articles of association the number of members of the company was declared not to exceed twenty, but the trustees were empowered to register an increase in the number of members whenever they thought fit. Under art. 3 the subscribers to the company's memorandum of association were members by original subscription, and any person thereafter desiring to become a member was required to apply in writing to the company for admission to membership in a prescribed form, and it was for the managing trustees to accept or reject such application. Under art. 8 the company was to keep a register of fire policies sealed and issued, and by art. 1 "fire policy holders" were defined as the holders for the time being of fire policies in accordance with the said register. Under art. 13 every member, trustee and fire policy holder who had not appointed a trustee was entitled to attend a general meeting which was to be held once at least in every calendar year. If and so long as a fire policy holder had appointed a trustee, the trustee was to be so entitled and the fire policy holder was not to be so entitled to attend. By art. 15 the managing trustees were empowered, and were required upon a requisition made in writing by any five or more persons, each of whom must be either a member of the company or a trustee, to convene an extraordinary meeting. Fire policy holders who had not appointed a trustee were not entitled to join in any such requisition. Under art. 21 the business of an ordinary meeting was to be to receive and consider the profit and loss account, and balance-sheet, the reports of the managing trustees and of the auditors, to elect or remove managing trustees, trustees and other officers, to fix the remuneration of the auditors, and to transact any other business which under the articles ought to be transacted at an ordinary meeting. Under arts. 26 to 30 every question submitted to a meeting was to be decided by show of hands or by poll if demanded. By art. 31 on a show of hands every member, every fire policy holder who had not appointed a trustee, and every trustee (present in person or by proxy in each case), had one vote, and at a poll every member present in person or by proxy had one vote, and every fire policy holder who had not appointed a trustee and every trustee (present in person or by proxy) had one vote, and an additional vote for each sum of £25,000 above £25,000 and up to £100,000 and for each sum of £50,000 above £100,000 insured by him or by the fire policy holder appointing him. By art. 36 every person insured against fire with the company was given power to appoint some one person to be one of the trustees of the company, to remove the trustee so appointed, and to appoint some other person to be a trustee in the place of any trustee so removed or otherwise vacating office. By art. 47 the management of the company's business was vested in a body of persons called managing trustees, of whom three-fourths at least were to be trustees appointed under art. 36, and who were to be regarded as directors. By art. 48 the number of the managing trustees was not to be less than five nor more than fifteen. By art. 95 it was provided that in the winding-up of the company the surplus assets which shall remain after paying off and satisfying all the debts and liabilities of the company and providing for the costs of the winding-up, shall be divided among the persons who shall be fire policy holders of the company at the commencement of the winding-up and in proportion to the amounts of the aggregate premiums which shall have been paid by them respectively upon the fire policies at any time effected by them with the company.

In the early days of the company the business done was mainly that of fire insurance, but from 1913 onwards a relatively small though increasing miscellaneous business was done. In 1918 it was considered desirable that the company should undertake an extensive business of employers' liability insurance. This would have involved a deposit of £20,000 under the Assurance Companies Act, 1909, if the company had not been able to satisfy the Board of Trade that its business under this head was that of mutual insurance of its members. To this end, after correspondence with the Board of Trade and following the suggestions of that department, the articles of association were amended by special resolutions passed on March 11, 1918, and confirmed on March 27, 1918, by the insertion of provisions that no person should be capable of becoming a member unless he were insured or about to be insured either against fire risks or against employers' liability risks, and that a member of the company should ipso facto and immediately cease to be a member if he ceased to be insured against fire risks or employers' liability risks so that he was no longer insured with the company against either of such risks.

Since 1918 the company has undertaken a large and rapidly growing business of employers' liability insurance without being required by the Board of Trade to make a deposit under the Assurance Companies Act. The miscellaneous business has also largely expanded. By 1922 the annual net premiums both from the miscellaneous business and from the employers' liability business exceeded those from the fire business. At the present time about one-half of the policies issued by the company are held by fire policy holders on the fire policy register and one-half by other persons, and about one-quarter of the total net premiums received by the company are paid in respect of fire policies.

The reports show that cumulative reductions of fire insurance premiums were allowed each year to those authorities which had been insured with the company against fire for four years or more. No similar reductions of premiums were granted in the case of policies of other classes than fire. It was explained that in the case of employers' liability policies the premiums varied, and while the prosperity of the department as a whole would be taken into account in fixing the premiums, the case of each policy holder would be considered individually and the premiums increased or decreased according to the experience as regards claims in each particular case.

In giving their evidence the officers of the company drew no distinction between members and policy holders. They appeared to take it for granted that any public authority which took out a policy with the company was a member, and no information was forthcoming from them as to the extent to which policy holders had been formally constituted members in accordance with the articles of association. It was admitted that some policies, at all events in the miscellaneous section, had been issued to persons who were not members, e.g., to servants of local authorities. Many of the employers' liability policies and of the miscellaneous policies had been issued to authorities which also held fire policies.

It was admitted on behalf of the Crown that the fire insurance business of the company was a business of mutual insurance, and that there was no liability to assessment to income tax under Case I of Sched. D in respect thereof. It was admitted on behalf of the company that the company was liable to assessment to income tax in respect of any surplus arising from miscellaneous business done by the company with persons who were neither members nor holders of fire insurance or employers' liability insurance policies.

It was contended on behalf of the company:—

(a) That the company was not assessable to income tax in respect of any surplus arising from any business done with members or with holders of fire insurance policies or of employers' liability insurance policies.

(b) Alternatively, that there was no liability to assessment to income tax in respect of any surplus arising from employers' liability or miscellaneous business done with fire policy holders.

It was contended on behalf of the Crown that the company was assessable to income tax under Case I of Sched. D in respect of any profit arising to or from its business otherwise than from its fire insurance business.

The commissioners who heard the appeal gave their decision thereon in the following terms:

There is no doubt that those concerned in the promotion and in the subsequent extension of the scope of this company intended it to be (a) an association of owners or occupiers of buildings carrying on business mainly for the purpose of the mutual insurance of its members against damage by or incidental to fire, and (b) an association of employers carrying on business mainly for the purpose of the mutual insurance of its members against liability to pay compensation or damages to workmen employed by them. But, in the first instance, no provision was made for the establishment of any identity between the members of the insuring association and the persons insured, and though in 1918 it was provided that members of the association must be holders of either fire or employers' liability policies there is still no necessity that policy holders of either class should be members of the association. The articles of association make and

A maintain throughout a distinction between members and fire policy holders, and make no mention of employers' liability policy holders except as being elegible for membership. The position is thus different from that considered in the cases of *New York Life Insurance Co.* v. *Styles* (1), *Cornish Mutual Assurance Co., Ltd.* v. *I.R.Comrs.* (2), and *Jones* v. *South-West Lancashire Coal Owners' Association* (3), in which the policy holders dealt with were ipso facto members of the association and interested in its funds.

B Membership of this company is a barren honour. The members have no privileges except a possible liability to pay £10 on winding-up, and a smaller voice in the management than is given to the fire policy holders. As members they cannot receive any benefit from any surplus of contributions except protection against a call under their guarantee.

It is common ground that the fire business is a purely mutual business. The fire C policy holders, irrespective of membership, have votes, they can appoint trustees, who form the majority of the managing trustees, they are entitled to have the surplus assets divided amongst them on a winding-up, and they receive progressive reductions of their premiums according to the age of their policies. On the other hand, it is admitted that any surplus arising on miscellaneous business done by the company with persons who are not members, fire policy holders, or employers' liability policy holders is a trading D profit, and, as such, assessable to income tax.

The question left for the commissioners' consideration is whether any surplus arising from miscellaneous business done with members, fire policy holders, or employers' liability policy holders, or employers' liability business done with members or fire policy holders, is a taxable trading profit or is outside the charge to the tax as being a mere excess of contributions over immediate requirements for a mutual purpose. In our E opinion no distinction can be drawn between the miscellaneous business and the employers' liability business, or between the different classes of persons taking out policies under these heads. In no case is any redundant part of the premiums returnable to the contributors, as contributors, either in the shape of a reduction of premiums or in cash on cessation of the policy or on winding-up. The fire policy holders may receive a portion of a surplus of miscellaneous or employers' liability premiums, but only as fire F policy holders and not as contributors of those premiums, and any benefit that the miscellaneous or employers' liability policy holders may receive from the accumulation of a surplus of premiums is indirect only and of the same nature as the advantages which any insured person may receive from the accumulation of reserve by an ordinary trading company. They accordingly hold that the surplus arising from employers' liability and miscellaneous business was taxable as a trading profit.

G The company immediately after the determination of the appeal declared their dissatisfaction therewith as being erroneous in point of law, and in due course required the commissioners to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, s. 149.

It was agreed between the parties that when the questions of principle at issue had been determined by the court the case should be remitted to the commissioners for H settlement of the amount of the liability.

ROWLATT, J., affirmed the decision of the Special Commissioners, and his decision was subsequently affirmed by the Court of Appeal.

The company appealed.

Wilfrid Greene, K.C., *Raymond W. Needham, K.C.*, and *John S. Scrimgeour* for the I appellants.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills*, for the respondent, were not called upon.

The House took time for consideration.

March 15.—The following opinions were read.

LORD DUNEDIN.—In this case I am content with the judgment of the commissioners as expressed by them and affirmed by ROWLATT, J. The point may be stated as a question whether the facts in this case, so far as the point of controversy extends, fall under the decision in *New York Life Insurance Co.* v. *Styles* (1) or under *Last* v. *London Assurance Corpn.* (4).

Any person, or set of persons, or company, carrying on the business of insurance, charges premiums and has to meet claims on the policies for which the premiums have been paid and, if it transpires in the course of business that the amount obtained by the premiums has been more than sufficient to meet the claims, this is a surplus. If that surplus is a profit it must bear income tax, secus if it is not; and whether it is a profit or not depends, as was found in the two cases, on the question: to whom does it go? If it goes to the insurer or insurers it is a profit. If it simply goes back to the insured either in reduction of his premium or in enhancing the sum insured, it is in essence merely a return of his own money which he has overpaid, and is not a profit.

Now, it is found in this case as a fact that, as regards employer's liability business and miscellaneous business—and that is the only point disputed—

> "in no case is any redundant part of the premiums returnable to the contributors either in the shape of a reduction of premiums, or in cash on cessation of the policy or on winding-up."

All surpluses eventually go to the fire policy holders. In so far as the surplus arises from a fire policy, they are really entitled to the money as being those who contributed it, and accordingly it has been admitted that any profit made on the fire policies is governed by the *New York Case* (1). But as regards employers' liability business and miscellaneous business, it does not go to the contributors for, as fire policy holders in a body, they have not contributed, and therefore this business is in the same position as business with complete outsiders, the surpluses in which are admitted to be profit.

I move that the appeal be dismissed.

LORD WARRINGTON.—This is an appeal from an order of the Court of Appeal, dated May 11, 1931, dismissing an appeal from an order of ROWLATT, J., whereby an appeal from the Special Commissioners was dismissed and their decision was affirmed. The question is whether in arriving at the amount of the profits of the appellants' trade under Case I of Sched. D, premiums received by the appellants from holders of fire policies in respect of insurance business other than fire policy business ought to be treated as receipts of the trade or whether those premiums should be excluded as derived from mutual insurance business on the principle of decisions in this House of which *New York Life Insurance Co.* v. *Styles* (1) is the leading example.

Mutual insurance business is now perfectly well known. It consists essentially in the association of a number of persons who insure each other against certain risks by contributing by way of premiums to a common fund to be used, together with further contributions if necessary, for the purpose of indemnifying any member or members who may have suffered injury in consequence of a risk insured against, any surplus being either carried forward or used to reduce future premiums as the members may determine. It is now settled by the decisions above referred to and is not disputed that the mere carrying on of such a business is not a trade, nor are the surpluses profits for the purposes of income tax.

In the present case certain local bodies conceiving that through mutual insurance against fire and other risks they would be able to insure on terms more favourable to themselves than by insuring with any of the fire insurance companies, determined to associate together for that purpose, and to work the business by means of a company incorporated under the Companies Acts and limited by guarantee. On March 9, 1903, the appellant company was so incorporated, the memorandum of association being signed by eight persons, each a member or an officer of a local authority.

The first object of the company as expressed in the memorandum is to enable public bodies and authorities by co-operation to insure against fire and other risks on the most favourable terms. In addition, power was taken in wide terms to carry on any form of insurance business except life insurance. It was provided that the income and property of the company, whencesoever derived, should be applied solely towards the promotion of the objects of the company and no portion of it should be paid or transferred by way of profit to the members of the company. Every member undertook to contribute in the event of a winding-up for the purposes specified in the memorandum such amount as might be required not exceeding £10.

Under the provisions of the articles the members of the company are the original subscribers and such other persons as may apply for admission and be accepted by the managing trustees. It is a condition of a person becoming a member that he is insured or about to be insured either against fire risks or against employers' liability risks. In the event of a winding-up the surplus assets, if any, are divisible amongst the fire policy holders at the date of the commencement of the winding-up in proportion to the amounts of the aggregate premiums paid by them respectively upon fire policies.

Since the year 1913 the company have, in addition to the fire insurance business conducted on the mutual system, carried on an extensive insurance business of a miscellaneous character and particularly employers' liability business. Considerable profits are derived from this miscellaneous business, and it is admitted that in general the appellants are liable to be assessed to income tax in respect of these profits, but they claim to be exempt in respect of any surplus arising from employers' liability or other miscellaneous business done with fire policy holders. The commissioners and both courts below have rejected this claim, and I entirely agree.

No part of the surplus arising from the employers' liability or other miscellaneous business is paid to the assured whether fire policy holders or not in reduction of premiums or otherwise. In fact in this part of the business the principle of mutual insurance business does not prevail at all. I fail to understand how the surplus arising from any part of this business can be treated otherwise than as profits and gains under Sched. D. The fact that a surplus in a possible winding-up is divisible amongst those who happen to be fire policy holders at the time cannot in my opinion affect the character of the current profits.

In my opinion the appeal must be dismissed with costs.

LORD ATKIN.—I concur.

LORD THANKERTON.—The appellants were incorporated under the Companies Acts in 1903 as a company limited by guarantee and not having a capital divided into shares. Their main object was to enable local authorities and other public bodies by co-operation to insure against fire and other risks on the most favourable terms. The memorandum of association provided that no part of the company's income and property should be paid or transferred by way of dividend, bonus, or otherwise by way of profit to the members of the company, and every member undertook in the event of winding-up to contribute such amount as might be required not exceeding £10 for the payment of the debts and liabilities of the company contracted before the time at which he ceased to be a member and the expenses incidental to winding-up.

The appellants carry on (a) fire insurance business, (b) employers' liability insurance, and (c) miscellaneous insurance business. It was common ground between the parties that under the present constitution of the company, the members of the company are, in effect, the fire policy holders, who have the substantial control of the company through their votes and through the trustees—forming the majority of the managing trustees—whom they appoint; on a winding-up the fire policy holders are alone entitled to any surplus assets.

It has been conceded by the Crown that the fire insurance business done by the appellants with the fire policy holders is mutual business, and that any annual surplus arising therefrom is not profit subject to income tax. On the other hand, it is not now disputed by the appellants that employers' liability insurance business or miscellaneous insurance business done with persons other than fire policy holders is not mutual business, and that profits arising therefrom are subject to income tax. The question at issue in this appeal is whether the annual surplus arising from employers' liability insurance or miscellaneous insurance business done with fire policy holders forms profits and gains subject to income tax.

At first the company's main business was that of fire insurance, but since 1913 a progressively increasing miscellaneous business has been undertaken; in 1918 the company started the business of employers' liability insurance, which has developed on an extensive scale. It is stated that they were exempted by the Board of Trade from the A statutory deposit in respect of the latter business, on satisfying the board that their business under this head was that of mutual insurance of the members. By 1922 the annual net premiums both from the miscellaneous business and from the employers' liability business exceeded those from the fire business. At the present time about one-half of the policies issued by the company are held by fire policy holders on the fire policy register and one-half by other persons, and about one-quarter of the total net B premiums received by the company are paid in respect of fire policies.

The accounts of the company show that the fire policy holders alone receive progressive reductions of their premiums according to the age of their policies, and, as already stated, the fire policy holders are alone interested in any surplus assets arising on the winding-up of the company, such surplus being divided among the holders of such policies at the commencement of the winding-up in proportion to the amounts of the aggregate C premiums paid by them on fire policies at any time effected by them with the company.

The appellants contended that, it being admitted that the fire policy holders in substance were the members of the company, any business done by them with the company whether it was fire, employers' liability or miscellaneous, was mutual business of the same character as that which was held not to be subject to tax in *New York Life Insurance Co.* v. *Styles* (1), and that accordingly none of the business done with the D fire policy holders was subject to tax. Although the New York Company issued both participating and non-participating policies the question in that case related only to the former. Lord Watson (14 App. Cas. at p. 392), describes the two classes:

> "The company issues life policies of two kinds, participating and non-participating but the relations existing between the corporation and the two classes of insured differ materially. There are no shares and no shareholders, in the ordinary sense of E the term; but each and every holder of a participating policy becomes, ipso facto, a partner of the company, with a voice in its administration, entitled to a share of its assets, and liable for all losses and expenses incurred by it. On the other hand, the holder of a non-participating policy is not a partner of the company; he is a creditor merely without any interest in its assets, and without any liability for its debts. The rate of premiums paid for participating is different from that which applies to F non-participating policies, and is moreover not fixed, but fluctuating."

After expressing the view that incorporation did not prevent the company being regarded as an association of individuals for their mutual purposes, Lord Watson proceeds (14 App. Cas. at p. 394):

> "When a number of individuals agree to contribute funds for a common purpose, G such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions returned to them should be regarded as profits."

Lord Herschell says (14 App. Cas. at p. 409): H

> "Let us see how the so-called profit arises. It is due to the premiums which the members are required to pay being in excess of what is necessary to provide for the requisite payments to be made upon the deaths of members, and not being, as the case states they were intended to be, commensurate therewith. This may result either from the contributions having, owing to an erroneous estimate or over-caution, been originally fixed at a higher rate than was necessary, or from the death rate being I lower than was anticipated. Can it be properly said that, under these circumstances, the association of mutual insurers has earned a profit? The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them, for this object, and accordingly their next contribution is reduced by an amount equal to their proportion of this excess. I am at at loss to see how this can be considered as a 'profit' arising or accruing to them from a trade or vocation which they carry on. It is true the alternative is allowed

> A them of leaving the excess in the common fund, and so increasing their representatives' claim upon it in case of death, but I cannot think that this makes any difference."

Reference may also be made to *Jones* v. *South-West Lancashire Coal Owners' Association, Ltd.* (3), which was the case of a purely mutual concern, formed to indemnify its members, who were all coal owners, against liability for compensation in respect of B fatal accidents to workmen in their employment. The association was limited by guarantee, and the funds were supplied by calls from time to time on members, the surplus in each year being carried to a reserve fund. There was provision for ascertainment and payment to a retiring member of a certain sum out of the reserve fund, but, subject to this, the funds were to remain with the company, and in the event of a winding-up were to be divided among the members in the proportions prescribed. C It was held that the surplus of the calls received from members over the expenditure for the year did not constitute profits liable to income tax. LORD CAVE, L.C. ([1927] A.C. at p. 832), says:

> "In this case, as in the *New York Life Insurance Co. Case* (1), there are no shareholders interested, and the whole of the yearly surplus remains to the credit of the members, and must either be applied to meeting their future claims or be returned D to them on retirement. Sooner or later, in meal or in malt, the whole of the company's receipts must go back to the policy holders as a class, though not precisely in the proportions in which they have contributed to them; and the association does not in any true sense make a profit out of their contributions."

My learned and noble friend LORD DUNEDIN says ([1927] A.C. at p. 833):

> E "The whole case for the Crown rests on the idea that because in a single year the premiums received exceed the sums paid in respect of the losses in that year the balance represents a profit. It represents no such thing. It is simply a sum of money which is carried forward in order that it may be available to meet excessive losses in a future year, or, if it is found in the end to be redundant, be returned to the shareholders either in the form of reduced premiums or of cash."

F I find myself quite unable to reconcile the disposal of the surplus arising on the employers' liability and miscellaneous policies held by fire insurance policy holders in the present case with the tests of mutuality expressed in the opinions above quoted. The premiums on these policies are fixed and not fluctuating; the fire policy holders, as holders of employers' liability or miscellaneous policies, have no interest or share in any surplus arising on such policies; such surplus belongs to all the fire policy holders, G irrespective of whether they hold any other policies or not. The surplus arising on employers' liability and miscellaneous policies held by fire policy holders is dealt with in exactly the same way as the surplus arising on such policies held by persons who are not fire policy holders, which is admittedly subject to income tax. I agree with ROWLATT, J., when he says:

> H "I cannot see the slightest distinction between what is made out of a member in respect of non-fire business and what is made out of a stranger in respect of non-fire business; qua that business the member is a stranger. He is not, as a miscellaneous policy holder, getting any share in the miscellaneous policy business."

Accordingly I am of opinion that the appeal should be dismissed with costs.

I **LORD MACMILLAN.**—The appellant company carries on several branches of insurance business, classified as fire insurance, employers' liability insurance and miscellaneous. Notwithstanding its name, it is admitted that some of its business is not conducted on a mutual basis, and the constitution of the company differs in several respects from that of the ordinary mutual insurance company. In particular its policy holders do not by the mere fact of taking out policies become members of the company, and membership is limited to the original subscribers of the memorandum of association, and such persons as may be admitted on approved application in writing. The position of a member seems indeed to offer little attraction, for apart from certain voting power his only privilege consists of a possible liability to contribute £10 in the event of liquidation. If the contributions of policy holders yield a surplus after meeting claims, the members do not benefit by it except as a protection against the remote possibility of a call under their guarantee. The actual business of the company is conducted by a board of managing trustees. A feature of the constitution is the distinctive and predominant position accorded to the holders of fire policies, who form a privileged class by themselves. Their names are entered in a special register and in addition to rights in the matter of voting and appointing trustees they are entitled to have the surplus assets divided among them on a winding-up while they and they alone benefit directly by any surplus arising in the conduct of any branch of the company's business.

It was conceded on behalf of the Crown that the fire insurance business of the company is conducted on a mutual basis and that any surplus arising therefrom is not taxable profit being "a mere excess of contributions made over immediate requirements for a mutual purpose." The company on the other hand admitted that as regards so much of the employers' liability business and the miscellaneous business as is done with persons who are not fire policy holders any surpluses arising are taxable profits, such surpluses not arising from business conducted on a mutual basis. But as regards employers' liability business and miscellaneous business done with fire policy holders the company maintains that any surpluses arising are not taxable profits inasmuch as they arise from mutual insurance business.

The principle on which the surpluses arising in the conduct of a mutual insurance scheme are not taxable as profits is now well understood. The essence of the matter is that a number of persons who are exposed to some contingency, whether the inevitable contingency of death or such possible contingencies as fire, employee's claims, marine casualties or the like, associate themselves together as contributors to a common fund on the footing that if the contemplated contingency befalls any contributor he or his representatives shall receive a compensatory payment out of the common fund proportional to his contribution. The scale of contributions or premiums is fixed on experience and estimate. If it is found to yield more than enough to satisfy the claims that emerge the contributors receive the entire benefit in the shape of bonuses, reduction of future contributions or otherwise. As the common fund is composed of sums provided by the contributors out of their own moneys, any surplus arising after satisfying claims obviously remains their own money. Such a surplus resulting merely from miscalculation or unexpected immunity cannot in any sense be regarded as taxable profit. This was clearly laid down in *New York Life Insurance Co.* v. *Styles* (1), and is now beyond dispute. The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words there must be complete identity between the contributors, and the participators. If this requirement is satisfied the particular form which the association takes is immaterial.

Now this cannot be predicated of the employers' liability insurance and the miscellaneous insurance business conducted by the appellant company. The common funds created to meet employers' liability claims and miscellaneous claims are contributed by those who have taken out policies against these risks respectively, and these contributors include both persons who have and persons who have not taken out fire policies, but the surpluses arising redound not to the benefit of all the contributors to the common funds but to the benefit only of those contributors who happen also to be holders of fire policies. Certain of the contributors to these common funds thus benefit at the expense of the other contributors. This is in my opinion sufficient to negative the contention that either the employers' liability business or the miscellaneous business of the appellant company is conducted on a mutual basis. That being so, I do not think it is admissible to attempt to segregate that part of the business of employers' liability insurance or of the business of miscellaneous insurance which is done with persons who happen to be also fire policy holders and to characterise that part as mutual. The benefits derived by the fire policy holders from the surpluses on employers' liability and miscellaneous business are augmented by the contributions of those who, not being fire policy holders, do not participate in these surpluses. The fire policy holders receive

A these benefits not in their capacity as contributors to the employers' liability and miscellaneous funds but in their capacity as fire policy holders.

I am accordingly of opinion that the contention of the appellant company is not well founded, and I concur in the motion that the appeal be dismissed with costs.

Appeal dismissed.

B Solicitors: *Ridsdale & Son*; *Solicitor of Inland Revenue.*

[*Reported by* EDWARD J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

C

CONSOLIDATED LONDON PROPERTIES, LTD. *v.* JOHNSTONE (INSPECTOR OF TAXES)

D [HOUSE OF LORDS (Lord Warrington, Lord Atkin, Lord Tomlin and Lord Macmillan), November 30, December 1, 3, 4, 1931, January 29, 1932]

[Reported [1932] A.C. 351; 101 L.J.K.B. 224; 146 L.T. 429; 96 J.P. 134; 48 T.L.R. 229; 30 L.G.R. 133; 17 Tax Cas. 231]

Income Tax—Allowance—Repairs—Block of flats in metropolis—Assessment of each E *flat—Actual outgoings to be taken into account—Valuation of Property (Metropolis) Act*, 1869 (32 *&* 33 *Vict., c.* 67), *s.* 45—*Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sched. A, No. V, r.* 7, *as amended by Finance Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 14), *s.* 28 (1), (2).

The appellants were the owners of a house within the area to which the Valuation (Metropolis) Act, 1869, applied. The house contained eight flats, each of which F was self-contained and let to a separate tenant. There was one entrance to the house and common staircase from the street. The cost of external repairs was borne by the appellants. In the valuation list in force during the relevant period the eight flats were assessed separately and the assessments to income tax against which the appellants appealed were based on the gross values in the separate assessments. General commissioners held that the tax assessments should follow the assessments G fixed under the Act of 1869 and that therefrom should be made the appropriate deductions allowed for repairs in the case of each flat in accordance with the Income Tax Act, 1918, Sched. A, No. V, r. 7, as amended by the Finance Act, 1923, s. 28 (1), (2), and they reduced the assessments by amounts arrived at in accordance with the scale in r. 7 (3).

Held: the amount of the actual outgoings was relevant to a claim for reduction H under r. 7, and the case would be remitted to the commissioners to make the necessary inquiries and determine what deduction, if any, should be allowed in respect of each assessment on the basis that the amount of outgoings referred to in r. 7 (2) as amended by s. 28 (3) of the Finance Act, 1923, was to be ascertained separately as to each flat and each year of assessment.

I **Notes.** The Income Tax Act, 1918, Sched. A, No. V, r. 7, has been replaced by s. 100 (1) of the Income Tax Act, 1952.

As to allowances for repairs, &c., see 20 HALSBURY'S LAWS (3rd Edn.) 64 et seq., and for cases see 28 DIGEST 9, 10. For Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.).

Case referred to:

(1) *Towle* v. *Improved Industrial Dwellings Co., Ltd.*, [1931] 1 K.B. 263; 100 L.J.K.B. 37; 144 L.T. 281; 95 J.P. 51; 47 T.L.R. 74; 29 L.G.R. 41; 17 Tax Cas. 231, C.A.; Digest Supp.

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., SLESSER and ROMER, L.JJ.) upon a Case Stated by the Commissioners for the General Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the General Purposes of the Income Tax acting for the division of Kensington in the county of Middlesex, held at No. 23, Young Street, Kensington, W., on Nov. 21, 1927, the appellant company, Consolidated London Properties, Ltd., appealed against eight assessments made under Sched. A of the Income Tax Acts in respect of eight flats in their property known as No. 1, Linden Gardens, Notting Hill Gate, W., in the sums hereinafter set out in respect of the year ending on April 5, 1927, on the ground that they were entitled to allowances under Sched. A, No. V, r. 7 (1) (b), of the Income Tax Act, 1918, as amended by the Finance Act, 1923, s. 28.

No. 1, Linden Gardens was a building which contained eight flats used for residential purposes and rooms resided in by a porter. All the flats were self-contained and each flat was let to a separate tenant. The flats had separate front doors abutting on to a staircase inside the building, which was common to all the flats. None of the flats communicated with any other. There is one entrance from the public street giving access to the whole building. A porter (who superintended the whole building) in the employ of the company resided in rooms in the basement. The appeals were against the respective assessments in respect of the eight flats let to tenants. There was no appeal against the assessment of the rooms resided in by the porter. The corresponding allowance claimed by the company in respect of the eight flats had in fact been made in respect of the porter's rooms, to which Sched. A, No. V, r. 7 (2), as amended by the Finance Act, 1923, s. 28 (3), did not apply, no rent being payable therefor, the company being the occupier. The property was within the area to which the Valuation (Metropolis) Act, 1869, applied, and in the valuation list in force during the year ended April 5, 1927, the gross value of each flat was shown separately and the assessments now in question were in amounts which were the same as the respective gross values appearing in such valuation list. Under its lease each flat was let on the terms that the rent hereinafter appearing was payable and that the rates, cost of lighting the common entrance and staircases of the building by electricity and gas, the cost of the maintenance of the lift and other parts of the building and of the provision of a porter, and the cost of cleaning the common entrance and stairways, was borne by the company. In the case of two flats only did the tenants make a fixed contribution of £10 per annum towards the lighting of the entrance and staircase and services of porters and use of lift, &c. The company were liable for external repairs to the whole building. The tenants of six of the flats were responsible for internal repairs. During the year of assessment the total rents payable under the said leases of the flats amounted to £1,471, and the additional payment by way of fixed contribution of £20, but details were at the appeal refused of particulars necessary to arrive at any outgoings which should by law be deducted in making the assessment. The gross values of the eight flats and the porter's rooms appearing in the valuation list for the quinquennial period 1926 to 1930 and the amounts of the assessments made to income tax in respect of the year ending April 5, 1927, are shown below in column A and the rents reserved under the leases in column B.

	A	B		A	B
Flat 1 ...	£75	£140	Flat 5 ...	£127	£235
Flat 2 ...	108	200	Flat 6 ...	86	160
Flat 3 ...	88	163	Flat 7 ...	113	210
Flat 4 ...	118	220	Flat 8 ...	77	143
			Porter's Rooms	8	—

On behalf of the company it was contended that: (i) the gross assessments of the eight flats as fixed by the valuation committee under the Valuation (Metropolis) Act, 1869, were conclusive of the rents at which the flats might reasonably be expected to let during the quinquennial period and were conclusive for the purpose of income tax during that quinquennial period, and that the actual outgoings during the three years ending April 5, 1927, were irrelevant; (ii) under r. 7 of Sched. A, No. V, of the Income Tax Act, 1918, as amended by s. 28 of the Finance Act, 1923, the company were entitled to the appropriate allowances from the gross Sched. A assessment set out in para. (3) of the rule for the purposes of collection. On behalf of the Crown it was contended (inter alia): (i) that for the purposes of income tax under the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (c), the whole of No. 1, Linden Gardens was the unit of assessment and assessable as such in one sum, and that under s. 45 of the Valuation (Metropolis) Act, 1869, such sum was the total amount of the gross values of the various flats (including the porter's rooms) appearing in the valuation list made under the last mentioned Act for the time being in force, i.e., £800; (ii) that in any event the figures before the commissioners showed that there was no title to the reduction claimed, as by the Income Tax Act, 1918, Sched. A, No. V, r. 7 (2), as amended by the Finance Act, 1923, s. 28, there was no title to the reduction of the assessment claimed where the amount of the assessment was less than the rent by a sum greater than the authorised deduction which would be allowable if the assessment were on the amount of the rent after deducting from such rent any outgoing which should by law be deducted in making the assessment. In reply to the first contention on behalf of the Crown the company contended that each flat was rightly assessed as a separate hereditament, and, furthermore, that, whether this were so or not, the Valuation (Metropolis) Act, 1869, was conclusive as to the hereditaments in the present case, and that the deductions to be allowed in fixing the gross value might not have been the same, and in fact would probably have been greater, if the whole of No. 1, Linden Gardens had been treated as a single hereditament.

The commissioners were of the opinion that the income tax assessments should follow the assessments as fixed under the Valuation (Metropolis) Act, 1869, and therefrom should be made the appropriate deductions allowed for repairs in the case of each flat. They, accordingly, reduced the assessments by amounts arrived at in accordance with the scale in para. 3 of r. 7. The inspector of taxes, on behalf of the Crown, required the commissioners to state and sign a Case for the opinion of the High Court of Justice under s. 149 of the Income Tax Act, 1918. The Court of Appeal held, affirming the decision of ROWLATT, J., that the whole of r. 7 of No. V. of Sched. A related to a deduction from a value already otherwise ascertained and so was not excluded by the preliminary statement to the rules applicable to Sched. A as one relating to valuation. It related to a system of reducing by deductions the calculations made. The company appealed.

R. M. Montgomery, K.C., *A. M. Latter, K.C.*, *Ernest G. Palmer* and *Elliot Gorst* for the appellants.

The Attorney-General (*Sir William Jowitt, K.C.*) and *R. P. Hills* for the Crown.

The House took time for consideration.

Jan. 29. **LORD ATKIN.**—I have had the advantage of reading the judgment which is about to be delivered by my noble and learned friend, LORD WARRINGTON, and I concur in it.

LORD WARRINGTON read the following opinion.—This is an appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., and SLESSER and ROMER, L.JJ.), dismissing an appeal by the appellants from an order of the King's Bench Division (ROWLATT, J.), whereby an appeal by the Crown upon a Case stated by the General Commissioners was allowed and the decision of the General Commissioners was reversed.

The appellants are the owners of a house, No. 1, Linden Gardens, Notting Hill Gate, within the area to which the Valuation (Metropolis) Act, 1869, applies. It contains eight flats used for residential purposes and some rooms in the basement used as a residence for the porter. Each flat is self-contained and is let to a separate tenant. The details of the arrangement of the building are set out in the Case Stated and are those commonly to be found in blocks of flats in London and need not be here repeated. The rents payable by the several tenants cover the rates and the cost of lighting the common entrance and the staircases, maintaining the lift, providing a porter, and cleaning the common entrance and stairways, all of which, and the cost of external repairs, are borne by the appellants. In two cases the tenants make a fixed contribution of £10 a year towards the cost of lighting and of the provision of a porter, &c., and for the use of the lift. In six cases the tenants are liable for internal repairs. The Valuation (Metropolis) Act, 1869, provides by s. 43 for quinquennial valuations, which are to remain in force for five years. In this case the five years commenced on April 6, 1926, and expired on April 5, 1931. The year of assessment in question is that ending April 5, 1927, the first year of the period. In the valuation list then in force the eight flats and the porter's rooms were each assessed separately and the assessments and charges were all made upon the appellants as landlords under r. 8 (c) of No. VII relating to Sched. A, but there was no assessment of the entire house or building such as is directed in r. 8 (c). The appeal to the commissioners was confined to the eight separate assessments in respect of the eight flats, and the commissioners expressly stated in the Case that the appeal was on the ground that the appellants were entitled to allowances under Sched. A, No. V, r. 7 (1) (b), of the Income Tax Act, 1918, as amended by the Finance Act, 1923, s. 28.

Much of the difficulty experienced in this House in dealing with the present appeal arose, in my opinion, from the fact that the limited nature of the appeal to the commissioners and of the ground on which it was presented was lost sight of both in the King's Bench Division and in the Court of Appeal, and points were argued and decided which really did not arise for decision. At the hearing before the commissioners the contentions on the part of the appellants were (in effect): (i) That the assessments in question were, under the Act of 1869, conclusive of the gross values, and, therefore, of the annual values for the purposes of income tax, and that the actual outgoings during the three years ending April 5, 1927, were irrelevant; (ii) that under Sched. A, No. V, r. 7, of the Income Tax Act, 1918, as amended by s. 28 of the Finance Act, 1923, the appellants were entitled to the appropriate allowances from the assessments as set out in para. (3) of that rule for the purposes of collection. It was contended on the part of the Crown (in effect) (i) that under the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (c), the whole house was the unit of assessment and assessable in one sum, namely, the total amount of the gross value of the eight flats and the porter's rooms: (ii) that in any event the figures before the commissioners showed that there was no title to the deduction claimed, reliance being placed upon para. (2) of the r. 7 above mentioned.

The first of these contentions on the part of the Crown raised altogether new matter. The officers of the Crown had had ample opportunity of raising this point before the valuation list had come into force. Under s. 45 of the Act of 1869, such a valuation list is to be deemed to have been duly made in accordance with that Act and is for the purpose, amongst others, of income tax under Sched. A, conclusive evidence of gross values and of the fact that all hereditaments required to be inserted therein have been so inserted. The valuation list in force at the time of the appeal in question contained no valuation of the entire house as one unit, and if such a contention could be raised at all before the general commissioners, it could only, in my opinion, be raised by an independent appeal on the part of the Crown (if such an appeal were competent) seeking to have the list altered by substituting one assessment in respect of the entire house for the nine separate assessments appearing in the list. But no provision is made for an appeal by the Crown, and for, I think, obvious reasons. The assessment before it comes before the commissioners has been examined and passed by the surveyor, and it has become in effect an assessment adopted by him as correct from the point of view of the Crown: Income Tax Act, 1918, ss. 119 and 120. Hence provision is made (s. 136) for an appeal by the taxpayer only, and the position of the surveyor is defined by s. 137 (2) (a), (b) and (c). He may be present at the hearing, he may produce evidence in support of the assessment, and give reasons in support thereof. It was, therefore, in my opinion, incompetent for the Crown to raise the first of its two contentions mentioned above, and the commissioners were right in refusing it. Unfortunately, as I think, ROWLATT, J., being of opinion that on the true construction and effect of r. 8 (c) of No. VII of Sched. A the entire house was the proper unit, and not realising that the only "matter" before the commissioners and the court was the appeal of the present appellants for an allowance (s. 149 (2) (a)), by his order dated May 7, 1930, directed that the Case be remitted to the commissioners with a direction to discharge the existing separate assessments and raise one assessment on the whole building. This order was affirmed by the Court of Appeal. For the reason given above, namely, that the question was not effectually raised so as to give the court jurisdiction to make such an order, I think the order made by Rowlatt, J., and affirmed by the Court of Appeal, ought not to have been made and should now be discharged.

But the discharge of the order of Rowlatt, J., and that of the Court of Appeal does not dispose of the present appeal. It remains to be considered whether the commissioners properly dealt with the matter actually before them, namely, the appellants' claim to the statutory allowances. The commissioners state that they were of opinion that the income tax assessments should follow the assessments as fixed under the Act of 1869, and that therefrom the appropriate reductions should be allowed for repairs in the case of each flat. They, accordingly, reduced the assessments by amounts arrived at in accordance with the scale in r. 7 (3) as amended. In other words, they held that r. 7 (2) did not in this case exclude the operation of the scale in para. 3. The material parts of r. 7 as amended by s. 28 of the Finance Act, 1923, are as follows:

> "(1) Where tax is charged upon annual value, estimated otherwise than by relation to profits, the following provisions shall have effect: . . . (b) In the case of an assessment upon any house or building (except a farmhouse or building included with lands in assessment), the amount of the assessment shall, for the purposes of collection, be reduced—(i) Where the owner is occupier or chargeable as landlord . . . by a sum equal to the amount of the authorised reduction hereinafter mentioned. . . . (2) Where the amount of the assessment in the case . . . of any house or building (except a farmhouse or building included with lands in assessment) is less than the rent by a sum greater than the authorised reduction which would be allowable if the assessment were on the amount of rent, after deducting from such rent any outgoing which should by law be deducted in making the assessment, this rule shall not apply."

In para. (3) are specified the authorised reductions for the purposes of the rule, which vary with the amount of the assessment.

The construction of r. 7 (2) is by no means easy, but I think that the object of it from the point of view of the Revenue was to compare the net income derived from the house (i.e., the actual rent less any outgoing which should by law be deducted in making the assessment) with the annual value forming the basis of the assessment, and if that net income exceeds the annual value by a sum greater than the authorised reduction which would be allowable had the assessment been on such net income then to regard the taxpayer as having thus received an equivalent of the authorised reduction, and, therefore, not to be entitled to any further allowance. If I am right in this, and I do not think there is any dispute on the point, then it follows that as the net income varies from year to year the necessary inquiries as to the outgoings to be allowed in ascertaining the amount of the net income must be made in each year of assessment, and in this case, having regard to the form of the valuation list, must be made as to each flat separately.

The commissioners have simply allowed from the assessed annual values the appropriate reductions in accordance with the scale in r. 7 (3), thereby adopting the arguments on the part of the appellants mentioned above. This seems to me to be wrong. I cannot understand how the amount of the actual outgoings can be irrelevant to a claim for reduction under r. 7. In the present case the rents reserved by the leases so largely exceed the annual values under Sched. A that if they are to be treated as representing the net income for the purposes of para. (2) that paragraph would clearly be operative. It seems to me to follow that if the taxpayer is to make good his claim to reduction, inquiry must be made as to outgoings, and the commissioners should not have allowed the authorised reduction until such inquiry had been made. The commissioners have ample means of obtaining information if it is not tendered voluntarily by the taxpayer. I should have thought it was in his own interest to tender it. The result is that while the order of the Court of Appeal should be reversed and that of Rowlatt, J., discharged, the Case should be remitted to the commissioners to determine what deduction, if any, should be allowed in respect of each assessment on the basis that the amount of the

outgoings referred to in r. 7 (2), as amended, is to be ascertained separately as to each A
flat and as to each year of assessment. I think the expense of both appeals below and of that to this House have been substantially occasioned by the position taken up by the respondent, and that the Crown ought to pay the costs here and below.

A great part of the argument in this House was devoted to the question of the construction and effect of r. 8 of No. VII of Sched. A, and in particular of its application to
the area of the metropolis in view of the Act of 1869. As I have already said, this B
question does not arise in the present case, and for that reason I think it is undesirable that this House should express any opinion on that question. I am fortified in this view by the fact that in *Towle* v. *Improved Industrial Dwellings Co., Ltd.* (1), which was heard by ROWLATT, J., and the Court of Appeal at the same time as the present case, that question did arise and was decided against the respondents in that case. That
case or some other like it may come before the House, and it is undesirable that the C
arguments therein should be prejudiced by any expression of opinion which would be merely obiter.

LORD MACMILLAN.—I agree.

LORD ATKIN.—I am asked to say that my noble and learned friend, **LORD
TOMLIN**, agrees with the judgment which has been delivered. D

Appeal allowed.

Solicitors: *Charles Stevens & Drayton*; *Solicitor of Inland Revenue.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

E

WESLEY *v.* MANSON (INSPECTOR OF TAXES)

[HOUSE OF LORDS (Lord Warrington, Lord Atkin, Lord Thankerton and Lord F
Macmillan), February 26, March 3, April 19, 1932]

[Reported [1932] A.C. 635; 101 L.J.K.B. 312; 147 L.T. 82; 48 T.L.R. 370;
16 Tax Cas. 654]

*Income Tax—Discontinuance of trade—Additional assessment—Profit of "year
preceding the year of assessment"—Actual profit—Method of ascertainment—* G
Finance Act, 1926 (16 *&* 17 *Geo.* 5, *c.* 22), *s.* 31 (1) (*b*).

Prior to July 2, 1928, the taxpayer carried on a business which, on that date, was sold to a limited company and permanently discontinued within s. 31 (1) of the Finance Act, 1926. The profit of the business for the year to June 30, 1926 (when the accounts were made up), was £6,898, that for the year to June 30, 1927, was
£11,025, and that for the year to June 30, 1928, was £15,889. For the income tax H
year 1927–28 the taxpayer was assessed, under s. 29 (1) and s. 34 (1) (a) of the Act, on the £6,898. Subsequently, an additional assessment was made on him under s. 31 (1) (b) of the Act in the sum of £7,774, being one-fourth of the profit of £11,025 plus three-fourths of the profit of £15,889, less the original assessment of £6,898, the Crown contending that the actual profit for the year ended April 5, 1928,
must be ascertained under s. 35 of the Act by taking the appropriate proportions of I
the profits of the business for the years to June 30, 1927, and June 30, 1928. The taxpayer contended that under s. 34 (1) (a) the profit of the year ended June 30, 1927, must be taken to be the profit for the year ended April 5, 1928—the "year preceding the year of assessment in which the discontinuance occurred" within s. 31 (1) (b)—and, therefore, the additional assessment should be for £4,127, the difference between £11,025 and £6,898.

Held: the Act required that the actual profit for the year ended April 5, 1928, be taken; that profit was to be ascertained under s. 35 by taking the appropriate proportions of the profits of the business for the years to June 30, 1927, and June 30, 1928; and, therefore, the contention of the Crown was right.

Notes. Section 31 (1) (b) of the Finance Act, 1927, has been replaced by s. 130 (1) (b) of the Income Tax Act, 1952.

As to assessment on discontinuance of a trade, see 20 HALSBURY'S LAWS (3rd Edn.) 134 et seq., and for cases see DIGEST Supps., tit. Income Tax, case 204e et seq. For Income Tax Act, 1952, see 31 HALSBURY'S STATUTES (2nd Edn.).

Appeal from an order of the Court of Appeal (LORD HANWORTH, M.R., LAWRENCE and ROMER, L.JJ.), on a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Special Commissioners held for the purpose of hearing appeals, the appellant, Harold Wesley, appealed against an additional assessment to income tax in the sum of £8,102 for the year ending April 5, 1928, made upon him by the Additional Commissioners of Income Tax for the division of Kensington under the provisions of the Income Tax Acts. The appellant had for some years carried on the business of a manufacturing stationer. On July 2, 1928, he sold his business (under the terms of an agreement of that date) to a private limited company (hereinafter referred to as the company), in which all the shares were held by him or members of his family. It had been customary to make up the accounts of the business annually to June 30 in each year. The account for the year ending June 30, 1926, showed a profit of £6,898, and the account for the year ending June 30, 1927, a profit of £11,025. Notwithstanding the change of ownership of the business, one account was made up for the whole of the year ending June 30, 1928, and this account showed a profit of £15,889. The appellant had originally been assessed to income tax for the year ending April 5, 1928, in the sum of £6,898, being the amount of the profit shown by the account for the year ending June 30, 1926, in accordance with the provisions of s. 29 (1) and s. 34 (1) (a) of the Finance Act, 1926. For the year ending April 5, 1929, the appellant was primarily assessable under the same provisions in the sum of £11,025, being the amounts of the profits shown by the account for the year ending June 30, 1927, but, as the company succeeded to the trade after April 5, 1928, sub-s. (2) of r. 11 of the Rules Applicable to Cases I and II of Sched. D, as substituted by s. 32 (1) of the Finance Act, 1926, came into operation and the appellant was assessed for the year ending April 5, 1929, under the provisions of s. 31 (1) (a) and s. 35 of the Finance Act, 1926. No question arose in regard to this last-named assessment. Under the provisions contained in sub-s. (2) of r. 11 of the Rules Applicable to Cases I and II of Sched. D, as substituted by s. 32 (1) of the Finance Act, 1926, that in the case of a succession occurring after April 5, 1928, the tax payable for all years of assessment by the person who had previously carried on the trade should be computed as if the trade had been discontinued at the date of succession, the appellant's liability to income tax for the year ending April 5, 1928, being the year preceding the year of assessment in which the succession occurred, was reviewed under the provisions of s. 31 (1) (b), and the additional assessment under appeal was made. The amount of this assessment was arrived at by aggregating one-fourth part of the profits shown by the account for the year ending June 30, 1927, with three-fourth parts of the profits shown by the account for the year ending June 30, 1928, and deducting from the aggregate sum the amount of the original assessment for the year ending April 5, 1928. It was admitted by the Inspector of Taxes that, if the amount of the assessment had been calculated on correct principles, it was mathematically erroneous, and ought to be reduced to the sum of £7,774 as follows:

One-fourth of £11,025	£2,756
Three-fourths of £15,889	£11,916
	£14,672
Less	£6,898
	£7,774

It was contended on behalf of the appellant: (a) That as it had been customary for the respondent to make up accounts annually to June 30 in each year, and as only one account was made up to a date within the year preceding the year of assessment in which the succession occurred, and that account was for a period of one year ending June 30, 1927, the profits or gains of the year ending June 30, 1927, were required by s. 34 (1) (a), of the Finance Act, 1926, to be taken to be the profits or gains of the year ending April 5, 1928, which was the year preceding the year of assessment in which the succession occurred. (b) That as the profits or gains which were to be taken to be the profits or gains of the year ending April 5, 1928, were thus determined by s. 34 (1) (a) of the Finance Act, 1926, it was not necessary, in order to arrive at the profits or gains of the year ending on that date, to have recourse to the method authorised by s. 35 of the Act, and s. 35 was inapplicable. (c) That the additional assessment under appeal ought to be reduced to the sum of £4,127, being the difference between the original assessment of £6,898 made for the year ending April 5, 1928, and the profits or gains of £11,025, shown by the account for the year ending June 30, 1927, which were required to be taken to be the profits or gains of the year ending April 5, 1928, for the purposes of s. 31 (1) (b), no less than for the purposes of s. 29 (1). (d) Alternatively, that the trade was not permanently discontinued on May 22, 1928, and that s. 31 (1) (b) of the Finance Act, 1926, was not applicable.

It was contended on behalf of the Crown, inter alia: (a) That in order to arrive at the profits or gains of the year ending on April 5 in the year preceding the year of assessment in which the succession occurred it was necessary to adopt the method authorised by s. 35 of the Finance Act, 1926. (b) That the amount of the additional assessment under appeal had been computed on correct principles, and ought not to be reduced to less than £7,774.

The commissioners gave their decision in the following terms:—Every year of assessment begins on April 6, and the year preceding any year of assessment is the year ending April 5 immediately preceding the beginning of the year of assessment. The expression "the year ending on the fifth day of April in the year preceding the year of assessment" is, therefore, precisely equivalent to "the year preceding the year of assessment." Applying the words of the Act to the concrete facts, and assuming that we are right in our decision that "discontinued" at the end of s. 32 (2) bears the same meaning as "permanently discontinued" at the beginning of s. 31 (1) we cannot avoid the conclusion that the amount to which the assessment for the year ending April 5, 1928, is adjustable under s. 31 (1) (b) is the amount of profits or gains resulting from the account for the year ending June 30, 1927. The company succeeded to the trade on May 22, 1928, and is assessable under s. 32 (2) as if it had set up or commenced the trade at that time. The assessment on the predecessor for the year beginning April 6, 1928, originally based on the profits of the year ending June 30, 1927, has to be adjusted under s. 31 (1) (a) to the amount of the profits of the period from April 6 to May 21, 1928, and, as there is no account for that specific period, recourse must be had to the method authorised by s. 35, and the profits of the year ending June 30, 1928, must be divided and apportioned to that period. The charge for the year ending April 5, 1928, has also to be adjusted under sect. 31 (1) (b), to the amount of the profits of that year, and here again, but for the provisions of s. 34 (1) (a), it would be necessary, as the inspector contends it is, to have recourse to s. 35. But it has been customary to make up accounts, an account has been made up for a period of one year ending June 30, 1927, and this is the only account made up to a date within the year ending April 5, 1928. In these circumstances it is prescribed by s. 34 (1) (a), that the profits or gains of the year ending June 30, 1927, shall be taken to be the profits or gains of the year ending April 5, 1928. A figure is thus provided which meets the requirements of s. 31 (1) (b), and there is no necessity to adopt the method of s. 35 in order to arrive at the profits of the year ending April 5, 1928. We, accordingly, reduce the additional assessment for 1927–28 to £4,127, being the difference between the first assessment of £6,898 and the amount of the profit of £11,025 shown by the account for the year ending June 30, 1927. (Note.—At the hearing of the appeal both sides assumed that the date of the succession to the trade was May 22, 1928, and so informed the commissioners. From the agreement attached to

A the case it appears that this was in fact incorrect, but the exact date of the succession is not material to the present case.

The appellant appealed. The Court of Appeal held (reversing the decision of ROWLATT, J.), that s. 34 (1) (a), allowing the profits of the year to be made up to the date when the yearly accounts of the business were taken, only dealt with the method of computing profits for the year preceding the year of assessment for the purpose of B arriving at the amount of income tax to be charged in the year of assessment under s. 29 (1) and had no application to an additional assessment under s. 31 (1) (b), and the additional assessment of £7,774 was arrived at correctly, the method adopted coming strictly within the letter and true meaning of s. 31 (1) (b). Section 34 dealt solely with the method of calculation to be adopted in ascertaining the profits of the year preceding the year of assessment, whereas what had to be ascertained to arrive at the excess under C s. 31 (1) (b) was the amount of profit of the year of assessment ending April 5. From this decision the appellant appealed to the House of Lords.

Latter, K.C., and *Frederick Grant* for the appellant.

The Attorney-General (*Sir Thomas Inskip, K.C.*) and *R. P. Hills* for the Crown.

The House took time for consideration.

D April 19. The following opinions were read.

LORD WARRINGTON.—The question in this appeal turns on the true construction and effect of certain provisions of the Finance Act, 1926, relating to the mode of assessment to income tax under Sched. D in cases where the trade in question is permanently discontinued in any year of assessment, and, in particular, of s. 31 (1) (b) of that Act. E The appellant's trade was permanently discontinued on July 2, 1928, that is to say, in the year of assessment commencing on April 6, 1928, and ending on April 5, 1929. Under s. 31 (1) (a) of the statute in question the appellant became chargeable and was charged for the year of assessment 1928–29 on the amount of the profits of the period beginning on April 6, 1928, and ending on the date of the discontinuance, roughly speaking one-quarter of the year, and no question arises as to the correctness of this F charge.

The question really arises on the true construction and effect of s. 31 (1) (b). This section, omitting immaterial words, is as follows:

> "If the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year . . . an addi- G tional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April."

The year preceding the year of assessment in which the continuance occurs was in the present case the year from April 6, 1927, to April 5, 1928. For that year the appellant had been charged under s. 29 of the Act on the full amount of the profits or gains of the H year preceding the year of assessment, namely, of the year from April 6, 1926, to April 5, 1927, and under s. 34 (1) (a), the profits of the year ending June 30, 1926 (up to which date the customary annual account was made up), were taken to be the profits of the year preceding the year of assessment, namely, of the year 1926–1927. The profits of the year ending April 5, 1928, in fact exceeded the amount on which the appellant had been charged for that year, and accordingly s. 31 (1) (b) came into operation and the I additional assessment had to be made. On the true construction and effect of s. 31 (1) (b), with all respect to those who have expressed a different view, it seems to me to be reasonably clear that in order to effect the express purpose of the provision, namely, that as the result of the additional assessment the appellant is to be charged on the amount of the profits for the year ending April 5, 1928, some means of making the additional assessment other than those prescribed in cases where the year is itself the "year of assessment" (namely, the provisions already referred to of s. 29 (1) and s. 34) must be resorted to. Fortunately, these other means are supplied by s. 35 which (omitting immaterial words) is as follows:

> "(1) Where in the case of any profits or gains chargeable under Case I. . . . of Sched. D it is necessary, in order to arrive at the profits . . . of any year of assessment or other period, to divide and apportion to specific periods the profits . . . for any period for which the accounts have been made up . . . it shall be lawful to make such a division and apportionment. . . . (2) Any apportionment under this section shall be made in proportion to the number of months or fractions of months in the respective periods."

The additional assessment complained of has been made by the Crown under the provisions of s. 35. I agree with the Court of Appeal that it has been rightly so made, and, in my judgment, the appeal fails and should be dismissed.

LORD TOMLIN.—I am asked to state that **LORD ATKIN** concurs in the opinion which has been read by my noble and learned friend, LORD WARRINGTON.

LORD THANKERTON.—On July 2, 1928, the appellant, who carried on the business of a manufacturing stationer, sold his business to a private limited company, and it is not disputed that the provisions of s. 31 (1) of the Finance Act, 1926, became applicable for the purpose of determining his liability to income tax. These provisions are as follows:

> "31. (1) Where in any year of assessment a trade, profession or vocation is permanently discontinued, then, notwithstanding anything in this Part of this Act—(a) the person charged or chargeable with tax in respect thereof shall be charged for that year on the amount of the profits or gains of the period beginning on the sixth day of April in that year and ending on the date of the discontinuance, subject to any deduction or set-off to which he may be entitled under the section of this Part of this Act which provides for relief in respect of certain losses or under r. 13 of the Rules Applicable to cases I and II of Sched. D, and, if he has been charged otherwise than in accordance with this provision, any tax overpaid shall be repaid, or an additional assessment may be made upon him, as the case may require; (b) if the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs exceed the amount on which the person has been charged for that preceding year, or would have been charged if no such deduction or set-off as aforesaid had been allowed, an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth day of April, subject to any such deduction or set-off as aforesaid to which he may be entitled."

It had been customary to make up the accounts of the appellant's business for a period of twelve months up to June 30 in each year. For the material years these accounts had shown a profit as follows:

Account to June 30, 1926	£6,898
Account to June 30, 1927	£11,025
Account to June 30, 1928	£15,889

For the income tax year 1927–1928 the appellant had been assessed to income tax on the profits and gains of that year computed—as directed by s. 29 (1) of the Finance Act, 1926—"on the full amount of the profits or gains or income of the year preceding the year of assessment" as defined by s. 34 (1) (a), of that Act, which is as follows:

> "34. (1) Where, in the case of any trade, profession or vocation, or of the occupation of any land occupied solely or mainly for the purposes of husbandry, or of the occupation of any woodlands, it has been customary to make up accounts,—(a) if only one account was made up to a date within the year preceding the year of assessment, and that account was for a period of one year, the profits or gains of the year ending on that date shall be taken to be the profits or gains of the year preceding the year of assessment. . . ."

Accordingly, the profit of £6,898 shown by the account to June 30, 1926, provided the

A figure on which the profits or gains for the income tax year 1927–1928 were computed. Similarly, if the trade had not been discontinued during the income tax year 1928–1929, the figure of profit, namely, £11,025, shown by the account to June 30, 1927, would have provided the figure on which the profits or gains for the income tax year 1928–1929 would have been computed.

On the discontinuance of the appellant's business at July 2, 1928, two assessments B were made upon him under the provisions of s. 31 (1) of the Finance Act, 1926, namely, (i) an assessment in respect of the broken period of the income tax year 1928–1929 (April 6 to July 2, 1928) under s. 31 (1) (a), the amount being ascertained by an apportionment under s. 35 of the Act, and (ii) an additional assessment in the sum of £8,102 (corrected to £7,774) for the year ending April 5, 1928, under s. 31 (1) (b), the amount being ascertained by an apportionment under s. 35, and deduction therefrom of the C original assessment of £6,898. No exception was taken by the appellant to the first of these assessments, but he challenges the amount of the second assessment as not being arrived at in terms of the provisions of s. 31 (1) (b), and it will be convenient to examine exactly how this assessment was arrived at. Section 35, which was used for the purpose, provides as follows:

> D "35. (1) Where in the case of any profits or gains chargeable under Case I, Case II, r. 4 of Case III or Case VI of Sched. D, it is necessary, in order to arrive at the profits or gains or losses of any year of assessment or other period, to divide and apportion to specific periods the profits or gains or losses for any period for which the accounts have been made up, or to aggregate any such profits or gains or losses or any apportioned parts thereof, it shall be lawful to make such a division and E apportionment or aggregation: Provided that nothing in this section shall be construed as limiting the power of the general commissioners with respect to the adjustment of an assessment under r. 9 of the Rules Applicable to Cases I and II of Sched. D. (2) Any apportionment under this section shall be made in proportion to the number of months or fractions of months in the respective periods."

F

Proceeding on the view that the "year of assessment" of the additional assessment under s. 31 (1) (b) was the income tax year 1927–1928, and applying s. 35, the additional assessment was arrived at as follows:

		£
G	One-fourth of the profit of £11,025 shown by the account to June 30, 1927	2,756
	Three-fourths of the profit of £15,889 shown by the account to June 30, 1928	11,916
		£14,672
H	Less the original assessment	6,898
		£7,774

I The appellant disputes this construction of s. 31 (1) (b) and maintains that the "year of assessment" of the additional assessment is the "year of assessment in which the discontinuance occurs," which is admittedly the income tax year 1928–1929; that the "profits or gains of the year ending on the fifth day of April in the year preceding year of assessment in which the discontinuance occurs" are, therefore, the profits or gains of the year preceding the year of assessment and fall to be computed under s. 34 (1) (a); and that, accordingly, it is not necessary to resort to s. 35 for an apportionment. In this view the additional assessment would be an assessment for the year ending April 5, 1929—not the year ending April 5, 1928—and would be arrived as follows:—

	£
Profit shown by the account to June 30, 1927	11,025
Less the original assessment	6,898
	£4,127

The appellant seeks to have the assessment corrected to that figure.

Certain general observations may be made at this stage. Under s. 237 of the Income Tax Act, 1918, "year of assessment" means, with reference to any tax, the year for which such tax was granted by any Act granting duties of income tax, and this provision, taken along with ss. 1 and 2 of the 1918 Act, makes clear that the year of charge and year of assessment must be the same. Secondly, the Income Tax Act, 1918, as amended by later Finance Acts, operates as regards any particular income tax year by virtue of the Finance Act of that year, in terms of s. 1 of the 1918 Act. It follows, in my opinion, that the solution of the present question will depend on whether the additional assessment provided for under s. 31 (1) (b) of the Finance Act, 1926, which amends the Income Tax Act, 1918, was charged in the present case by the Finance Act, 1927, or by the Finance Act, 1928. The amendments of the 1918 Act made by Part IV of the Finance Act, 1926, were operative under both the Finance Act, 1927, and the Finance Act, 1928, as regards their respective income tax years.

In my opinion, the whole question turns on the construction of the words in s. 31 (1) (b):

> "an additional assessment may be made upon him, so that he shall be charged for that preceding year on the amount of the profits or gains of the said year ending on the fifth of April."

It is agreed that in this case "the said year" is the year ending April 5, 1928. Now, these are words of charge and not words of computation, and it is difficult to see how the Finance Act, 1928, could be held to charge the profits of the year to April 5, 1928, although it could charge the profits of the year ending April 5, 1929, by computing them on the profits of the year ending April 5, 1928. On the other hand, I see no difficulty in holding that the additional assessment is part of the charge made by the Finance Act, 1927, on the profits of the income tax year ending April 5, 1928, and that it is authorised by the operation of Part IV of the Finance Act, 1926, under the Finance Act, 1927, which enacted that income tax should be charged for the year ending April 5, 1928 (Income Tax Act, 1918, s. 1). In that view, the phrase "the year preceding the year of assessment in which the discontinuance occurs" is merely for the purpose of identifying the profits or gains which are to be subject to the additional assessment, and also to the charge involved in such assessment, and, as I have already stated, I am of opinion that the profits and gains of that previous year could only be held to be charged and assessable under the Finance Act of that previous year. Further, the words "so that he shall be charged for that preceding year on the amount of the profits or gains of the said year" in s. 21 (1) (b) are to be contrasted with the words "shall be charged for that year" (i.e., the year of assessment in which the trade is discontinued) "on the amount of the profits or gains of the period beginning on the sixth day of April in that year and ending on the date of the discontinuance" in s. 31 (1) (a). If, then, the year of assessment of the additional assessment is the year ending April 5, 1928, there is no room for the application of s. 34 (1) (a), and it is necessary to have recourse to s. 35, with the result that the appeal fails. It seems to me that the Special Commissioners and Rowlatt, J., did not give sufficient weight to the view that it is the profits and gains of 1927–1928 that are being brought into charge and assessment. I agree with the learned judges of the Court of Appeal and, in particular, with the judgment of Romer, L.J. I am of opinion, therefore, that the appeal ought to be dismissed with costs.

LORD MACMILLAN.—The appellant, on July 2, 1928, permanently discontinued the trade of a manufacturing stationer which he had previously carried on and transferred his business to a private limited company. The question before your Lordships relates to the effect of that discontinuance on the appellant's liability to income tax in respect of the profits or gains of his former business. The appellant was in the practice of making up his accounts annually as at June 30 in each year and the circumstance that his financial year thus did not coincide with the tax year which ends annually on April 5 is one of the causes which have given rise to the present problem.

As regards the assessment for the year to April 5, 1929, there is no dispute. The parties are agreed that under s. 31 (1) (a) of the Finance Act, 1926, the appellant is for that year chargeable with tax on the amount of the profits of the business from April 6, 1928, to July 2, 1928, the date of discontinuance. As the business was not wound-up but was continued by the company which took it over, and as the latter, following the appellant's practice, prepared a single account for the whole year to June 30, 1928, covering the period before as well as the period after its succession, the appellant's profits from April 6 to July 2, 1928, were ascertained by utilising the method of apportionment provided by s. 35 of the Act of 1926. It is with regard to the appellant's assessment for the tax year 1927–28 that a question has arisen. For that year the appellant was duly assessed to tax on £6,898, the amount of his profits or gains as brought out in his accounts for the year to June 30, 1926, that being the terminal date of his last financial year preceding the tax year 1927–28: see ss. 29 (1) and 34 (1) (a) of the Finance Act, 1926. But in consequence of the discontinuance of his trade on July 2, 1928, the Inland Revenue became entitled under s. 31 (1) (b) of the Act of 1926 to re-consider his assessment for 1927–28 in order to ascertain whether his profits or gains for that year, i.e., for the year ending April 5, 1928, exceeded the amount on which he had already been charged for that year and if any excess was found to exist to make an additional assessment upon him. The comparison which the Act directs is between (i) the appellant's profits or gains for the year ending on April 5, 1928, and (ii) the amount on which the appellant was charged for that year, the declared object being that the appellant should be charged for the year ending April 5, 1928, on the amount of the profits or gains of that year. The comparison intended to be instituted, as I conceive it, is between the statutory income notionally attributed to the appellant for the tax year 1927–28 and his actual income in that year.

Now, as to one of the factors in the comparison, namely, the amount on which the appellant was actually charged for the tax year 1927–28, there is of course no question. It is an historical fact that he was charged on £6,898, arrived at as I have already explained. The controversy relates to the other factor, namely, the profits or gains of the appellant's trade for the year ending April 5, 1928. The appellant invokes s. 34 (1) (a) of the Act of 1926 and says that on a sound construction of s. 31 (1) (b), his profits or gains for the year ending April 5, 1928, ought to be ascertained from his accounts for the year ending June 30, 1927, on which basis the figure would be £11,025. The Crown replies that what the Act requires is that the actual profits for the year ending April 5, 1928, be taken and that these are to be ascertained by taking under s. 35 the appropriate proportions of the profits or gains brought out in the accounts of the business for the years to June 30, 1927, and June 30, 1928, i.e., one-fourth of the former and three-fourths of the latter. The profits for the year to June 30, 1927, as already stated, were £11,025, one-fourth whereof is £2,756; the profits for the year to June 30, 1928, were £15,889, three-fourths whereof are £11,916. Adding these two sums of £2,756 and £11,916 a total of £14,672 is brought out. Accordingly, stated arithmetically, the issue is whether the comparison should be between £11,025 and £6,898 or between £14,672 and £6,898. If the former is right the appellant is liable to an additional assessment on £11,025—£6,898 = £4,127; if the latter is right the appellant is liable to an additional assessment on £14,672—£6,898 = £7,774. The Special Commissioners and Rowlatt, J., took the former view, the Court of Appeal the latter.

In my opinion, the Court of Appeal were right. The critical words are those requiring the ascertainment of

> "the profits or gains of the year ending on the fifth day of April in the year preceding the year of assessment in which the discontinuance occurs."

The year of assessment in which the discontinuance occurred in the present case was the tax year 1928–29. The year preceding that year was the year 1927–28. If this is right —and I confess I have difficulty in seeing how it can be otherwise than right—the appellant cannot avail himself of s. 34 (1) (a) in order to make his accounts for the year to June 30, 1927, the basis of ascertaining his profits or gains for the year ending April 5, 1928. The date June 30, 1927, is a date within the tax year 1927–28 and not a date within the year preceding the tax year 1927–28. Moreover, the appellant has already availed himself of s. 34 (1) (a) for the purpose of ascertaining his profits or gains for 1927–28 inasmuch as his original assessment for that year was in virtue of s. 34 (1) (a) based on his accounts for the year ending June 30, 1926. I do not think it can be used over again to ascertain the profits or gains of the year 1927–28 on a different basis. It comes to this, that the appellant in order to succeed must establish that the additional assessment provided for under s. 31 (1) (b) is an additional assessment for the year 1928–29; that that year is, accordingly, the year of assessment within the meaning of s. 34 (1) (a); and that his profits or gains for the year 1927–28 for the purpose of s. 31 (1) (b) must therefore under s. 34 (1) (a) be based on his accounts for the year ending June 30, 1927, being his accounts made up to a date within the year preceding the year of assessment. I am of opinion that there is no warrant for such a construction.

Finding myself, as I do, in agreement with the decision of the Court of Appeal and particularly with the judgment of ROMER, L.J., I concur in the motion that the appeal be dismissed.

Appeal dismissed.

Solicitors: *Gery & Brooks*; *Solicitor of Inland Revenue.*

[*Reported by* E. J. M. CHAPLIN, ESQ., *Barrister-at-Law.*]

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